

# Book Reviews

## *Community Care and the Law* by Luke Clements (3rd edition)

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“Community care law remains a hotchpotch of conflicting statutes, which have been enacted over 50 years; each statute reflects the different philosophical attitudes of the time”

So concludes Luke Clements in the Introduction to the third edition of *Community Care and the Law*, which to the relief of community care practitioners has just been published. In other words the law in this field is in a mess and cries out for reform in the way that the law relating to children was reformed by the *Children Act 1989*. Sadly, as the author observes there appears to be little sign that this will occur. All this is well known to practitioners and presents a considerable challenge to anyone who seeks to encompass the relevant law in a way that is useful both to the experienced lawyer as well as the non-lawyer who needs to be able to understand its essentials. On both counts Luke Clements succeeds in a way that is masterly.

One of the keys to the author’s success is to know what to leave out. As he asks at the beginning: “How can you do justice to the subject and yet exclude detailed consideration of welfare benefits or special education?” He does however do this and for very good reason (the ever changing nature of the former and the availability of alternative sources of information), and he focuses on the central community care statutes listed in the *National Health Service and Community Care Act 1990* – a substantial component of which remains the *National Assistance Act 1948*, a key aspect of the package of legislation that ushered in the welfare state. As a consequence the third edition resolutely maintains the focus of its predecessors on that mishmash of statutes, regulations, directions and guidance that make up the law relating to the provision of community care services and which, at first sight and probably at second sight as well, seems to the uninitiated, terrifyingly complex.

The other key to successfully addressing this topic is to set its development firmly within its historical context. In his Introduction Luke Clements in 8 pages sets out a most succinct summary of the relevant history from the great post-war reforms of 1948 through to the *Health and Social Care Act 2001*, acknowledging on the way the emergence in the 1990s of the disability rights movement, and observing that over the last ten years there has been a marked absence of any radical new thinking by the Government in philosophical or legal terms. The focus has been on structural and administrative reform and he quotes with approval Onora O’Neill’s observation in the 2002 Reith Lecture that “central planning may have failed in the Soviet Union but it is alive and well in Britain today”

Having set the scene, the author then proceeds to approach (attack is possibly a better word) the subject in such a way as to disentangle its complexity and persuade even the most timorous reader that it is possible, at the very least, to grasp the essentials of this demanding and at times rather rambling subject. At the outset it is essential to acquire some understanding of the legal basis of the functions of social services authorities and the regulatory framework in which they are undertaken. Some comprehension of the obligatory and discretionary functions of social services authorities (the distinction between which is not always as clear as it may seem), “target” and “specific” statutory duties and the relationship between regulations, directions and guidance are important if the reader is to make headway, and in the first chapter Luke Clements addresses these issues in a clear and comprehensive manner. It is followed by a discussion of the strategic context with an exploration of the obligations of both social services and the NHS to plan strategically, increasingly in collaboration with each other. He then moves to identify the potential beneficiaries of all this effort, and deals with the obligations of local authorities and health bodies to provide disabled people with relevant information, as well as data protection and confidentiality issues.

Having disposed of a number of key contextual issues, the author turns in the next three chapters to address what many would regard as the heart of the subject: the duty of social services to assess need, the provision of services and the care plan, and the important ancillary topic of the meaning of ‘ordinary residence’ (a reminder of the persistent survival of a number of Poor Law concepts in the current law). Assessment and care planning are as Luke Clements reminds us, central to the social work process and seek to reconcile the demand for services with the resources available. He quotes Phyllida Parsloe’s comments of over ten years ago that “the *NHS and Community Care Act* backs a whole field of horses, with the two front runners being user choice and scarce resources. Local authorities are apparently expected to give equal weight to empowering users and keeping within their own budget”.<sup>1</sup>

Eligibility for assessment, the nature of an assessment, the assessment process itself, what needs must be satisfied by the provision of services, the issue of resources and the limits of the eligibility criteria (in particular the key case of *R v Gloucestershire CC ex p Barry*<sup>2</sup>), and timescales for assessments are amongst the issues dealt with in the assessment chapter with the assistance of helpful explanatory diagrams. A similar logical approach is taken to the provision of services and care planning with a particularly helpful diagram addressing common service problems.

Care home accommodation and domiciliary and community-based services are the subjects of the next two chapters. Particularly helpful are the discussion about the legal implications of home closures (especially the *Coughlan*<sup>3</sup> case) and the author’s attempt to present diagrammatically the ludicrously complicated legal basis for the provision of domiciliary and community based services. An example of the author’s attention to detail as well as the practical value of this book for non-lawyers working in the field, is the section on manual handling – relevant not only in care homes but increasingly in domiciliary and community settings.

