

Newsletter

Luke Clements Training: socio-legal training

Legal and social policy developments

Key practice

Carers

The increased rights of carers – including young carers.

NHS Continuing Care

The impact of case law and new 'integration' duties

Safeguarding

The law remains confused and increasingly dominated by Human Rights case law

Ordinary residence

The reforms including to s117 Mental Health Act 1983

Mental Capacity Law

The growing divide between 'best interests' assessments and 'needs' assessments.

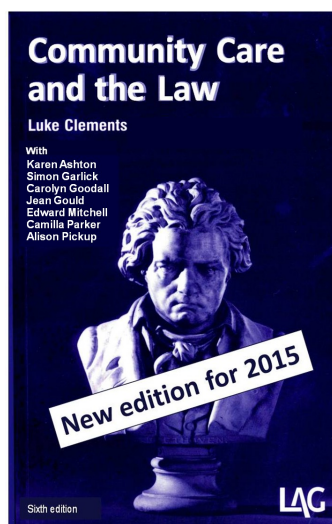
The ADASS Budget Survey 2015 notes that social care cuts in England since 2009-10 amount to £4.6 billion with 400,000 fewer people receiving care and that (contrary to the policy aims of the Care Act) spending on preventative services fell in 2015 by 6%.

If social services do get a significant cash injection, it is likely to come through a ring fenced NHS / social services integration arrangement (ie the Better Care Fund). The logic for extra social services cash helping the NHS achieve its objectives is difficult to fault. In the last 5 years, while NHS health funding increased by 19% to £116.4 billion, social care funding fell by over 10% to £13.3 billion. A key statistic, however, is that 2015 saw a 19% increase in delayed hos-

pital discharges attributable to social services.

In July 2015 came the news that the 'cap on costs' and the new appeals process in England are to be delayed. Hopefully both flawed proposals will now be abandoned. The need for an update of the Care Act Statutory Guidance was also announced, to address various glitches – in particular, problems with the 'ordinary residence' section.

In Wales, the Social Services and Well-being (Wales) Act 2014 will come into force in April 2016. As at October, the Statutory Code to the Act had still not been published. On the positive side it appears that the much criticised 'can and can only' eligibility criteria



have been watered down; on the negative side, it appears that the Code may fail to follow the English example of referring to independent living as a 'guiding principle' of the new statutory regime.

NHS Continuing Healthcare (CHC) funding

'There appears to be a profound lack of knowledge of the responsibilities that arise under the Care Act 2014'.

HHJ Wildblood QC
Bristol City Council v. S
(2015)

A case concerning a disabled parent whose children were the subject of care proceedings

The law relating to NHS CHC remains aligned in England and Wales and the case of *R (Whapples) v. Birmingham Crosscity CCG* (2015) is of considerable relevance to both nations. The Court of Appeal had to consider the extent to which an NHS body was required to provide support for a person eligible for CHC who lived in their own home.

The Court approved 2012 guidance that in such cases NHS bodies were 'financially responsible for all health and

personal care services and associated social care services to support assessed health and social care needs and identified outcomes for that person, e.g. equipment provision (see PG 79), routine and incontinence laundry, daily domestic tasks such as food preparation, shopping, washing up, bed-making, support to access community facilities, etc. (including additional support needs for the individual whilst the carer has a break)'.

One legal area on which

English and Welsh NHS CHC law differs concerns 'direct payments'. In England the NHS Act 2006 s12A enables health bodies to provide personal budgets / pay direct payments to patients along similar lines to those paid by social services. Since October 2014 CCGs are under a duty to make such payments to those eligible for NHS CHC funding. In Wales such payments are not possible, although payments to User Controlled Trusts are lawful.

Reassessment and funding panels

Although the Care Act applies to alcohol and drug misusers, the Statutory Guidance makes no mention of 'addiction — and 'substance misuse' is only referred to on four occasions. By way of contrast 'deafblind' is mentioned on 25 occasions.

Luke Clements
Community Care & the Law
6th edition (pending)

It is well established that the routine use of 'funding panels' in England and Wales to ration the funding for individual care packages is legally 'dubious'. In a series of cases the Courts and Ombudsman have expressed concern about the operation of such panels. To this must now be added the Statutory Guidance to the Care Act 2014 which suggests that panels should be limited to the 'sign-off [of] large or unique personal budget allocations' and stresses that they should not be used 'to amend planning decisions, micro-manage the planning process or are in place purely for financial reasons' (para 10.85). For details of relevant cases see www.lukeclements.co.uk/resources/ *R (Clarke) v Sutton LBC* (2015) is an example of the courts' concern about arbitrary reductions in care packages. The council decided to reduce the support in spite of expert evidence that the person's condition had not improved and that reduced package would not meet his needs. The court held the decision to be unlawful: the council had 'relied excessively on the non-expert view of a social worker in a face of a wealth of evidence to the contrary from appropriately qualified and experienced experts (para 28)'.

