

Newsletter

Luke Clements Training: **socio-legal training**

Legal and social policy developments

Key practice

Assessments

The duty to assess adults and carers and to have specific regard to the well-being criteria'.

NHS continuing care

Increasing pressure from the NHS to reduce its CC budget (while simultaneously closing acute beds).

Personal budgets

English councils must be able to demonstrate these are sufficient to pay for the adult's eligible needs.

Ordinary residence

The new rules concerning out of county and cross-border placements

Mental capacity

The interface between a social care assessment of need' and an assessment of capacity/ best interests.

Few social care cases of significance have reached the High Court since the last Newsletter—with the exception of *R (JF) v. Merton* discussed below. The Ombudsman's complaints' reports have however more than made up for this shortfall and are considered in this edition.

Funding cutbacks continue to dominate. The 2016-17 [ADASS budget survey](#) referred to a 37% cut in social care funding between 2010-2015 with a further £1bn cut in 2017. In addition councils may have to deal with a planned £500m cut in NHS Continuing Care spending according to a recent [National Audit Office](#) Report.

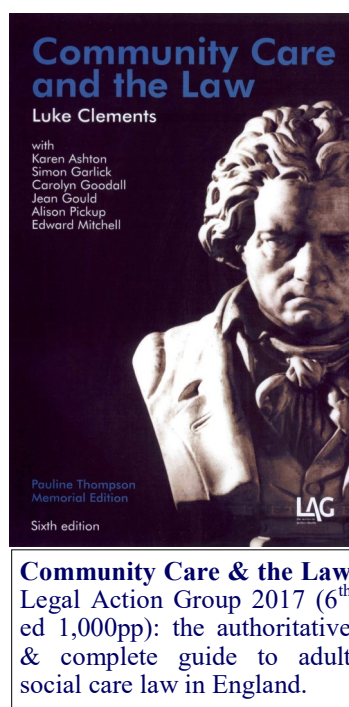
Social services Mental Capacity Act 2005 procedures remain a cause of concern. A 2017 Ombudsman report - *The Right to Decide* - taking stock of the 1,200 mental capacity

and deprivation of liberty complaints his office had received that year stressed the need for improvement (a quote from the report is overleaf). The report noted that in almost 70% of these complaints local authority failings had been identified.

In *N v. ACCG* (2017) the Supreme Court clarified the powers of the Court of Protection to investigate the adequacy of local authority social care arrangements

Later in the year the Government is due to publish a policy paper concerning the reform of social care funding for older people (funding that currently amounts to less than 1% of total public expenditure). Although this subject became a central issue in the General Election, the only certainty appears to be that the Care Act 'cap on costs' provisions will not now be implemented. For that we can be grateful, in that

their administrative implications were such as to make them unworkable.



Community Care & the Law
Legal Action Group 2017 (6th ed 1,000pp): the authoritative & complete guide to adult social care law in England.

Carers and care plan reductions

The Better Care Fund was little more than a ruse to move money from the health sector to social care, disguised within an overly bureaucratic initiative that purported to integrate health and social care services

House of Commons
Public Accounts
Committee
*Integrating health and
social care* (2017)

A number of Ombudsman reports have focused on the impact on carers, where a council reduces the care and support provided to an 'adult in need'. A complaint concerning [Bromley LBC](#) held that authorities must not assume a carer is willing or able to provide any care – including additional care, arising from a reduction in the care package: that it will be maladministration for such a reduction to occur without assessing the carer and explicitly clarifying (and recording) whether she/he is 'able and willing' to provide

the additional care.

A 2017 complaint against [Sefton MBC](#) concerned an adult with significant learning difficulties who lived with his parents. His care package of many years included respite care to enable his parents to have a break. On review this was substantially reduced although his needs had not changed. In finding maladministration the Ombudsman held that the council had failed to explain 'what circumstances have changed to warrant this reduction in respite provision'. In the Ombudsman's opinion it

was not acceptable for the council to state that it would offer emergency respite if the need arose: the need for 'weekends away and a little social life are not emergencies but part of a planned sustainable support regime'.

A 2016 Ombudsman's report concerning [Surrey Council](#) highlighted the requirement in the English Act section 10 (and by inference in the Welsh Act section 24) not only to involve carers in the hospital discharge process but to assess the main carer before the discharge occurs.

Well-being criteria

The people who these measures are designed to protect are all too often being let down by poor practice. And, while I appreciate the complex emotional and practical decisions social workers need to make, the people they look after are still entitled to be treated fairly, and have their assessments undertaken correctly and in a timely manner.

Michael King, Local Government Ombudsman
The Right to Decide: Towards a greater understanding of mental capacity & deprivation of liberty (2017)

One of the major imponderables about the English and Welsh Acts is the extent to which the well-being 'principle' will, in practice, have an impact.

