

# Newsletter

Luke Clements partnership

## Legal and social policy developments

### Key practice

#### The legal basics

Assessment, eligibility criteria and care planning processes.

#### Disabled children

The significant legal changes that accompanied the 2014 reforms.

#### Carers and their rights

The duty to assess adult carers, parent carers & young carers.

#### Direct Payments

Understanding the rules - what local authorities must do.

#### Lawful decision making

Evidenced based, reasoned decisions and understanding what 'legal discretion' actually means.

#### NHS continuing care

The legal limit to social services support for adults & for children.

If the second law of social work is 'how to say the word "No" the correct way' then the list of options is getting shorter. The ombudsman has given the thumbs down to the suggestion that disabled people should use their 'PIP' to pay for the support they need—[no 16012715](#) (Haringey) as well as the suggestion that support can be cut because the person is 'managing' [no 18007927](#) (Somerset). Other notable reports include [no 201705774](#) (Anglesey) which addressed the vexed issue of a forced care home move and topping up payments, and [no 201801474](#) (Gwynedd) which provides a shocking insight into the pressure put on some complaints' investigators by their own officers.

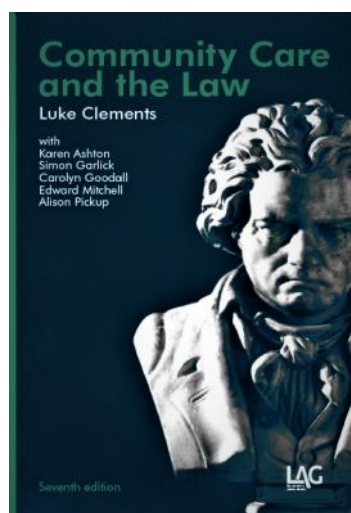
The recent substantial increase in care charges has resulted in several ombudsman

reports. [No 17008006](#) (Merton LBC) provides useful guidance as to the way councils should consider Disability Related Expenditure (DRE) when determining the charge payable. Live-in carers' food costs as a DRE was considered in [no 17019653](#) (Staffordshire) and pet care costs as a DRE analysed in a 2018 report by [Leeds University](#).

Recent and welcome guidance includes the 'Think Local Act Personal' report on the use (and abuse) by councils of [Payment Cards](#); the Royal College of Occupational Therapists report on [Adaptations without delay](#) (discussed further at page 2) and the Care Quality Commission's guidance on [Relationships and sexuality in adult social care services](#) – which is ground breaking in international terms – as most states (and their regula-

tors) give this subject a very wide berth.

Things must get better in social care – though exactly when is for clairvoyants. However, anyone craving more tangible good news should avoid the ADASS [2019 Budget Survey](#) – it is double barrelled 'bleak'.



## Carers' rights

*A hallmark of a poorly functioning personalisation market is a 'thin market', which occurs when there are zero or very few providers of a certain service in a local area.*

E Malbon et al  
[Personalisation schemes in social care](#)  
BMC Public Health 2019

Although there is now an explicit duty to assess parent carers in England and in Wales – the evidence suggests that many councils have either not woken up to this or are simply ignoring it. Not infrequently councils are telling families that they don't do (or don't 'generally' do) such assessments. It should be noted that:

- the English and Welsh Acts define a 'disabled child' in wide terms (see further page 3 below – Assessing Disabled Children);
- the duty to assess is triggered by the 'appearance of

need' – i.e. if it appears to the authority that a parent carer may have needs for support (Children Act 1989 s17ZD & 17ZE in England and the Social Services and Well-being (Wales) Act 2014 s24 in Wales); and

- the assessment must consider the carer's well-being which includes, for example, their physical, mental and emotional well-being as well as their participation in work and education.

A number of ombudsman reports have considered this issue - see for example the

recent report [no 201801474](#) (Gwynedd) - cited above. Report [no 14015230](#) (Kent) is a case in point. The council refused to consider a mother's need to work when assessing her son's care needs, advising her that it was not its responsibility to provide support to enable parents to work. The ombudsman held this to be maladministration – the authority had simply failed to understand the law. Not only do such policies offend social care law, they are also discriminatory as they impact disproportionately on women.

