

Newsletter

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Ombudsmen Reports

Keeping up-to-date with the range of reports and maladministration findings

2012 has seen a number of key legal and policy developments. The articles in this newsletter consider some of the court judgments – including the first Supreme Court judgment concerning the personalisation programme (*R (KM) v. Cambridgeshire*) and a series of challenging mental capacity decisions.

Often overlooked – but of great importance – are the many Ombudsman reports. In the last 12 months these have included reports concerning: NHS Continuing Care decisions (see page 2 below); local residential and domiciliary care charging policies (eg Walsall MBC concerning the misapplication of topping up charges and Northamptonshire CC concerning changes to its home care charging arrange-

ments); the use of 'self assessment questionnaires' (Kent CC); unreasonable curtailment of respite care support (Lambeth LBC) and restrictions on the availability night time care services (Southward LBC).

Adult safeguarding issues continue to be prominent, with both the English and Welsh Social Care Reform Bills (see article page 2) putting this on a statutory footing. Authorities have faced criticism for inflexible use of these procedures against their own staff (*Crawford v. Suffolk NHS Trust* 2012) and members of the public (Ombudsman report Leeds CC). Additionally, in a joint NHS local authority report the Ombudsmen were critical of the rele-

Community Care and the Law

Luke Clements and Pauline Thompson

With
Carolyn Goodall
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Edward Mitchell
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Fifth edition

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vant public bodies' failures to take more assertive action in relation to a 'voluntary patient with capacity' who was 'knowingly' self neglecting (Report concerning St Helens MBC and the 5 Boroughs Partnership NHS Trust).

It appears to be the almost automatic response of many employers to allegations of this kind to suspend the employees In my view it almost defies belief that anyone who gave proper consideration to all the circumstances of this case could have thought that they were under any obligation to take that step.

Elias LJ

Crawford v. Suffolk NHS Trust (2012)

Supreme Court ruling on 'personalisation'

The Supreme Court gave its qualified approval to the use of Resource Allocation Systems (RASs) in *R (KM) v. Cambridgeshire CC* (2012). In its opinion there was nothing wrong in principle with a system that provided disabled people with a 'ballpark' figure for the amount of funding they might receive - provided this was adjusted depending upon their individual circumstances.

The Court held, however, that once a figure has been proposed 'the requisite ser-

vices ... should be costed in a reasonable degree of detail so that a judgement can be made whether the indicative sum is too high, too low or about right' (para 28).

The court held that the amount of a direct payment must equate to the reasonable cost of securing the services and also expressed concern about the realities underlying the FACS criteria – that it was 'highly regrettable that any needs of a disabled person, whatever their category,

should not be met'.

Research concerning RASs has questioned many of the claims made to justify their use, particularly that they are 'more transparent', 'more equitable', 'simpler' and less discretionary than the traditional social work-led assessment process – see a pre-publication copy *Putting the Cart before the Horse: RASs and Community Care*, (Lucy Series & Luke Clements) at www.lukeclements.co.uk/whats-new/.

NHS Continuing Care

The administration of medication ... must accordingly be based on a 'law' that guarantees proper safeguards In the present case such safeguards were missing. The decision-making was solely in the hands of the treating doctors [and] their decision-making was free from any kind of immediate judicial scrutiny

X v. Finland
European Court of Human Rights (2012)

NHS Continuing Care remains a controversial area. As before, the Ombudsmen are taking the lead in clarifying the legal process, although a few Court decisions are emerging (eg *Secretary of State v. Slavin* 2011 concerning learning disabilities covered in Newsletter 6).

The Public Services Ombudsman for Wales has issued a number of reports – of wider relevance, since the NHS CC statutory system is the same in England and Wales. These reports have expressed concern about (amongst other things): short comings in the training of staff on Multidisciplinary Teams and of Review Panel

Chairs; the composition of some MDTs, and the importance that these be ‘truly representative’ of the patient’s healthcare needs and that ‘families are involved in ... a meaningful way in reaching decisions about eligibility’; the failure to take into consideration a request by the social work assessor that a nursing assessment and a psychiatric report were required; a failure to keep recorded minutes of key meetings and how decisions were reached; the erroneous perception that the test for NHS CC was whether or not a person’s ‘needs are currently being met’; and an over-focus on physical healthcare needs rather than

looking at ‘care needs holistically’. In a particularly critical decision (where a health body had decided a patient no longer qualified for NHS CC funding) he observed that it was simply ‘attempting to unload its own financial obligations onto the Council’. The Ombudsman has also found maladministration where a local authority and health body had no NHS CC disputes procedure: this common failure appears to stem from a mistaken understanding as to the relevance of the *St Helens* judgment – see Luke Clements and Pauline Thompson *Community Care & the Law* (Legal Action 2011 para 14.181).