R (JF) v Merton LBC (2017) concerned a young man with complex needs. The council proposed moving him to a less expensive setting, but in the court's opinion the council's social care assessment was inadequate. The court held that for an assessment to be lawful it must (among other things):

- assess the impact the adult's needs for care and support have upon the factors of wellbeing listed in section 1(2) of the Act;
- assess the outcomes that the adult wishes to achieve in his/her day-to-day life;
- have regard to the adult's wishes and preferences; the outcomes he/she seeks; the severity and overall extent of their needs.

A series of English Ombudsman reports have concerned the application of the well-being principle to the key 'outcomes' in the Eligibility Criteria. What we learn from these reports is that the Criteria must be viewed through the lens of the well-being duty.

A Hammersmith complaint concerned a person with visual impairments who needed help to sort her clothes (so she did not wear stained or inappropriate clothing) and to check the contents of her fridge; read cooking instructions; and have an escort to help her on occasional shop trips. In the council's opinion the Act did not require clothes to match or to be clean and that she could make more use of long-life foods, her freezer, and ready meals.

In finding maladministration the Ombudsman focused on dignity and health (two key well-being principles).

The council had failed to recognise: (1) the importance to personal dignity of wearing clean, presentable and appropriate clothes; and (2) that 'fresh food is essential to meet nutritional needs' and that consumption of out of date food carries a significant health risk.

A Birmingham complaint concerned an adult who could no longer manage to use her bath. The council decided that there was no need for a level access shower as she could maintain her hygiene by strip washing at the sink.

The Ombudsman has previously held that the right to bathe with 'dignity ... is the entitlement of everybody' and by cross referring to the disabled facilities legislation (and its guidance) found there to be a duty to facilitate the disabled person's access to a bath or shower.

Funding panels

An effect of austerity economics has been the proliferation of council 'funding panels'. Legally such panels are problematical, as 'eligible needs' must be met regardless of resources.

The Statutory Guidance reinforces this view stating (para 10.85) that although panels may be 'an appropriate governance mechanism to sign-off large or unique personal budget allocations and/or plans', where used they 'should be appropriately skilled and trained, and local authorities should refrain from creating or using panels that seek to amend planning decisions, micro-manage the planning process or are in

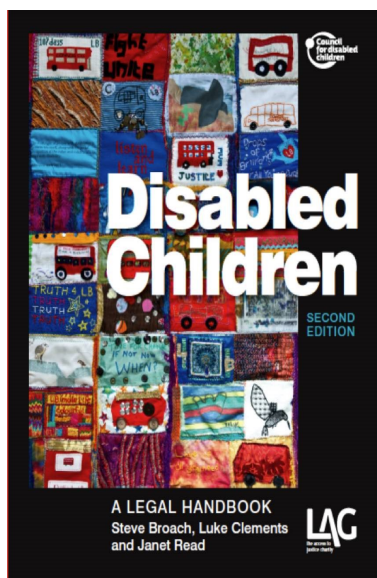
place purely for financial reasons'.

The Ombudsman has expressed concern in the past about the misuse of panels and recent reports continue this trend.

A report concerning Brighton & Hove Council noted that a care manager had assessed the disabled person as having eligible needs but the council's 'funding panel' had over-ruled this. The Ombudsman, in finding maladministration, expressed particular concern that the decision was: '*in direct contravention of the care manager's recommendations by a panel who was not involved in the assessment*'.

In order to avoid panels being criticised in this way some authorities have stipulated that care managers cannot express a view on eligibility: that this must be left blank for the panel to complete. In a report concerning Bromley LBC the Ombudsman would appear to have ruled out this approach: reports from assessors that go to a 'panel' must include a recommendation from the assessor as to her or his professional opinion as to what care is required.

An overview of court / ombudsmen cases concerning council funding panels is at www.lukeclements.co.uk/resources/