DLA and charging

The rules concerning the disregard of mobility allowance are explained in the [Statutory Guidance to that Care Act 2014](#). At Annex C page 427 para 15 this states that income from the mobility component of DLA (or PIPs) must be disregarded – an obligation that derives from statute – namely the Social Security Contributions and Benefits Act 1992 s73 (14). Previous (2012) guidance (which must continue to be correct) noted that 'some local authorities were taking the mobility component into account when considering what social services to be provided' – and stated that the Department of Health '*would like to make the position clear*' that the duty to assess and to meet eligible needs '*does not change because a particular individual is receiving the mobility component of Disability Living Allowance*'.

Wellbeing

The English and Welsh social care reform Acts both place a general duty on councils to promote the wellbeing of carers and people in need of support. Both Acts define wellbeing in such expansive terms there must be a fear that the courts will consider the duty purely aspirational and of little practical application. Three aspects of wellbeing are likely, however, to attract more positive consideration. Both Acts create a presumption that individuals are best placed to judge their own wellbeing. This creates a default position (like the presumption of capacity in the [Mental Capacity Act 2005](#)). This will probably mean that the courts will require specific evidence from a council if it proposes a course of action that the individual opposes.

The second is the identification of the importance of participation in work, education, training and recreation. This will be of especial relevance to carers – almost half of whom have had to give up work or go part-time due to their caring commitments. The third concerns the right

to 'independent living'. At the time of writing the final Welsh guidance is not available, but it is to be hoped that it adopts the powerful statements in the English Statutory Guidance (para 1.19), that the wellbeing principle includes '*the key components of independent living, as expressed in the UN Convention on the Rights of People with Disabilities (in particular, Article 19 of the Convention). Supporting people to live as independently as possible, for as long as possible, is a guiding principle of the Care Act.*'

CARERS UK

CARERS AND THEIR RIGHTS
THE LAW RELATING TO CARERS
SIXTH EDITION

Luke Clements

Carers

The most significant change made by the Care Act concerns carers, particularly: (1) the new duties to young carers; (2) the redefinition of 'carer' – by removing the requirement that he/she provide 'regular and substantial care'; and (3) most importantly, the creation of a duty on social services to meet carers' eligible care needs (this was previously discretionary).

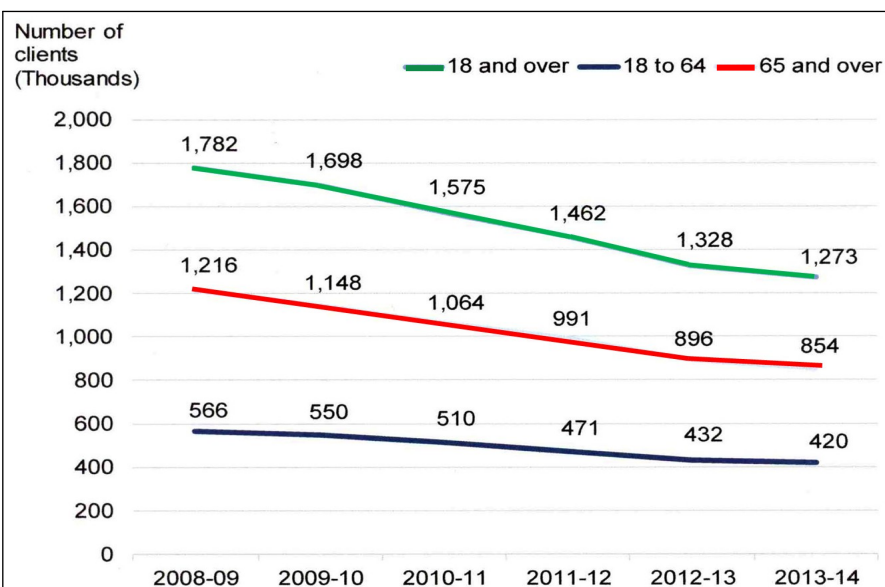
The Eligibility criteria for carers appear generous, since (for example) sig-

nificant impacts on a carer's health or employment caused by their caring role, will create entitlement to support. This will mean that many carers will be eligible for assistance, even if the adult for whom they care may not be eligible.

