

Newsletter

Luke Clements *partnership*

Legal and social policy developments

Key practice

Reviews/reassessments

The distinction between these two functions and the 'triggering criteria' for a reassessment.

NHS continuing care

The new 2018 Framework in England and reviewing practice in relation to young people's funding.

Direct payments

Appropriate and inappropriate conditions, payment rates and the promotion of choice and control.

Evidenced based

The crucial role of 'evidence' in determining eligibility and in care planning.

Well-being

The duty to promote well-being and its role in interpreting the eligibility criteria

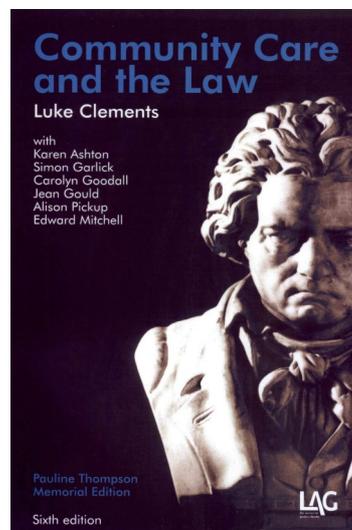
An issue of recurring importance in social care is the importance of evidence. Councils must be able to explain why a care plan will meet a person's needs; why a person was reassessed (rather than 'reviewed'); why a care plan was reduced and in such cases evidence (in writing) that any carer is willing to undertake any extra caring that may result. Where there is disagreement, then (given the presumption that adults are best placed to judge their own well-being), the onus is on the council to explain its decision. A recent ombudsman's report concerning [Gloucestershire \(17 002 906\)](#) found fault where the assessment stated that an adult's needs could 'easily' be met at home but provided no evidence to explain how it had come to this conclusion.

In 2018 NICE issued a further guideline concerning the

needs of people with learning disabilities and behaviours that challenge, relating to service delivery [NICE guideline \[NG93\]](#). It contains much of value - eg the importance of ensuring that people in this situation 'should have the support they need to live where and how they want' and early support to address their 'health or sensory problems'. Another new [NICE guideline NG 86](#) relates to 'people's experience of adult social care services' which reinforces the importance of 'face to face assessments' - a point also made by the ombudsman in a recent report ([Trafford Council 16 005 922](#)) which advised that financial assessments 'should normally be carried out by personal interview in the user's own home ...'.

A key 2017 ombudsman's report ([Haringey LBC 16 012 715](#)) sought to dispel the com-

mon misconception that receipt of DLA / PIP means that individuals are not eligible for support to meet their transport or housework needs - see 'That's What your DLA is for' at www.lukeclements.co.uk/thats-what-your-dla-is-for/.



Ministerial default powers

Most English and Welsh statutes that place duties on councils and NHS bodies to provide health and social care / education services contain a 'default power' which enables central Government to 'direct' the local body to behave.

If a council has a policy that is contrary to the law or to Government guidance - then one option may be to write to the Secretary of State / Welsh Minister asking that s/he directs the council to stop behaving this way. This remedy was proposed in recent Leeds [School of Law, LEaP project](#)

research concerning the widespread failure of councils in relation to their '[home-to-school](#)' transport policies.

In such cases, if the Government refuses to use this power, it leaves itself open to a challenge on the ground that its failure to act is unreasonable.

The power can also be used by councils who are having difficulties with a local NHS body (eg one failing to complete an assessment or to convene a dispute hearing). The NHS Acts in England and Wales contain powers that enable the Governments to

direct NHS bodies in such cases.

Although it is rare for the Secretary of State / Welsh Minister to issue a direction following such a request, there is some evidence that requests of this kind do lead to a resolution of the problem. This could be because, on receiving such a letter, the civil service write in strong terms to the local council / NHS body asking that it explains itself and stops behaving in a way that has the potential to cause embarrassment to their Master / Mistress.

Councils cannot contract out responsibility for care when they contract out the provision: poor quality care by a council-funded provider is poor quality care by the council itself.

Michael King Local Government and Social Care Ombudsman 27 February 2018

Intermediate care must be free of charge for the first six weeks ... and 'simply referring to it by another name' [for example reablement] 'does not allow a council to charge for it'.

