

Key practice

Legal literacy

Understanding the Care Act and in Wales—the Social Services & Well-being Act.

The legal basics

Assessment, eligibility criteria and care planning processes.

Disabled children

Treating disabled children as disabled children and not simply 'children in need'.

Carers and their rights

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

Direct Payments

Understanding the rules - what local authorities must do.

NHS continuing care

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

Legal and social policy developments

What follows are examples of some 'legal basics': legal 'no no's' that the courts / ombudsman have, of late, sought to reiterate.

There is no 'hierarchy of eligible needs' - [no 19 016 357](#) (Hampshire CC): councils are under the same duty to provide housework support as they are to provide support to enable someone to feed themselves or access the toilet. Councils can't prioritise some 'outcomes' over others: all outcomes are of equal importance.

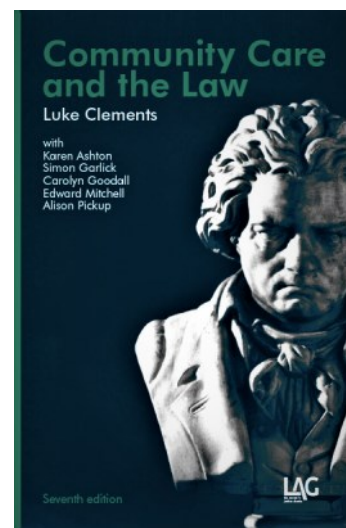
Councils can't avoid their responsibility for funding individuals' eligible needs by telling them to find the money themselves - [no 19 000 200](#) (Hertfordshire CC) or to pay for these [from their DLA](#) / PIP / etc; or by erecting bureaucratic barriers - for example requiring families to regis-

ter with their 'on-line systems' to access support - [no 19 007 786](#) (Sutton LBC).

Councils cannot pre-empt an assessment of needs by saying it will not fund a particular type of care (or fund care from a particular charity) as this constitutes a fettering of the council's discretion - [no 18 000 484](#) (Kent CC) and needs assessments must consider all an individual's needs regardless of whether they are being met or 'unmet' [R \(Antoniak\) Westminster CC](#) (2020).

Councils cannot refuse to consider increasing the amount of home care support a person receives because the existing package is 'almost the rate of residential care' - [no 16 017 084](#) (Hertfordshire CC) or because it is already 'a very large care package' - [no 19 011 005](#) (West Berkshire Council). In similar vein, it is not accepta-

ble for the Council to reduce support based on a cheaper care provider that does not at present exist - [no 18 015 558](#) (Nottinghamshire CC) or does not meet the need - [no 19 000 201](#) (Brighton & Hove) .



Carers' rights

The English and Welsh social care legislation require that councils make no assumption that a carer (including a parent carer) is willing or able to provide care. Complaint [no 18 015 558](#) (Nottinghamshire CC) concerned a council policy that attempted to undermine this clear legal position by stating that individuals should seek help from family and friends *before* approaching the council and stating that support would only be available 'if there is no other way of supporting you'. The ombudsman held this to be 'contrary to the law'.

The ombudsman continues to remind councils that assessments must explicitly record whether carers are willing and able to provide support (see for example [no 19 013 241](#) against Kent CC). Problematically, the new English [hospital discharge guidance](#) disregards both the law and the policy implications of assuming families are able/willing to care (a duty abolished in 1948). The new guidance merely suggests that carers 'should' be informed of discharges and (by default) be responsible for the discharge transport. There is no shred of recognition that

discharge procedures of this kind are utterly self-defeating - resulting in 'emergency readmissions', 'untold anguish' for families and carers - and, in the most tragic cases, 'potentially avoidable death' (to quote a [2016 English Health Ombudsman report](#)).

On a more positive note the English [NHS CHC Framework](#) (para 326) contains a welcome requirement that where individuals are being supported in the community the CCG should 'undertake an assessment of the carer's ability to continue to care'.