An alternative way in which local authorities can discharge their community care responsibilities is by way of direct payments. It is probably fair to observe that this particular alternative is where the aims and objectives of the disability rights movement and community care provision appear to be least in

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<sup>1</sup> *Community Care*, “Making a bid for fair play”, 5 August 1993.

<sup>2</sup> [1997] 2 All ER 1

<sup>3</sup> *R v North and East Devon Health Authority ex p Coughlan*. [2000] 3 All ER 850.

collision and the legal framework within which they are administered is presented in a separate chapter. Social services authorities and their responsibilities are the principal focus of the first nine chapters. One of the reasons for the complexity of the subject is that as Luke Clements notes: "At no time since the formation of the NHS has there been a clear separation between its responsibilities for health services and those of the local authorities for care services." In a chapter entitled NHS responsibilities for community care services, Luke Clements places those responsibilities in a concise historical context and then addresses a number of crucial issues. These include the NHS's continuing health care responsibilities, the scope of which has been exercising the service since at least 1957 and the publication of the Bouchier Report which addressed the worries of local authorities that their residential homes were caring for many people who ought to be in hospital. More recently this problem has been the subject of high profile publicity commencing with the publication of a highly critical Health Service Commissioners report in 1994, the *Coughlan* case, no less than three separate sets of guidance, and finally 'The Continuing Care (National Health Service Responsibilities) Directions 2004'. That it has taken so long to begin to resolve this issue is an indicator in itself of the wider challenges faced by those seeking to work with the law in this area.

Twenty years ago it is probably correct to note that the law made no provision for the needs of carers in the community. In that time three separate pieces of legislation have been enacted that give increased recognition and rights to Britain's 6 million carers, including young carers. One again a consequence of the incremental development of the relevant statutory provision is that the resulting legal framework is in places mind numbingly complex, and the author's diagrammatical representation of the rights of carers is a great assistance in fully understanding the implications of the chapter on carers. Similarly complex are the arrangements for charging for community care services; an issue highlighted in 2002 for mental health services by the decision of the House of Lords in *R v Manchester CC ex p Stennett and others*<sup>4</sup> that it is unlawful for local authorities to charge for services under section 117 of the Mental Health Act 1983. Charging by social services for community services falls under two headings: the general duty to charge for accommodation in registered care homes and the discretionary power to charge for non-accommodation services. In relation to the latter, one of the challenges is that there is no statutorily defined procedure for assessing non-accommodation charges. It is no use pretending that the home care charging rules are very easy to comprehend but the presentation in the text of a tabular example goes a long way to providing some enlightenment.

The next five chapters deal with specific groups of community care service users: people with a learning disability; older people; mental health service users; users of drug, alcohol and HIV/AIDS services; tenants and owner occupiers in receipt of housing-related community care services, and finally children. The chapter on mental health service users helpfully links The National Service Framework standards, in particular Standards 2, 3 and 4, with the Care Programme Approach and entitlements to community care assessments under the *National Health Service and Community Care Act 1990*, and considers the decision in *R (on the application of HP and KP) v London Borough of Islington*<sup>5</sup>. It finishes with a comprehensive examination of the implications of section 117 of the Mental Health Act 1983, and the author's consideration of the duration of the duty under this section is especially helpful.

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4 (2002) UKHL 34. See 'Charging for after-care services under section 117 of the Mental Health Act 1983' by Nicolette Priaulx, JMHL December 2002 pp 313–322.

5 [2004] EWHC 7 (Admin). This decision is reviewed by Joanna Sulek in this issue of the JMHL.

Community Care and the Law concludes with detailed examination of the remedies available in law by which a failure in the provision of community care services may be challenged: for example, the various complaints procedures, judicial review, default powers; and an application to the court under the Human Rights Act 1998. As with the rest of the book the discussion is clear, concise and accessible to the interested non-lawyer.

Since the publication of the first edition, *Community Care and the Law* has been an essential tool for all those who advise on community care entitlements, and the third edition merely confirms that position. It is well presented with a good index and an extensive range of different tables including those listing local government ombudsman complaints decisions referred to in the text and relevant circulars and guidance. In addition a number of helpful precedents are provided. Whilst it is always possible to identify topics that could usefully be included – for example a little more on the implications of the *Disability Discrimination Act 1995* and the *Race Relations (Amendment) Act 2000* for the public authorities undertaking community care responsibilities would have been interesting – this third edition more than enhances the reputation established by its predecessors. It is an essential requirement for anybody seriously interested in this subject.

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