NHS Continuing care: adults and children

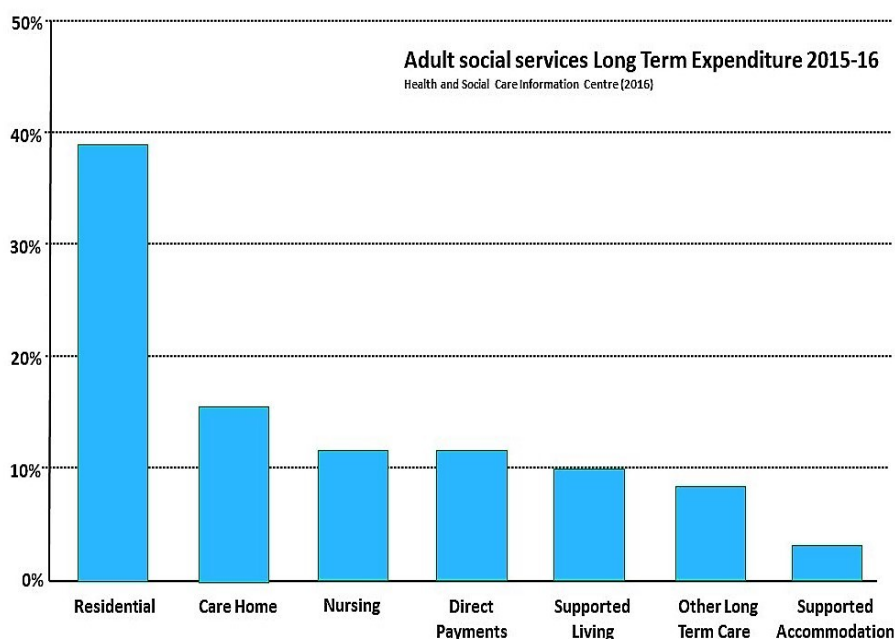
New NHS CC guidance for adults is due in England later in 2017. The expectation (hope?) is that it will make only modest changes, as its main purpose is to update references in the framework: replacing references to the National Assistance Act 1948 with references to the Care Act 2014. The current adult guidance in both England and Wales is generally considered to be of good quality (unlike the problematic Decision Support Tool).

Unfortunately the equivalent guidance

for children and young persons is dreadful: opaque and materially worse than the guidance it replaced. The equivalent Welsh guidance is equally defective and has been likened to an '[operating system for a pinball machine](#)'.

The guidance in both nations fails to reflect the full legal implications of the judgment in *R (T, D & B) v Haringey LBC* – that the 'limit to social care' principle applies with equal force to children and young persons as it does to

adults. The inadequacy of the guidance causes major problems in a number of areas, not least: (1) for councils – their children's teams are spending very substantial sums on the care of children with profound impairments whose nursing needs are well above the 'limits of social care'; and (2) for the young person and their parents, serious problems resulting from the failure of local health bodies to align adult and children's NHS CC eligibility can arise during the transition process.



Young people with autistic spectrum conditions

Many court and Ombudsman cases involve complaints about the way councils address the needs of young people with Autistic Spectrum Conditions (ASC) and behaviours that challenge.

The complaints often concern the remit of councils' social care teams; their failure to realise that they have 'whole family' duties and their failure to provide timely / appropriate support.

Councils will often have teams focusing on the needs of older people, people with learning disabilities, mental health difficulties and so on – but few have teams specialising in the needs of people with ASC. As many people with ASC do not have a learning disability, this means they are often (unlawfully)

turned away by councils. Even if the person is exhibiting extreme behaviour – councils may (unlawfully) require a 'diagnosis' before providing support.

Similar problems occur if the person needs extra space in the home (eg to 'let off steam') as many councils think (incorrectly) that disabled facilities grants (DFGs) are not available for this purpose. A [research report](#) by the Leeds School of Law and the Access Committee for Leeds has shown dramatic cost benefits if DFGs are made available in such cases.

Even when a support need is identified, the council may fail to recognise their legal duties to the family: to assess parent carers / sibling / young carers.

Often council support is inadequate – eg direct payments paid at the minimum rate when only a trained care assistant is able to manage the challenges.

The cost of failing to address needs can be great as a recent Ombudsman report concerning [Surrey](#) demonstrates. As the Ombudsman notes:

This distressing case serves to remind councils of the very real impact on families when councils get things wrong.

The parents have described the trauma of having to make the decision to seek residential accommodation for their son – a decision they say they would not have made so soon, had they received the support they were entitled to.

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:

- The Care Act 2014;
- The Social Services & Well-being (Wales) Act 2014;
- Eligibility criteria: making sense of the law and guidance;
- Carers Rights;
- 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 for adults;
- NHS Continuing Care Responsibilities for young people;
- Ordinary Residence and the Law;

New resource materials

The National Charity [Cerebra](#) has published an innovative [Accessing Public Services Toolkit](#) written by Luke Clements with precedent letters and advice on dealing with commonly encountered problems.

[Cerebra](#) and the *pro bono* research Centre at the School of Law, Leeds University are collaborating on a new website 'www.difficultbox.com' which aims to provide a link to the many guides that exist concerning social care, education and health care rights in the UK's four nations. The site is still under construction but please visit it and give feedback on how you think it should develop.

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

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

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Contact lukeclementstraining@gmail.com to be added to the Newsletter email list



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At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society ... Courts exist in order to ensure that the laws made by Parliament ... are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter ... That is why the courts do not merely provide a public service like any other.

Lord Reed in *R (UNISON) v Lord Chancellor* [2017] UKSC 51 [68]



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Carers and their rights

England

Professor Luke Clements