A breach of a statutory duty is a breach of statutory duty. It is, by definition, unlawful conduct. Unlawful conduct by a public body cannot merely be discounted or ignored

Haddon-Cave LJ in [R \(CP\) v North East Lincolnshire Council](#) [2019] EWCA Civ 1614

'Parent blame' and disabled children assessments

... cost should not be the primary consideration – and councils should not leave people without the care they need while deferring decisions. In this case the council continually questioned the cost of providing the care package in his own home, where he wanted to remain, without proposing suitable alternatives”

LGO [Press Release](#) on complaint no 19 002 258 a (Norfolk CC) 24/01/20.

Research undertaken by the Cerebra [LEaP project](#) at the School of Law, Leeds University (due out in Spring 2021) has found that most English children's services departments have an unlawful 'default position' for disabled children's assessments. This concerns cases where parental requests for assistance are met with an insistence that this must involve the assessor inspecting the child's bedroom and interviewing the child (and their siblings) alone: actions that many parents find deeply demeaning. Policies of this kind interfere with [Article 8\(1\)](#) of the European Convention on Human Rights (ECHR) and yet they are generally silent on the implications of this fact.

These practices appear to be predicated on the perception that disabled children need protecting from their parents rather than their family needing additional support. Families report that in many cases all they receive is advice as how to improve their parenting. 'One-size-fits-all' procedures that treat disabled children in the same way as children thought to be at risk of neglect, conflict with Article 14 ECHR ([Thlimmenos v Greece](#) 2000).

The English ombudsman has considered complaints concerning such heavy handed safeguarding practices (where the council focuses on parental failings and not the needs of the family for additional support). Complaint no

[18 010 275](#) (Somerset CC) for example, is highly critical of a council that suggested that a mother's 'relaxed' parenting style (and not its failure to take action) was the reason why she was unable to protect herself and her younger children—over a period of three years—from unpredictable outbursts of violence by her oldest child who had significant impairments.

Complaint no [19 004 566](#) (Gloucestershire CC) refers to a council inquiry that found a social worker had been 'actively trying' to identify a case of a parent fabricating / inducing illness (FII) in relation to her disabled child, that was unsubstantiated and led to inappropriate safeguarding action .

Housing and Disabled Facilities Grants

The interface between the duties on councils to provide accommodation for disabled people under the social care and the housing legislation has been considered in a number of recent cases. In [R \(M\) v. Newham LBC](#) the court reviewed the case law concerning these complementary duties to accommodate disabled homeless applicants. [R \(KS\) v Haringey LBC](#) concerned the duties owed to disabled children in need under the Children Acts. The court held that having recognised that the children were 'in need' under s17 Children Act 1989, the council had failed in its duties under s17 (and s11 Children Act 2004) to 'actively pro-

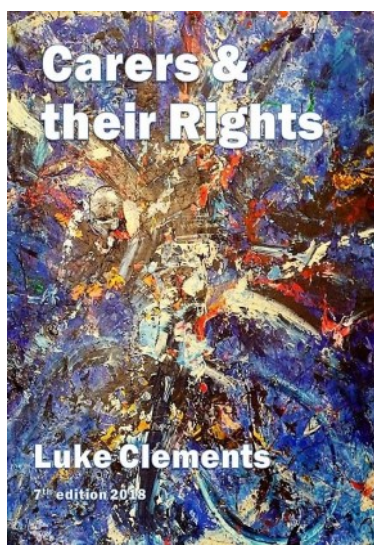
mote' their welfare.

In [R \(J & L\) v. Hillingdon LBC](#) the family was deemed to be homeless (due to the inadequacy of their accommodation) and the court considered the interplay between the general housing and social services duties, and the duties to make DFGs. When ordering the council to make suitable provision the court rejected the notion that this turned social services 'into another kind of housing department'. Ombudsman's report [no 18 014 227](#) (Southampton) provides a further helpful decision in this field, concerning the way councils should respond to homelessness and statutory overcrowding claims

A recent DFG judgment, [R \(McKeown\) v Islington LBC](#) appears to suggest that individuals might be able to subdivide their adaptation plans into discrete DFG applications (each under £30,000).