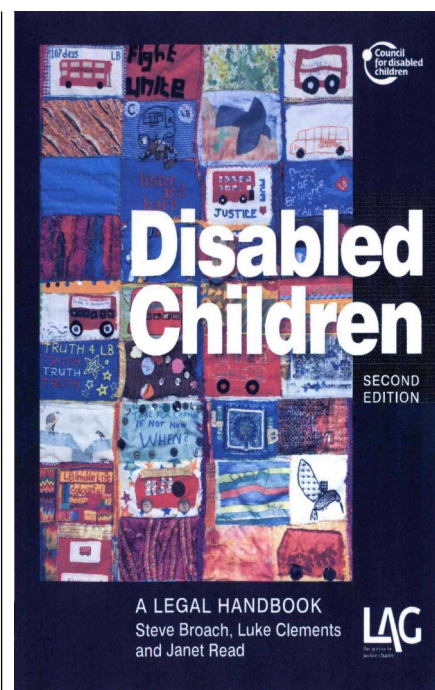
Where an adult in need is assessed as ineligible but their carer is assessed as eligible, section 20 enables the carer to require the support to be provided to the adult in need (for example by way of a sitting service), to enable the carer to

remain in work or at a training college etc. Once carers appreciate that their assessment may 'make good' any shortfall in the eligibility of the person for whom they care – councils are likely to experience a considerable surge in demand for carers assessment.

The new Act considerably enhances the duty to assess young carers - and since most young carers care for adults, this will be a duty to which adult social services must pay particular regard.



Community Care Statistics 2013-14
Health & Social Care Information Centre



Safeguarding

In the first 6 months of 2015 the Care Quality Commission (CQC) was notified of 30,000 allegations of abuse involving people using care services, of which 24,000 were care homes: notifications have doubled in the last 4 years.

Councils have recorded similar increases and the (2014) House of Commons Public Accounts Committee attributed this to either an increased awareness of abuse or to the 'overstretched resources and pressure within the system'.

Both the English and Welsh Reform Acts place safeguarding on a statutory

footing. Unlike the English Act, the Welsh Act provides councils with enhanced powers to combat abuse (a power of entry) and makes people subject to abuse or neglect eligible for support. The English criteria do not, however, identify 'keeping safe' as an eligibility outcome - which is problematic.

Councils will, however, be under a duty to provide care and support to protect people at risk of abuse by virtue of the Human Rights Act 1998. The European Court of Human Rights judgment in *Dordević v. Croatia* (2012) concerned the failure of the municipal

authorities to take effective action to protect an adult with learning disabilities. He had been physically abused by school children and his mother (his carer) had been harassed by them.

The Court identified a 'lack of any true involvement of the social services' in their case and found a violation of Article 3 (degrading treatment) for the disabled person and a violation of Article 8 (interference with private life) in relation to his mother. For a recent review of the human rights obligations in such cases see *The Mental Health Trust v DD* (2015).

Training courses

Luke Clements Training provides training and consultancy in all areas of health and social care services for adults 'in need', carers and disabled children. Standard courses include:

- Law Reform: The Care Act 2014;
- Law Reform: The Social Services & Well-being (Wales) Act 2014;
- Community Care Law updates;
- Carers Rights and the New Law;
- Mental Capacity, Decision Making and the Law ;
- Direct Payments, Personal Budgets and the Law
- Disabled Children, the Law and Good Practice;
- Equality Law and Human Rights in Social Care;
- NHS Continuing Care Responsibilities;
- Ordinary Residence and the Law.

New resource materials

Luke Clements is collaborating with the National Charity **Cerebra** and a number of specialist lawyers to produce a series of guides and precedent materials. These include an innovative **Problem Solving Toolkit** with precedent letters and advice on dealing with commonly encountered problems people experience when dealing with the statutory sectors. The Guide will be published on the Cerebra website later in the year.

Social Care Law Lecture Series

Lectures concerning 'Social Care Law' are accessible at www.lukeclements.co.uk/lecture-series/.

Regular updating briefings

The 'what's new' section of the www.lukeclements.com website has regular updating briefings on social care law developments as well as new papers and articles on social care law and policy.

The 'resources' section of the website has precedent letters, advice on common problem areas in social care law and web-links to other materials.



Luke Clements will join the Leeds University Law School in January 2016 as Professor of Law and Social Justice.

The Law School & the Centre for Disability Studies at Leeds offer a wide range of postgraduate study and research programmes.

Details at www.law.leeds.ac.uk/postgraduates/



Problem Solving Toolkit



Luke Clements
Illustrations by Gillian Clements

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

Training fee details are at www.lukeclements.co.uk/training/

For further information and for details of availability etc.

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A PDF copy of this newsletter is at www.lukeclements.co.uk/training/
Contact lukeclementstraining@gmail.com to be added to the Newsletter email list

CONFERENCES

London

December 10th 2015
Kensington Town Hall
Event with 'Full of Life'

Cardiff

December 11th 2015
Future Inn Cardiff Bay
with 'Learning Disability Wales'

Birmingham

January 19th 2016
Cophthorne Hotel
Event with 'Cerebra'

Details of all at www.lukeclements.co.uk/events/