

<b>Institution: Cardiff University</b>
<b>Unit of Assessment: 20</b>
<b>Title of case study: Putting carers on the legal map</b>
<p><b>1. Summary of the impact</b></p> <p>The law regulating social care services for disabled and elderly adults, and their carers, had been unreformed for over 60 years. Reform had been inhibited by the law's complexity, the rapid growth in community dependency (due to deinstitutionalisation and the growth in the numbers of elderly people) and the lack of political consensus on the direction reform should take. Fundamental demographic and societal change over the last 20 years has made the failure of the legislation to address the support needs of unpaid carers and those for whom they care an even more pressing issue. As a result of a sustained period of research, academic publication and Parliamentary action by Clements, this area of law is now being reformed. Both the Westminster Parliament and the National Assembly in Wales have been scrutinising Public Bills (the Care Bill 2013 in England and, in Wales, the Social Services and Well-being (Wales) Bill 2013). Despite significant social policy research on this fundamental issue, Clements was almost alone in highlighting the legal dimensions. He thereby made a major contribution to public discourse on this question and played a key role in bringing about legal change.</p>
<p><b>2. Underpinning research</b></p> <p>Since 1996 Clements (Research Fellow, 1996 – 1999; Senior Research Fellow 1999 – 2003; Senior Lecturer, 2003 – 2004; Reader, 2004 – 2007; Professor 2007 - ) has undertaken in-depth research of the adult social care and carers' legal regimes in England and Wales. In 1996 Clements carried out research, published as a book<sup>3.1</sup>, which identified a range of Acts that collectively regulated the provision of social care support to disabled and older people, and their unpaid carers. It critically analysed the 'contradictions and inconsistencies' in the legislation and called for fundamental reform of the law. In 1997 in an article<sup>3.2</sup>, Clements identified the essential elements of any reformed legislation and in a further paper<sup>3.3</sup> in 2004 he highlighted the social exclusion experienced by large numbers of carers as a manifestation of the social model of disability: essentially carers being disabled 'by association'.</p> <p>In 2007, at the invitation of HM Government's Office for Disability, Clements briefed a private seminar on the need for law reform of adult social care law. His paper<sup>3.4</sup> pointed to the very complexity of the law as a disabling barrier to accessing the rights of those in need. He also drew attention to the problems created by the absence of any underpinning principles as to eligibility for social care support services. In a major updated publication in 2007<sup>3.5</sup> Clements took stock of his research in this field. He pointed to the decline in the number of people being supported by council services (despite a significant increase in community dependency) and to the significant increase in the number of women in paid employment. He then drew attention to how these factors had resulted in an increase in the number of unpaid family carers (to over 6 million) the highest proportion of whom were women in work. In 2008 in an article<sup>3.6</sup> Clements critically analysed the reform option being proposed by the English Government for this branch of the law which involves commodifying a person's social care needs into a 'personal budget' which they then use to purchase support services. The paper drew attention to, amongst other things, the potential of the policy to exacerbate social exclusion and the negative impact it could have on family carers.</p>
<p><b>3. References to the research</b></p> <ol style="list-style-type: none"> <li>1. <b>L. Clements</b> &amp; P Thompson <i>Community Care &amp; the Law</i> (Legal Action Group) 1<sup>st</sup> edition (1996) pp 381. (Available from the HEI, on request)</li> <li>2. <b>L. Clements</b> <i>Community Care: Towards a Workable Statute</i> in <i>Liverpool Law Review</i> Vol. XIX(2) (1997) p181-191. <a href="http://dx.doi.org/10.1007/BF02810549">http://dx.doi.org/10.1007/BF02810549</a> (Available from the HEI, on request)</li> <li>3. <b>L Clements</b> (2004) <i>Keynote Review: Carers – the sympathy and services stereotype</i>. British</li> </ol>

Journal of Learning Disabilities. v.32 No. 1 March 2004 6-8 (Blackwell, 2006)

<http://dx.doi.org/10.1111/j.1354-4187.2003.00268.x> (Available from the HEI, on request)

4. **L. Clements** *The Need for New Legislation* briefing paper for HM Government's Office for Disability (unpublished) (2007) (Available from the HEI, on request)
5. **L. Clements** & P Thompson *Community Care & the Law* (Legal Action Group) 4<sup>th</sup> edition (2007) pp951. ISBN: 9781903307472 (Available from the HEI, on request)
6. **L. Clements** *Individual Budgets and irrational exuberance* in *Community Care Law Reports*, 11, (2008) pp 413-430. <http://www.lukeclements.co.uk/resources-index/files/PDF%2006.pdf> (Available from the HEI, on request)

#### 4. Details of the impact

The 1.57 million disabled and older people receiving social care support in England and Wales rely heavily on extensive support from 6.5 million unpaid carers. Legal reforms since 2008 are removing the disabling barriers of legal complexity and ensuring that services for disabled and older people as well as their carers focus on the promotion of independent living and of 'dignity'. Clements' research has helped bring these changes about in three ways:

- Drafting and amending earlier social care Bills which have informed the legislation passed since 2008 and currently under scrutiny;
- Impact on the Law Commission recommendations now included in the Bills passing through Parliament and the Welsh Assembly;
- Direct advice given to the Joint Parliamentary Select Committee scrutinising the Care and Support Bill 2013.