In report [no. 18 014 975](#) (Cheshire West & Chester) the ombudsman expressed the view that (non-urgent) OT assessment visits should take place within 4–6 weeks of receiving a request for adaptation support.

In report [no 18 012 994](#) (Havering LBC) the ombudsman reminded councils that there can be no requirement that the quotes applicants have to submit for works, have to be from a Council's 'approved provider list'.



Charging for domiciliary care

Charges for home care have increased steeply over the last decade (in part to off-set central Government cuts). They drive [disabled and older people into care poverty](#) with many forgoing support they need because they [cannot afford to pay the charges](#) (see for example ombudsman report [no 19 015 436](#) - Durham CC). In Wales, the permitted charge has increased by over 65% in the last four years and is profoundly regressive – capping the costs for the wealthy and but creating severe hardship for the poor.

In [R \(SH\) v Norfolk CC](#) [2020] the High Court held the council's charging system unlawfully discriminated against those with more severe impairments compared to those who were able to sup-

plement their income with earnings—a judgment estimated to cost the [council £1 million](#). It is likely that many other councils will have adopted a similar approach to charging as did Norfolk.

The [Statutory Guidance](#) to the Care Act 2014 states that councils cannot charge more than is 'reasonably practicable' for the person to pay (para 8.2) – endorsed by recent guidance ([LAC\(DHSC\)\(2021\) 1](#)) that charges should be 'only what they can afford from their income'. Sadly, the ombudsman has tended to avoid questions of 'affordability' and focused instead on requiring councils to follow the statutory process – and having an open mind to claims relating to [Disability Related Expenditure](#): emphasising, for ex-

ample, that the list in the [Statutory Guidance](#) (Annex C para 40) is merely illustrative and that other costs can amount to DRE, [for example](#) hair braiding, holiday costs, telephone bills, live in carers food costs, transport costs, pet care costs and associated costs to the carers and the family's wider circumstances.

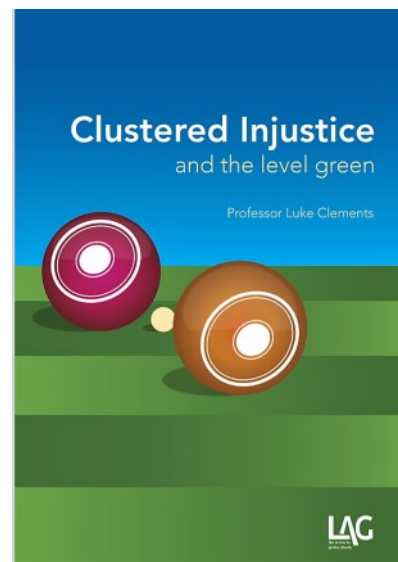
The ombudsman has, however, reminded councils that non-payment of a charge does not permit them to withdraw care and support needed to meet a person's eligible needs - [no 19 008 083](#) (Kensington & Chelsea LBC) and that councils must provide clear information about how charges have been calculated (including in accessible formats) - [no 19 002 161](#) (Islington LBC).

Lawn bowls rules (extract [Clustered Injustice and the level green](#))

To the distant observer, a bowl so carefully rolled along the green may seem round and true, but the more its course runs, the clearer it becomes – that it is anything but. To a bowls player, this bias is an inherent part of the game and unremarkable – it is a fact of life. To an outside observer – it is mesmerising.

Thus, to a clerk in a magistrates' court, it is utterly normal that she has every day paraded before her people who live with disadvantage, people with severe mental health problems, people with alcohol and drug addictions, people dependent upon pitifully small sums of social security and at the whim of loan sharks; and yet also utterly normal that behind her sit three magistrates with none of these characteristics and little or no comprehension of what it is like to live such a life. To an outside observer, it is mesmerising – a glimpse of our two nations, of Sybil and The road to Wigan Pier. Before these decent onlookers, justice rolls its predestined course – and the longer the process rolls on, the more inevitable is its outcome weighted against those who live with disadvantage.