## S117 Mental Health Act 1983 anomalies

*We are clear that when Officer 1 became involved ... she began Ms X's assessment with an intention to reduce hours; the Council was at fault ....*

LGO complaint  
no 17 017 535 against  
Bolton MBC para 74.

Entitlement to s117 services only arises if a person has been detained for treatment under the 1983 Act and the need relates to their mental disorder.

Section 117 is a legal anomaly — creating distinct rights for people who may also be eligible for social services support under the Care Act 2014 [CA 2014] in England or the Social Services and Well-being (Wales) Act 2014 [SSWA 2014] in Wales.

For s117 support, there is the added complication that the duty to provide it, is shared. It is the joint responsibility of the local authority in which the disabled person is resident and the CCG (in England) / LHB (in Wales) where they are present (or have their GP — in Eng-

land). All s117 support must be provided free of charge.

Any attempt to repeal s117 would be controversial as it is one of only two provisions that provide individuals with 'specifically enforceable' rights to healthcare support.

Repealing s117 would, however, make life a great deal easier for people who write texts books on social care law.

Here are a few 'starter' questions in relation to people in England or Wales funded under s117.

Answers in the box to the right.

1. Can they themselves fund 'top-ups' to their care package?
2. Are they covered by the statutory eligibility criteria in the CA 2014 / SSWA 2014?

3. Are they subject to the same ordinary residence rules as in the CA 2014 / SSWA 2014?

4. Can they be eligible for NHS CHC funding?

5. Can they get Direct Payments

6. Under what Act are their social care needs assessed?

### S117 quiz answers

1. Yes in England and Wales.
2. No.
3. No in England and Wales.
4. Yes but only if non-urgent mental health needs develop which are sufficient to create eligibility.
5. Yes.
6. The NHS & Community Care Act 1990 s47.

## Home adaptation duties and timescales

Who is responsible when an adaptation to a home is required to make it accessible and/ or safe for a disabled person or someone living with them? Is it the Housing Department or Social Services? It is, of course, both.

Social services will have a duty to assess and decide if the need is eligible under the children / adult social care legislation. In so doing Social Services will generally suggest that the applicant apply for a Disabled Facilities Grant (DFG) under the housing legislation—the Housing Grants, Construction and Regeneration Act 1996.

Section 34 of the 1996 Act states that DFGs must be awarded within 6 months and

paid within 12 months of the application.

The [key guidance](#) sets out significantly shorter timescales, particularly for urgent cases, (i.e. 55 working days from first contact to completion of works).

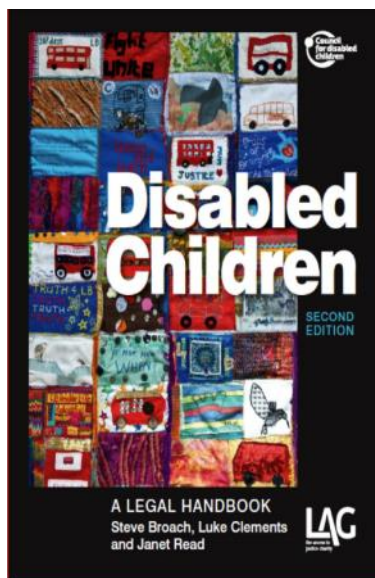
An urgent case is defined as where the disabled person cannot be discharged from hospital or cannot access essential facilities within the home. A case is defined as non-urgent if the person cannot use the home fully but can access the toilet and bathing facilities.

A recent ombudsman report [no 18003223](#) (Norfolk) concerned an urgent need and explains what must happen in such cases — stating (among

other things) that the social services 'responsibility cannot be passed on to another organisation' and that it remains 'until the needs are met' (even if a DFG application has been made).

One cause of delay can be the wait for an OT assessment but a 2019 [Royal College of OT's report](#) notes that this is not always essential — even if the works are expensive. It states (page 6) that:

*The greatest demand is for adaptations such as showers, stairlifts and ramps, which are often classed as major adaptations but can often be simple and straightforward.*



## Disabled children assessments

It appears that some councils are restricting the number of disabled children's assessments they undertake – by diverting certain categories of disabled children (for example those with autism or ADHD) to their 'Children in Need' teams: teams that generally deal with children who are considered to be neglected and / or abused.