#### Pathway to Impact

Before the REF period Clements was retained by a number of Parliamentarians to help draft and amend social care legislation to address the unmet needs identified in his research of elderly and disabled people and their carers. Commitments included the drafting of Bills which became the Carers (Recognition and Services) Act 1995 and the Carers (Equal Opportunities) Act 2004. Clements' draft of the latter included an attempt to prohibit "associative discrimination", which did not survive into the Act. In 2006 Clements was retained: as an expert adviser by the Disability Rights Commission on the Independent Living Bill 2006, which asserted among the guiding principles carers' rights to independent living; by Ed Balls MP in drafting the Disabled Children's Assessment and Services Bill 2006, which provided for respite care for family carers; and by Paul Burstow MP in the drafting of the Care of Older and Incapacitated People (Human Rights) Bill 2006 which sought to increase local authorities' powers to protect vulnerable people at risk of harm or exploitation. In 2007 Clements was retained by Barbara Keeley MP in drafting the Carers (Identification and Support) Bill. These interventions influenced subsequent legislation within the REF period.

#### Law Commission recommendations

As a direct outcome of Clements' 2007 briefing to the HM Government's Office for Disability<sup>3,4</sup> - the Law Commission was requested to add the reform of Adult Social Care to its list of projects.<sup>5,8,5,10</sup> This resulted in a 2008 scoping report<sup>5,1</sup> by the Commission that made extensive reference to Clements' research (including the above briefing<sup>3,4</sup>) as did the Commission's 2010 Consultation Paper (No 192: Adult Social Care)<sup>5,2</sup>. These fed into the Commission's formal report in 2011 (Adult Social Care: Law Com No 326: HC 941)<sup>5,3</sup> which concluded that the codification and the reform of the law was an imperative.

Clements' research was a leading influence on the Commission's formal report.<sup>5,8,5,10</sup> For example, the Law Commission recommended that the reformed legislation should: commence with a guiding principle concerning the promotion of personal well-being (para 4.37); and contain a single assessment duty and a single set of eligibility criteria for services (paras 5.23 and 6.17): requirements first identified by Clements' in his 1997 paper<sup>3,2</sup>. In addition the report recommended

that assessment and support for carers should be integral to any proposed Bill (para 7.9) and that carers' support needs should be put on the same legal footing as those of the people for whom they provide care (para 7.75): repeating Clements' 2004 paper<sup>3,3</sup>. The Law Commission recommended that adult protection provisions should be contained within the legislation (similar to the proposals in the Care of Older and Incapacitated People (Human Rights) Bill 2006 (above) (para 9.51)); and that the chilling effects on the 'ordinary residence' provisions should be addressed (as identified in Clements' HM Government's Office for Disability<sup>3,4</sup> and in the Social Care Portability Bill (see above) (para 10.22). All the above recommendations have now been included in the English and Welsh Bills passing through Parliament and the Assembly respectively.

### **Advice to Joint Parliamentary Select Committee**

Following the Law Commission's call for reform the English Government published a draft Bill for scrutiny (the draft Care and Support Bill 2012). In 2013 Clements was appointed Special Adviser to the Joint Parliamentary Select Committee that scrutinised this Bill. Clements' 'expertise in the law and practice of care and support' was considered to be 'invaluable' by the Committee and its final Report (March 2013) identified approximately 90 matters relating to the draft Bill that required attention<sup>5,4</sup>, for example: the vital importance of retaining, unchanged, the legislative boundary of responsibility with the NHS (known as the NHS continuing care boundary) (para 11.16); the importance of ensuring that the law did not create barriers to disabled children continuing to receive services on their transition into adulthood (para 11.79); the rights of 'young carers' to support from adult services (para 11.85); and the maintenance of protection for local authority supported residents under the Human Rights Act 1998 (para 11.93). In May 2013 the English Government introduced the Care Bill which incorporated many of these suggested matters<sup>5,9,5,10</sup>. The Welsh Government had published a similar Bill in January 2013.

### **Legislative changes**

Principles drawn from Clements' research and outlined in previous draft Bills were enacted after 2008. The provisions within the Disabled Children's Assessment and Services Bill 2006 concerning respite care for family carers were subsequently enacted (in amended form) as section 25 Children and Young Persons Act 2008.<sup>5,5</sup> Provisions of the Carers (Identification and Support) Bill concerning NHS responsibilities to provide information for carers became law in the Carers Strategies (Wales) Measure 2010. Provisions in the 2004 Carers (Equal Opportunities) Bill to amend the Disability Discrimination Act 1995 to prohibit 'associative' discrimination on grounds of disability were finally realised in the Equality Act 2010 (section 13). In 2012 Clements was retained by Baroness Jane Campbell in the drafting of the Social Care Portability Bill 2012, providing for transfer of support between local authorities.