These are degradation ceremonies – not because there is any malice in those operating the system – magistrates are volunteers and frequently deeply humane and public-spirited people, as are the prosecutors and defence lawyers, the probation officers, tribunal chairs and ushers – so are they all honourable people, bending over backwards to act fairly, scrupulously adhering to the creed of impartiality.



Direct Payments and flexibility

A council's approach to direct payments can be seen as a litmus test of its approach to person centred planning: rigid, controlling and bureaucratic or open, light-touch and imaginative. The ombudsman and statutory guidance ([SG](#)) remind councils that such payments are designed to be used flexibly and innovatively and should not be subject to unreasonable restrictions – [SG para 12.34](#), – and see no [18 010 441](#) – (Cheshire West & Chester Council) and [18 012 426](#) – (Norfolk CC) 7 November 2019, where arbitrary limits were placed on their use to meet social /community based needs.

The unlawful restriction in complaint [no 19 008 804](#) (Staffordshire CC) concerned the council's refusal of direct payments for respite care (because it had block purchased such care).

Research and ombudsman reports have highlighted the need for DP hourly rates be sufficient to secure and retain suitable personal assistants ([Leeds University](#)); for there to be no coercion to compel people to have such payments and to allow unused hours to be used at a later date - [no 19 011 005](#) (West Berkshire 2020). Councils must also be alert to any breakdown in a DP arrangement and to

'ensure there is no gap in the provision of care support' see [SG para 12.68](#) and no [17 016 036](#) (Buckinghamshire CC) and no [17 019 692](#) (Bromley LBC) – including (if requested) putting in place directly commissioned support services (generally within 2 weeks) – see for example no [16 019 120](#) (Lincolnshire CC). In the event of a breakdown the ombudsman will also scrutinise the extent to which the council fully explained its DP procedures and then monitored the arrangements no [17 018 117](#) (Lancashire CC) and no [18 010 441](#) (Cheshire West & Chester Council).

NHS Continuing care (CHC)

English Government (2020) guidance concerning the [Reintroduction of NHS continuing healthcare](#) brought to an end the COVID-19 discharge funding arrangements which enabled adults to be discharged from hospital and their care home support funded by CCGs. The guidance ‘suggests’ that where an ‘individual is assessed as not eligible for NHS CHC, responsibility for funding will sit with the local authority ...’

It is difficult to see how this can be the case where an authority is disputing such a finding. In such cases the [2012 regulations](#) (reg 22) require that the parties invoke their dispute procedures and pending its determination the [2018 Frame-](#)

[work](#) (para 190) requires that neither party ‘unilaterally withdraw from an existing funding arrangement’.

In relation to disabled children and NHS CHC responsibilities – both the English and Welsh guidance remains lamentable and only comprehensible by appreciating that (unlike the adult CHC guidance) they are not concerned with the legal ‘limits of social care’: that they merely describe a ‘type of service’.

The result of such woeful guidance is that children’s social services in both nations are funding all manner of healthcare supports for young people. One small but extraordinary example concerns ‘tracheal suctioning’. In [2005](#)

[the High Court](#) made plain that this was well above the limits of social care and in deciding what was above the limits, it was irrelevant who did it (ie whether it required a qualified nurse) – a point reiterated in [2018 proceedings](#).

Although this should have brought some sense to this field, it has not. In [R \(JP\) v NHS Croydon CCG](#) (2020) the CCG argued that local authorities could fund tracheal suctioning under the Localism Act 2011. An argument that the judge found ‘inconceivable’ - and one (if accepted) that would drive ‘a coach and horses through very carefully delineated frontiers of competence’ between the NHS and social services.