Adult Social Care law reform support

Both the English and Welsh Governments have published major proposals for the reform of social care law.

In England the draft Care and Support Bill adopts many of the Law Commission’s proposals - including the need for clear underpinning statutory principles (equivalent to those in the Mental Capacity Act 2005); a single assessment duty (including 16 and 17 year olds); a single set of eligibility criteria; a codification of carers’ legal rights; a new ‘portability’ of care package duty (for people moving between local authority areas); and putting the duty to ‘safeguard adults’ on a formal statutory footing.

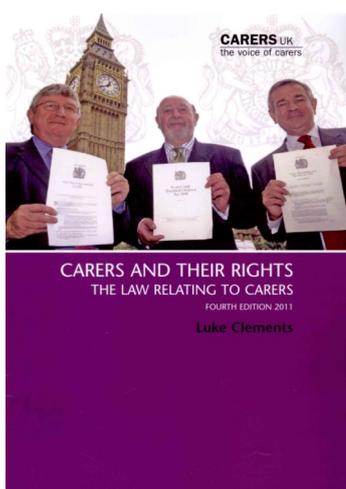
The consultation period on the draft Bill (ending mid-October 2012) will be followed by a Parliamentary Select Committee in 2013. This will culminate with the Committee’s report after which the Government can then introduce an actual Bill into Parliament – which could then become law.

Although possible, it is by no means certain that this would happen in 2014. Even if introduced in 2014 and approved by Parliament that year, it is unlikely that the Bill’s main provisions would come into force until late 2015 or more probably 2016.

The Welsh Government’s ‘Social Services (Wales) Bill’ is not so much a draft Bill –

as a series of questions about the contents of a future Bill - essentially a tentative blue print for what one might look like. The Bill is similar to that proposed in England – the major difference being that it will cover the provision of services irrespective of age. This is welcome – since the ‘adult only’ focus of the English Bill is likely to cause a number of unintended consequences (see ‘Young Carers’ article on page 3).

The Welsh Government expects to introduce the Bill in 2013 and for it to become law in that year – which is a rather tight timescale - particularly when compared to that proposed in England.



Carers and the Law
5th edition (2012)
Clements, L at
[www.lukecléments.co.uk/](http://www.lukecléments.co.uk/publications/)
publications/

Young carers

Two Westminster proposals run the risk of marginalising support for Young Carers – as evidence emerges that 2001 Census may have significantly underestimated Young Carer numbers.

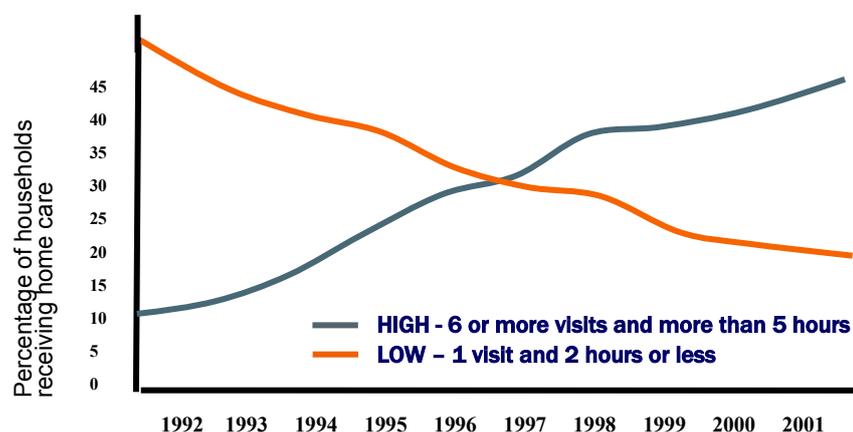
The first proposal, the new Care and Support Bill (see page 2), is seen as problematical, since its ‘adult focus’ means that it will streamline the law as it relates to ‘adults caring for adults’, but will add a layer of complexity to the law as it relates to the rights of young

carers and parent carers. This significant problem has been highlighted by both Carers UK and the Carers Trust and it is hoped that it will be addressed by Parliament during its scrutiny of the Bill.