Although many such disabled children and their families need substantial support, it has been suggested that these teams focus instead on inappropriate 'interventions' (generally short term) to address perceived parenting deficits. Such an approach brings with it potential

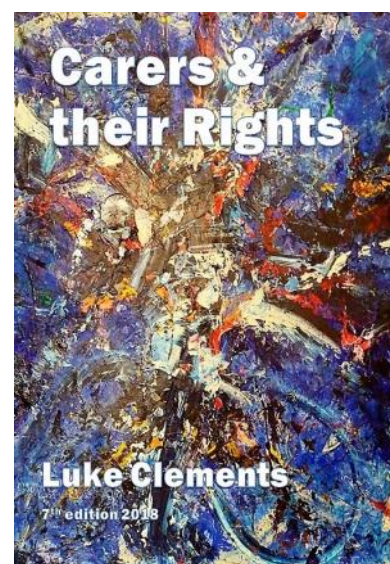
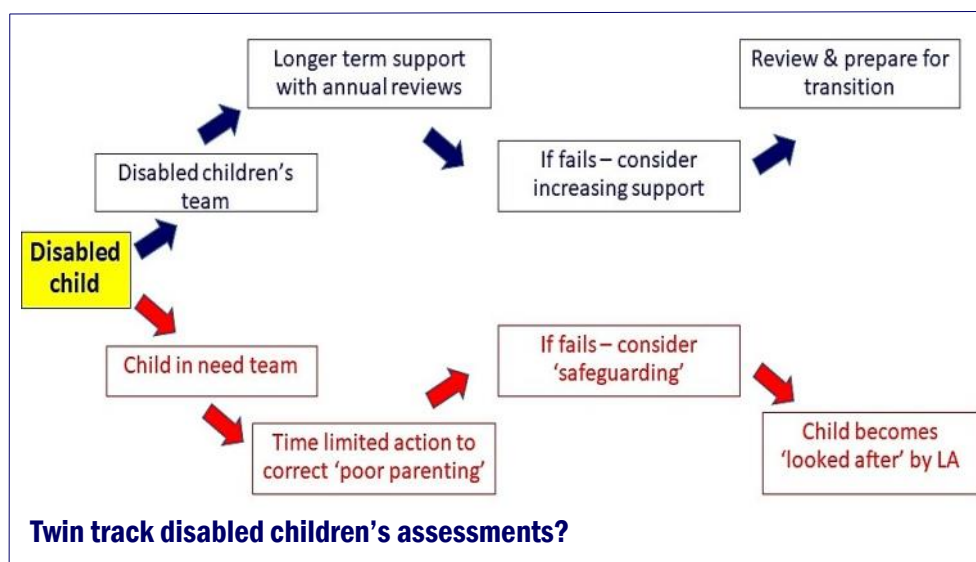
and serious risks for families and councils.

Legally it would be unlawful to pre-determine the support available to certain disabled children based on their particular diagnoses. In practice, if the presumption of a 'parenting deficit' is wrong, then there is a risk of escalation when the standard 'intervention' fails: i.e. an escalating 'safeguarding' response culminating with the threat (express or implied) of care proceedings – including in some cases allegations that they are exaggerating / fabricating the extent of the child's impairment or indeed inducing their illness. This is expressed dia-

grammatically below.

There is also a financial risk. If families in need of support fail to receive it, then there is a risk that they may be unable to cope and in some cases their child may have to be 'looked after' by the local authority. Financially, this can be expensive – and it may be one explanation for the £870 million over-spend by children's services departments in England.

The [Cerebra LEaP programme](#) at the School of Law, Leeds University, together with the [Disability Law Service](#) and the BBC are researching the extent and impact of such policies — their preliminary report is expected in December.



## Continuing Health Care (CHC)

The most recent [NHS CHC Statistics](#) for England (August 2019) show a further fall in CHC numbers—declining from 63,000 in 2014 to 55,872 (of which 35% were fast-track). The [ADASS 2019 Budget report](#) noted that directors of adult social services considered that reductions to CHC, shared care and health contributions to s117 funding were 'one of the most significant NHS related pressures on adult social care'.