Deprivation of Liberty Safeguards and Jurisdiction (extract [Clustered Injustice and the level green](#))

Legal responses of this kind, purportedly designed to safeguard individuals, ultimately create tortuously complex systems that demonstrably fail in the safeguarding stakes. At a micro scale, the cumulative result of the plethora of processes is the creation of yet more clusters of legal problems to exacerbate the disadvantage of the individuals they are designed to protect. Action of this kind bears an uncanny resemblance to Rachel Carson’s 1962 environmental science book, Silent Spring. In response to an insect problem at Clear Lake in California, a DDT-type pesticide chemical was applied for many years. At the end of this period, the initial problem remained but the unintended adverse environmental costs were found to be truly shocking. Similarly with the Bournemouth gap: as a result of a problematic gap in the law, a DoL type law was brought into force and applied for many years. Yet at the end of this period, the initial problem still remained (of individuals being incarcerated unnecessarily and without adequate protection) but the unintended economic costs of the resulting process were demonstrably staggering. The use of DDT to address the insect problem at Clear Lake and DoLS to address the Bournemouth gap are both classic examples of systems failure. In each case the problem was seen as simple (an infestation; a legal difficulty) and linear ‘solutions’ were adopted – spraying to kill the insects, legal process to regularise the detention. However, in both cases, the problems were complex ‘messes’ not simple difficulties.



NHS Ombudsman’s 2020 CHC report & NHS England Guidance

The NHS ombudsman’s [2020 report](#) on CHC focuses on care and support planning / communication failings and recommends that frontline assessing and care planning practitioners have regular competency training. Failings highlighted in the report included:

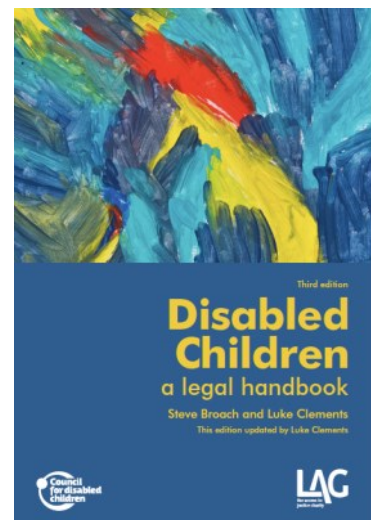
- Arbitrarily removing overnight care from a 24-hour funded care package;
- Not producing an adequate care plan – forcing individuals to fund some of their care (which in one case cost the person £250,000).

• A CCG that failed to produce a plan to support a home care package, but nevertheless placed an arbitrary cap on the level of NHS CHC-funded care.

These are cases where the families managed to fund and provide the essential care themselves, but - as the ombudsman notes - these failings ‘could have much more devastating consequences for people who do not have funds to draw on’.

Separately, NHS England has drawn attention to the relevant [2019 Personal](#)

[Health Budget Guidance](#) that reminds CCGs that they cannot insist that individuals use pre-paid cards and that the ‘offer of a ‘traditional’ direct payment paid into a bank account should always be available’. The guidance (page 8) also emphasises the importance of (among other things) information, independent advice and giving recipients ‘a high degree of flexibility and choice to spend their budget on services that make sense to them’ (including non-traditional NHS services).



Resources

Newsletter

To be added to the Newsletter mailing list — email lukeclementstraining@gmail.com. To view this Newsletter (16) as a PDF (with active hyperlinks) visit 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:

- [It's definitely not autism it's ...;](#)
- [Ordinary Residence s117 ~ all change;](#)
- [Coronavirus and direct payments;](#)
- [Unacceptable delay;](#)
- [Unfortunately ... there is no legal footing to justify us not funding;](#)

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 — in England and Wales. Standard courses include:

- The Care Act 2014;
- The Social Services & Well-being (Wales) Act 2014;
- 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.

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Referrals and Child Protection in

England Andy Bilson & Katie E. C. Martin *British Journal of Social Work* (2016) 0, 1–19

... this paper shows that 22.5 per cent of children born in the 2009–10 financial year were referred to children's social care before their fifth birthday. Three-quarters of them were at some point assessed, almost two-thirds found to be in need and a quarter formally investigated. These findings show the full extent of children's involvement in children's social care before the age of five. One in every nine children born in 2009–10 was suspected by social workers of being abused and this high level of involvement is only justifiable if it is demonstrably reducing harm and promoting well-being of children—an outcome which is contested.

