

# **Community Care & the Law**

**Luke Clements**

# S 21 National Assistance Act 1948

- *the duty / power to provide residential accommodation*
- persons aged 18 or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them.
- Ordinarily resident in local authority

# **S2 Chronically Sick and Disabled Persons Act 1970**

## **Non-accommodation services**

- **(a) practical assistance in the home**
- **(b) wireless. TV, library etc.**
- **(c) lectures, games outings and other recreational/educational facilities**
- **(d) assistance in travelling to community based care services**
- **(e) home adaptations**
- **(f) holidays**
- **(g) meals (at home or elsewhere)**
- **(h) a telephone**

## **S117 Mental Health Act 1983**

Patients detained under s3 (or one of the criminal provisions) of the Mental Health Act 1983 are, when discharged from hospital, entitled to free after care services under s117 Mental Health Act 1983.

## S47(1) NHS & Community Care Act 1990

- **Duty to assess ~ 3 Stage Process**
  - **Gather relevant information;**
  - **Decide which of the ‘presenting needs’ call for the provision of services by the SSD;**
  - **Construct a care plan – converting the NEEDS into SERVICES.**

# S47(1) NHS & Community Care Act 1990

1. Data gathering

2. Service provision decision

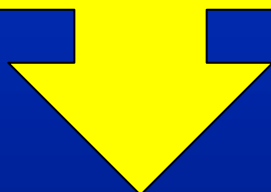
3. Care Plan

Direct Payments

Personal budgets

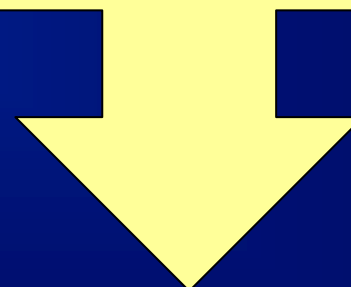
# S47(1) NHS & Community Care Act 1990

Cash actually handed to disabled person or a third party (s146 H&SCA 2008)



Direct Payments

Cash not handed to disabled person but managed by LA or an approved party on LA's behalf ~ but with disabled person exercising some 'choice'.



Personal budgets

# 1. Data gathering

Basic human needs

Family needs

Social needs

Musical interests

Language and cultural needs

Dog

# 2. Service provision decision

Which needs '*call for the provision of community care services*'



## 2. Service provision decision

Needs that call for services  
“Assessed Needs”

Needs that don't  
call for services  
“Unmet Needs”

Eligibility  
Criteria

FACS

1. Critical
2. Substantial
3. Moderate
4. Low

SSDs  
chose where to draw  
the line

## 2. Service provision decision

Needs that call for services

"Assessed Needs"

New FACS Guidance  
Prioritising need in the  
context of *Putting People  
First*: A whole system  
approach to eligibility for  
social care

Guidance on *Eligibility  
Criteria for Adult Social  
Care, England 2010*  
25<sup>th</sup> February 2010

Eligibility  
Criteria

FACS

1. Critical
2. Substantial
3. Moderate
4. Low

## 2. Service provision decision

### “Assessed Needs”

Basic human needs  
Family needs  
Social needs  
Language and cultural  
needs

### “Unmet Needs”

Musical needs  
Dog

Basic human needs  
Family needs  
Social needs  
Musical interests  
Language and cultural needs  
Dog

## 2. Service provision decision

“Assessed Needs”

Basic human needs  
Family needs  
Social needs  
Language & cultural  
needs

These needs  
MUST be met  
Regardless  
of resources

## “Assessed Needs”

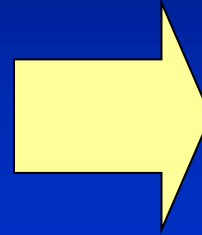
Basic human needs  
Family needs  
Social needs  
Language & cultural  
needs

## 3. Care Plan

Care Plan converts the  
assessed needs into services

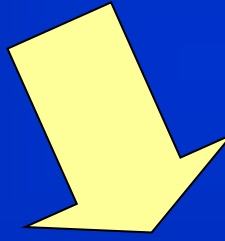
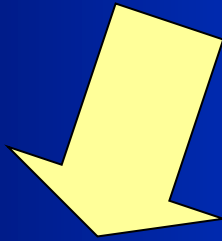
## "Assessed Needs"

Basic human needs  
Family needs  
Social needs  
Language & cultural  
needs



## Direct payments

Service user with  
Assistance prepares  
own care plan



## Resid'l CH

Meets all the  
assessed needs

## Home based

Home help  
Meals on wheels  
Sitting service  
Day Centre

# **Carers Legislation**

- **Disabled Persons (Services, Consultation and Representation) Act 1986**
- **Carers (Recognition and Services) Act 1995**
- **Carers and Disabled Children Act 2000**
- **Carers Special Grant (2000)**
- **Carers Equal Opportunities Act 2004**
- **Work & Families Act 2006**
- **Childcare Act 2006**
- **Equality Act 2010**

# **Carers (Recognition and Services) Act 1995**

- **Private Member's Bill**
- **Malcolm Wicks MP**
- **Long tradition of radical Private Members Bills in UK social welfare law**
- **Twilight of Conservative rule**



## **regular and substantial care**

**It is not only the time spent each week caring that has an impact on carers. For some ... such as those caring for adults with severe mental health problems, caring can be a sporadic or cyclical responsibility. The carer may not be physically or practically caring at all at certain times, but still be anxious and stressed waiting for, or actively seeking to prevent, the next crisis.**

# **Carers (Recognition and Services) Act 1995**

- **Assessment only**
  - Looks at 'sustainability of caring role'
- 
- 1. Autonomy (ie choice)**
  - 2. Health & safety**
  - 3. Involvement (work, social etc)**