Local Government
Ombudsman Complaint No.
16 018 163 (North Somerset
Council 2018) para 47

Inflexible direct payments (DPs)

The Care Act 2014 and its regulations enable councils to place conditions on the way DPs are spent – eg by prohibiting payments to a named person or by requiring the recipient to produce information to establish how the money is used.

Increasingly, it appears that councils are imposing wide ranging conditions that severely restrict the way DPs are used – see, eg the 2018 Ombudsman's report against [Leeds Council \(17 003 429\)](#). One such restriction is the requirement that DPs are paid by way of a pre-payment card. Such schemes have advantages for councils but not necessarily for recipients and although lawful, the [statutory guidance](#) stresses that they 'should not be provided as the only option'. It states that 'the offer of a 'traditional'

DP paid into a bank account should always be available if this is what the person requests and this is appropriate to meet needs' (para 12.58).

The [guidance](#) also states (para 12.59) that it is:

'important that where a pre-paid card system is used, the person is still free to exercise choice and control. For example, there should not be blanket restrictions on cash withdrawals from pre-paid cards which could limit choice and control. The card must not be linked solely to an online market-place that only contains selected providers in which to choose from.' Local authorities should therefore give consideration to how they ... encourage flexibility and innovation, and consider consulting care and support user groups on any proposed changes to direct payment processes.'

2018 NICE guidance concerning DPs ([NICE guideline](#)

[\[NG86\]](#)) states that in order to ensure DP plans are flexible and can 'accommodate changes to a person's priorities, needs and preferences' that councils should consider 'agreeing a rolling 3 monthly budget so that people can use their money differently each week'.

The ombudsman has held that individuals must not be put in a position where they feel that they have to have a DP: that in general directly commissioned care should be available within 2 weeks of the assessed need being identified – see complaint against [Lincolnshire \(16 019 120\)](#).

The [Leeds School of Law, LEaP project](#) is shortly to publish research findings concerning the adequacy of local authority DP hourly rates as well as the prevalence of inflexible conditions.

Helping with medication and charging

The responsibility for the prescribing and the administration of prescription medicines, brings with it the question of whether the whole process is the responsibility of the NHS, and if so, whether charges can be levied by social services when what it is arguably fulfilling is an agency role in this process.

Administering medication stems from an NHS professional's decision that it is needed - and from this decision flows the obligation on the NHS to ensure that the drugs are correctly administered (as to the frequency, quantity etc); that administration records are maintained (if the patient is unable to do this); that adverse reactions to the medication are closely

monitored; and that the regime is kept under appropriate review. All of these 'control' functions would appear to be the responsibility of the NHS – even though there may be no need for every aspect to be undertaken by an NHS employee (provided that appropriate training, guidance and back-up support is available).

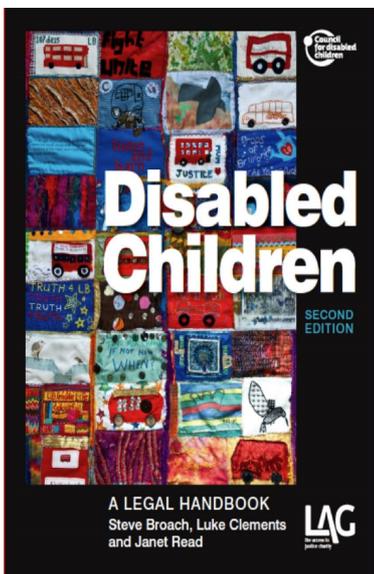
Legally the NHS can either discharge the whole function (eg using District Nurses) or delegate this responsibility to skilled third parties .

However delegation requires agreement – and this is where 2017 [NICE guidance 'Managing medicines for adults receiving social care in the community'](#) ([NG 67](#)) is of key importance. It stresses

that there must be a 'local agreement between health and social care that this support will be provided by a care worker' (para 1.3.5) .

Councils can (and clearly do) agree to take on this role for the local NHS. Presumably any agreement of this kind will contain a clause explaining how the NHS will compensate the council for acting as their agent.