In a 2019 report [no 17015113](#) (Essex) the ombudsman held that once a positive checklist has been received by a CCG, it will be maladministration to unreasonably delay: (1) completing a DST; (2)

paying for the care home fees of someone held eligible for CHC funding; and (3) reimbursing fees paid after the positive checklist was accepted.

Problematic as the CHC situation is in England—it may well be worse in Wales where the statistics on the number of people qualifying for CHC support are not published. Anecdotally, it appears that similar difficulties to those reported by ADASS exist—but the lack of published data makes this difficult to verify.

In addition, the Government intends to revise both the [adult](#) and [children's](#) CHC frameworks. The consultation papers are [troubling](#)—particularly so for the chil-

dren's framework. It takes little account of the [changes made by the 2014 Act](#) (which does not distinguish between adults and children's CHC). The consultation paper contains the innuendo that since the 2014 Act does not incorporate both limbs of the 'Coughlan criteria' ([para 3.1.3](#)) that CHC eligibility criteria are now different in Wales. The innuendo is wrong – but the mere fact that the Government feels able to make it demonstrates the depth of the problem in Wales. If the draft CHC framework is approved, it will be 'open season' for LHBs to challenge all CHC awards (for adults as well as for children).



## Resources

### Newsletter

To be added to the Newsletter mailing list — email [lukeclementstraining@gmail.com](mailto:lukeclementstraining@gmail.com). To view this Newsletter (15) as a PDF (with active hyperlinks) visit [www.lukeclements.co.uk/training/](http://www.lukeclements.co.uk/training/).

### www.lukeclements.com

The website is open access and its materials include:

**Resources** ~ addressing commonly occurring social care problems including:

- Challenging ~ [care home evictions / restrictions](#); [home care charges](#); [reductions in care services](#); [council funding panels](#); etc.
- Accessing [Disabled Facilities Grants](#);
- The [misuse by councils of their 'protection' powers](#);
- [Staying in a care home when savings are spent](#) ;
- [Transport to social care services](#);
- [Transport to and from school](#).

**What's new** ~ recent posts include:

- [‘Omg ... will it never end’](#);
- [Charges for community care](#);
- [Extra care housing](#);
- [Post-19 education transport costs](#);
- [Can you cope?](#)

**Publications** ~ including:

- [Carers and their Rights Guide](#);
- [Disabled Children: A legal handbook](#);
- [Direct Payment Research](#);
- [Accessing Disabled Facilities Grants](#);
- [The Lawfulness of Council School Transport policies](#);
- [The Cost Benefits of Disabled Facilities Grants](#);
- [Social care charges and pet care costs](#).

### Rhydian: Social Welfare law in Wales

Accessible, up-to-date information concerning the law as it applies in Wales.

## Luke Clements Training is a socio-legal training partnership

Provides training in areas of health & social care services for adults ‘in need’, carers and disabled children—in England and Wales. 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;
- 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;
- Social care law: recent developments in law and policy.

For further information visit: [www.lukeclements.co.uk/training/](http://www.lukeclements.co.uk/training/)

Email: [lukeclementstraining@gmail.com](mailto:lukeclementstraining@gmail.com)



## UNIVERSITY OF LEEDS

**Luke Clements is the Cerebra Professor of Law and Social Justice at the [School of Law](#), Leeds University.**

The School hosts the [Cerebra Legal Entitlements and Problem solving \(LEaP\) programme](#) and offers opportunities for undergraduates, postgraduates and an LLM in Law & Social Justice.

### Personalisation schemes in social care: are they growing social and health inequalities?

Eleanor Mabon, Gemma Carey & Ariella Meltzer [BMC Public Health](#) 2019 (19) 805.

*Personalization schemes are in danger of embedding assumptions in their design that privilege higher socio-economic groups. If we are to ensure that personalisation schemes deliver on their promise of choice, control, and participant empowerment for all, the systems through which they are delivered need to be designed in such a way as to not privilege those already at the top end of the social gradient.*

## Accessing Public Services Toolkit:

*A problem-solving approach*



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CEREBRA  
Working towards a future where everyone has the same opportunities