### **Care Bill 2013 ( England) and Social Services and Well-being (Wales) Bill 2013**

Clements' research has impacted in several ways on these two Bills, still undergoing scrutiny in the UK Parliament<sup>5,6</sup> and Welsh Assembly<sup>5,7</sup> as of July 31<sup>st</sup> 2013. The 'underpinning principles' in clause 1 of the Independent Living Bill 2006 formed the basis for much of the subsequent discussion concerning the need for such provisions and resulted in 'well-being' proposals in clause 1 of both the English and Welsh 2013 Bills. The adult protection provisions within the Care of Older and Incapacitated People (Human Rights) Bill 2006 have been incorporated in part in the Care Bill and to a greater degree in the Welsh Bill (clause 105). The Social Care Portability Bill's key proposals for transfer of local authority support appear in clauses 36 - 37 of the English Bill and clause 40 of the Welsh. Both the Carers (Recognition and Services) Act 1995 and the Carers (Equal Opportunities) Act 2004 have been incorporated in codified form in both the English and Welsh Bills (clauses 19 and 15 respectively).

All the Law Commission recommendations based on Clements' research (detailed above) appear in both Bills. Specifically: 'principle' led legislation (clause 1 of each Bill); a single assessment duty (clause 9 in England, clause 10 in Wales); a single set of eligibility criteria for services (clause 13 in England, clause 19 in Wales); assessment and support for carers placed on the same legal footing as those of the people for whom they provide care (clauses 10 and 18 in England, clauses 10 and 26 in Wales); adult protection provisions (clause 42 in England, clause 105 in Wales); and the portability of care packages (clause 36/37 in England, clause 40 in Wales).

The English Care Bill included many of the suggestions made by the Joint Select Committee on Clements' advice. Specifically: retaining the legislative boundary of responsibility with the NHS (clause 22); the importance of ensuring that the law does not create barriers to disabled children continuing to receive services on transition into adulthood (clause 55); the rights of 'young carers' to support from adult services (clause 60); and the maintenance of protection for local authority supported residents under the Human Rights Act 1998 (to be dealt with by way of a consequential amendment – Hansard House of Lords 22 July 2013 : Column 1118, Baroness Northover).

### 5. Sources to corroborate the impact

1. 2008 Law Commission *Adult Social Care Scoping Report* confirms Clements' briefing prompted the Commission to investigate the issue:  
[http://lawcommission.justice.gov.uk/docs/Adult\\_Social\\_Care\\_Scoping\\_Paper.pdf](http://lawcommission.justice.gov.uk/docs/Adult_Social_Care_Scoping_Paper.pdf)
2. 2010 Law Commission *Adult Social Care* (Consultation Paper No 192) shows how research helped shape the consultation:  
[http://lawcommission.justice.gov.uk/docs/cp192\\_Adult\\_Social\\_Care\\_consultation.pdf](http://lawcommission.justice.gov.uk/docs/cp192_Adult_Social_Care_consultation.pdf)
3. 2011 Law Commission *Adult Social Care* (No 326: HC 941) gives the final recommendations detailed, which were influenced by the research :  
[http://lawcommission.justice.gov.uk/docs/lc326\\_adult\\_social\\_care.pdf](http://lawcommission.justice.gov.uk/docs/lc326_adult_social_care.pdf)
4. Joint Parliamentary Committee on the Draft Care and Support Bill Final Report 2013 (Introduction, para 9), acknowledges Clements' contribution to amendments on adult social care: <http://www.publications.parliament.uk/pa/jt201213/jtselect/jtcare/143/14302.htm>
5. Children and Young Persons Act 2008. Section 25 provides for family carer's respite care: <http://www.legislation.gov.uk/ukpga/2008/23/section/25>
6. Care Bill 2013. Contains the clauses detailed in the narrative influenced by the research: <http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0123/14123.pdf>
7. Social Services and Well-being (Wales) Bill 2013. Contains the clauses detailed in the narrative which were influenced by the research: [http://www.assemblywales.org/bus-home/bus-business-fourth-assembly-laid-docs/pri-ld9181-e.pdf?langoption=3ttl=PRI-LD9181%20-%20Social%20Services%20and%20Well-being%20\(Wales\)%20Bill%20](http://www.assemblywales.org/bus-home/bus-business-fourth-assembly-laid-docs/pri-ld9181-e.pdf?langoption=3ttl=PRI-LD9181%20-%20Social%20Services%20and%20Well-being%20(Wales)%20Bill%20)
8. Chief Executive of the Law Commission. Written testimony confirming the research's influence on the creation of the Law Commission inquiry and final recommendations.
9. Chair of the 2013 Joint Parliamentary Committee on the Draft Care and Support Bill and Minister of Health responsible for the Care Bill. Written testimony confirming the influence on the Joint Committee's scrutiny and benefit to the current Care Bill.
10. Former Head of Carers UK and member, 2013 Joint Parliamentary Committee on the Draft Care and Support Bill, confirms Clements' research prompted the Law Commission's investigation and call for reform. Also confirms Clements' role in developing the Committee's amendments and their incorporation into the Care Bill.

(All URLs (saved by the HEI on 31.07.13) and testimony are available as pdfs from the HEI on request.)