The NHS can delegate but in doing so it cannot make a 'free at the point of need' NHS service metamorphose into a means tested social care activity for which the council can charge patients under either the Care Act 2014 or the Social Services and Well-being (Wales) Act 2014).

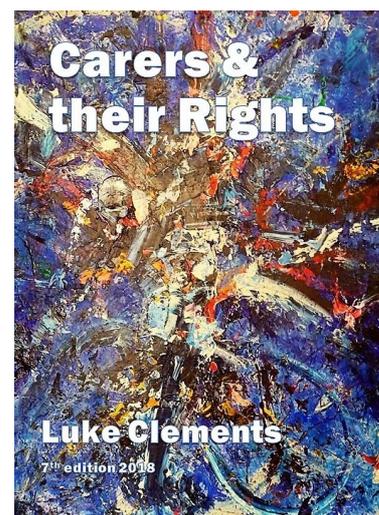
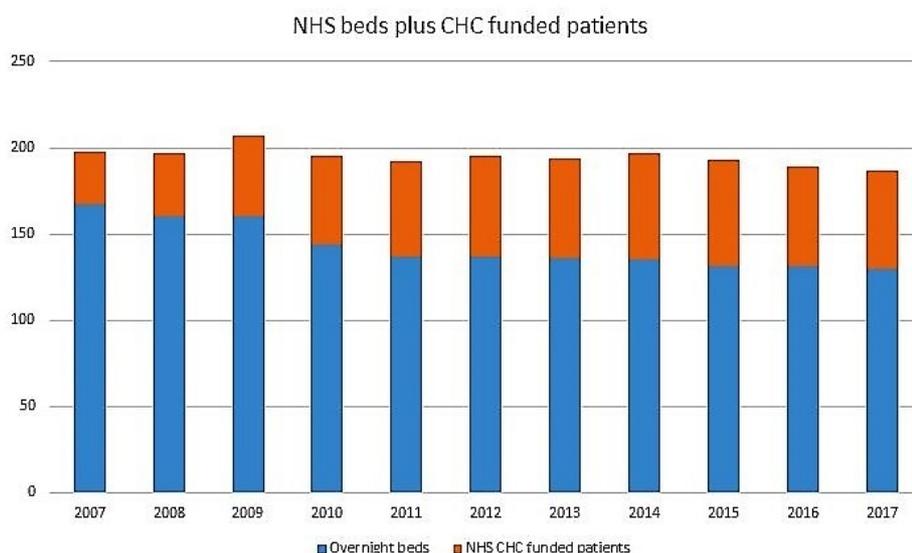


Community based support for care home residents

A [recent survey](#) of care home staff suggests that specific person-centred activities for care home residents are infrequent. Over a third of respondents were not aware of residents being taken out of the home for their enjoyment. Councils have the same assessment and care planning obligations to adults funded in residential care homes as in other settings. It follows that if the resident has an as-

essed need to take part in activities outside the care home, then the council is responsible (not the care home) for ensuring these needs are met. Where an adult's well-being is impaired (or at risk of being impaired) because of an inability to engage in community based activities, the council should undertake a reassessment and (if eligible) commission the necessary support (and if the adult chooses, a

direct payment for this). Another option is for the Council to agree that the person retains more than the minimum amount of their Personal Expense Allowance / Minimum Income Guarantee ([Statutory Guidance](#) Annex C para 46 and in Wales the Part 4 and 5 Code Annex B para 3.5) to enable them to pay directly from their own funds for the cost of this activity.



NHS Continuing Care (CHC)

A revised version of the [NHS Continuing Healthcare Framework](#) has been published in England – to come into force in October 2018. This is the third revision to the original 2007 Framework and the changes are modest and overall positive (if you believe that the NHS has not been properly discharging its responsibility for patients in need of long term care).

As the diagram above demonstrates, the NHS withdrawal from long term care funding is remorseless – even allowing for the increase in the numbers of people eligible for CHC funding.