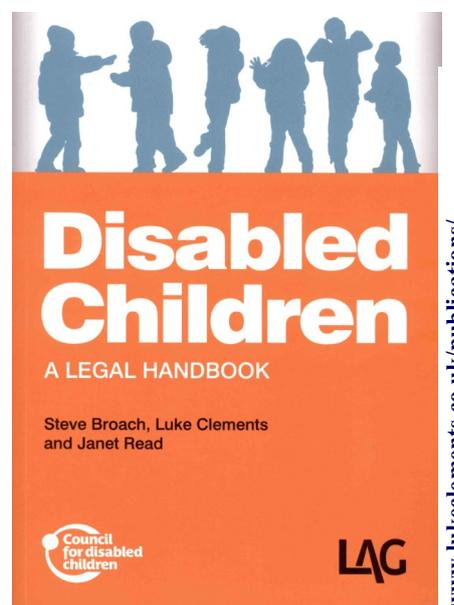
The second problem concerns plans to amend the Children Act 1989 assessment guidance *Framework for Assessing Children and Families in Need*. The proposals (for which the consultation period has closed) would (amongst

other things): (1) remove the requirement that children’s services check whether the parents have community care service needs; and (2) require children’s services to focus on children for whom there are child protection concerns.

Both these developments could result in Young Carers being overlooked – for further detail see ‘Carers and the Draft Care and Support Bill’ at www.lukeclements.co.uk/whats-new/



Decline in low level home care support social services since 1992
Source - 2001 Community Care Statistics



www.lukeclements.co.uk/publications/

Mental capacity legal developments

The stream of important Mental Capacity and Deprivation of Liberty (DoLs) judgments is becoming a deluge. The cases cover all areas—ranging between assessing the capacity to enter into a tenancy – to life and death decisions over the validity of ‘Advance Decisions’ (living wills) and the right to assisted suicide.

In relation to tenancies, *Wychavon DC v EM* (2012) provided helpful clarification as to when these can be valid (for housing benefit purposes) even if entered into by tenants who lacked sufficient capacity – and the Court of Pro-

tection has now issued guidance explaining the process by which it will sign such tenancies.

In an important judgment – *ZH v Commissioner of Police for the Metropolitan* (2012) the High Court held that police action in relation to the detention and restraint of a severely autistic young man was unlawful. The police failed to comply with the requirements of sections 5 and 6 of the Mental Capacity Act 2005 and their actions were ruled to be disproportionate. Damages of £28,250 were awarded.

In July 2012 the Supreme Court gave

leave for there to be a rehearing of one of the most perplexing DoLS decisions – *Cheshire West and Chester Council v P* (2011). In its 2011 decision the Court of Appeal held that in determining whether a person was deprived of their liberty it was necessary to consider the ‘relative normality’ of their situation. This highly contested and intellectually troubling idea will now be tested before the UK’s highest court. For details of a Conference that considers this case and reviews the last 12 months Mental Capacity and Mental Health law developments – see page 4.

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
- Community Care Law updates
- Carers Rights and the Law
- Equality Law and Human Rights in Social care
- Mental Capacity, Decision Making and the Law
- Deprivation of Liberty Safeguards & Mental Capacity
- Direct Payments, Personal Budgets and the Law
- Personalisation and the modernisation of Adult Care 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

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 £1,000.00 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 60. For class sizes in excess of 60 an individual quote can be provided. In general there is no audience size limit for voluntary sector events.

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

For details of training fees, terms and availability,
Contact Mo Burns at:
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Tel: 01432 343430
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Email: lukeclementstraining@yahoo.com

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



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Forthcoming Conferences

October 12th 2012
Mental Health & Mental Capacity Law
Royal Northern College of Music
Manchester

February 22nd 2013
Disabled Children and the UN Convention on the Rights of Persons with Disabilities
Cardiff

For Conference details—contact
enquiries@croesoevents.co.uk
telephone 07891 452260