In stark contrast to the positive news concerning the adult NHS CHC guidance, the 2016 [NHS Framework for Children and Young People](#) is a deplorable document and has resulted in many CCGs making drastic cuts to their support for young people with substantial long term healthcare needs. [R \(Juttla\) v](#)

[Herts Valleys CCG \[2018\] EWHC 267 \(Admin\)](#) concerned such a case where a decision to close a nurse-led respite unit for children with complex health needs was struck down by the court. In doing so it held that even if the care could in theory be delivered by trained social care staff, that did not mean that it was not a 'health service'. For a critical analysis of the shortcomings of the NHS Framework for Children and Young People see the paper '[Means testing children's healthcare ~ by stealth](#)' in the 'What's New' section of www.lukeclements.com.

In March CCGs were warned of facing potential [legal action by the Equality and Human Rights Commission](#) which is concerned about blanket NHS CHC policies having arbitrary caps on funding and failing to consider the specific needs of individual patients (such as their living location and family life).

The English Government has announced that it is considering extending the right of patients to have a Personal Budget (PB). Although the political case for PBs seems to be clear, the question of whether they offer any real benefits for individuals (in social care or the NHS) is far from certain.

The [consultation](#) suggests that the Government is contemplating extending the right to a Health PB to patients with long term conditions (including mental health conditions); people eligible for section 117 aftercare services; people leaving the Armed Forces, who are eligible for ongoing NHS services; people with a learning disability and/or autism who are eligible for ongoing NHS care; people who access wheelchair services whose posture and mobility needs impact their wider health and social care needs.

Resources

An extensive range of social care legal / support resources can be accessed at both www.lukeclements.com and at the website of the disabled children's charity Cerebra which funds the LEaP research programme (see below) at the School of Law, Leeds University.

Cerebra

Cerebra is national charity whose vision is that every family that includes a child with a brain condition will have the chance to discover a better life together.

Cerebra has published an innovative [Accessing Public Services Toolkit](#), a range of [template letters](#) and [resource guides](#). The [Cerebra Legal Entitlements and Problem Solving](#) (LEaP) project supports families encountering difficulties in obtaining assistance from children's social services authorities. Through this process Cerebra is able to identify common legal problem that confront families, and then to develop innovative ways of resolving these problems. The LEaP project is led by [Luke Clements](#) Professor of Law and Social Justice at the School of Law, University of Leeds.

www.lukeclements.com

The website is open access and its materials include:

- A 'what's new' section that provides updating briefings and commentaries on social care legal and policy developments;
- A 'resources' section that includes a regularly updated guide to the Care Act 2014 as well as advice on such questions as how to challenging cuts in care packages, decisions by 'funding panels' and home care charges;
- The ability to download without charge, social care publications;
- A list of forthcoming 'events' and a link to several YouTube lectures.

Rhydian: Social Welfare law in Wales

Social care law in Wales has become distinct from that in England and this site seeks to provide accessible, up-to-date information and critical commentary concerning the law as it applies in Wales. The Rhydian site is currently hosted on www.lukeclements.com and includes briefings on social care law and policy developments, an updated guide to the Social Services and Well-being (Wales) Act 2014 as well as an on-line journal.

Luke Clements Training is a socio-legal training partnership

Provides training and consultancy in 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;
- Problem Solving in Social Care.

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

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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



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Luke Clements is the Cerebra Professor of Law and Social Justice at the School of Law, Leeds University.

The School offers opportunities for undergraduates, postgraduates and specialised research including an [LLM in Law & Social Justice](#).

'... until more, and better, evidence is obtained, the asset-based approach should be treated with caution, and there should be considerable concern about the promise claimed for it in current policy discourse. There needs to be far greater critical interrogation of asset-based approaches, and closer scrutiny of policy 'solutions' which derive from them. Failure to do so may lead to policy strategies which are unrealistic in their assessment of the volume of untapped resources that exist and can be mobilised for social care. The result could be older people being without the necessary resources to support them in later life, either informal 'assets' or formal support previously provided by a now-retreating state.'

M Daly & S Westwood '[Asset-based approaches, older people and social care: an analysis and critique](#)' in *Ageing & Society* 2017

Accessing Public Services Toolkit:
 A problem-solving approach

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CEREBRA
 Working wonders for children with brain conditions