# **Carers and Disabled Children Act 2000**

- **Private Member's Bill**
- **Tom Pendry MP**
- **Election promise 'strengthen law for carers'**
- **The "third way"**

# **Carers and Disabled Children Act 2000**

- **Freestanding right to an assessment**
- **Services for carers**
  - Power only
  - Services which 'will in the local authority's view help the carer care for the person'

# **Carers services under the 2000 Act**

**Respite / short break not a carer service**

**Services often 'symbolic' / small scale**

- ☐ Travel assistance
- ☐ Training
- ☐ Relaxation therapy / counselling;
- ☐ Mobile phones
- ☐ Trips/holidays/special events;
- ☐ Driving lessons
- ☐ Gardening

# **Carers (Equal Opportunities) Act 2004**

- **Private members Bill**
- **Dr Hywel Francis MP**
- **Personal commitment to his son Sam**
- **Addresses carers' social exclusion**
- **Right to information; and**
- **Work/ training / leisure assistance**

# **Carers (Equal Opportunities) Act 2004**

## **Missing rights**

- **Information**
- **NHS obligation**
- **Social exclusion**
- **Discrimination**
- **UK economic potential**

# **Carers (Equal Opportunities) Act 2004**

**Section 1 – Information**

**Section 2 – Work, training & leisure**

**Section 3 – Duty to cooperate**



# **Carers (Equal Opportunities) Act 2004**

## **Section 2 – Work, training & leisure**

**Carers assessments must consider whether the carer:**

- (i) works or wishes to work;**
- (ii) is undertaking, or wishes to undertake, education, training or any leisure activity.**

# **New Legislation**

## **Work & Families Act 2006**

s12 of the Act extends the benefits of flexible working rights to cover other carers of adults.

## **Childcare Act 2006**

LA's must secure, 'so far as is reasonably practicable' sufficient childcare to meet the requirements of parents in their area who require childcare in order to work or to undertake training or education to prepare for work. In relation to disabled children, the duty extends to childcare facilities up to their 18<sup>th</sup> Birthday.

## *EU Equal Treatment Framework*

### *Directive 2000/78/EC*

#### *Coleman v Law (2006)*

Miss Coleman claimed that she was dismissed because she took time off to care for her disabled son

She argued that this contravened the Directive since she was dismissed for a disability related reason

In July 2008 the European Court of Justice gave judgment in her favour

# ***Directive 2000/78/EC***

## ***Disability Discrimination Act 1995***

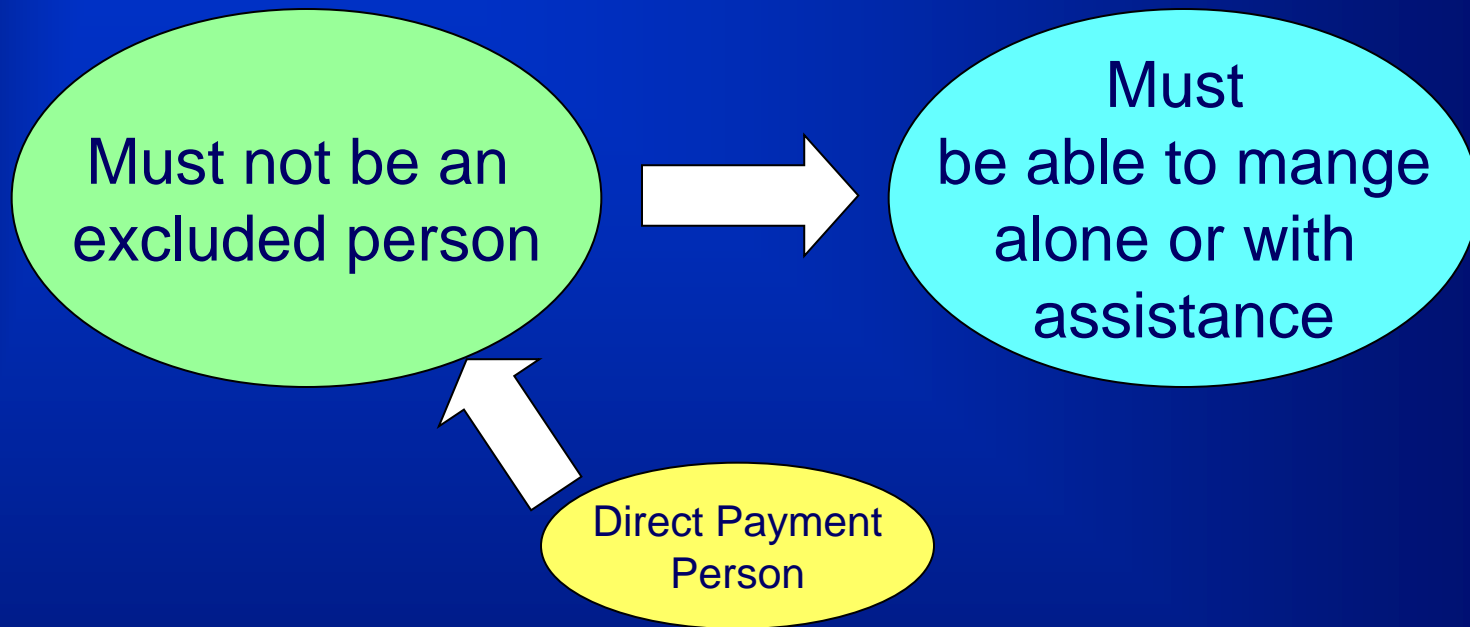
Unlawful to discriminate against a disabled person on grounds of disability

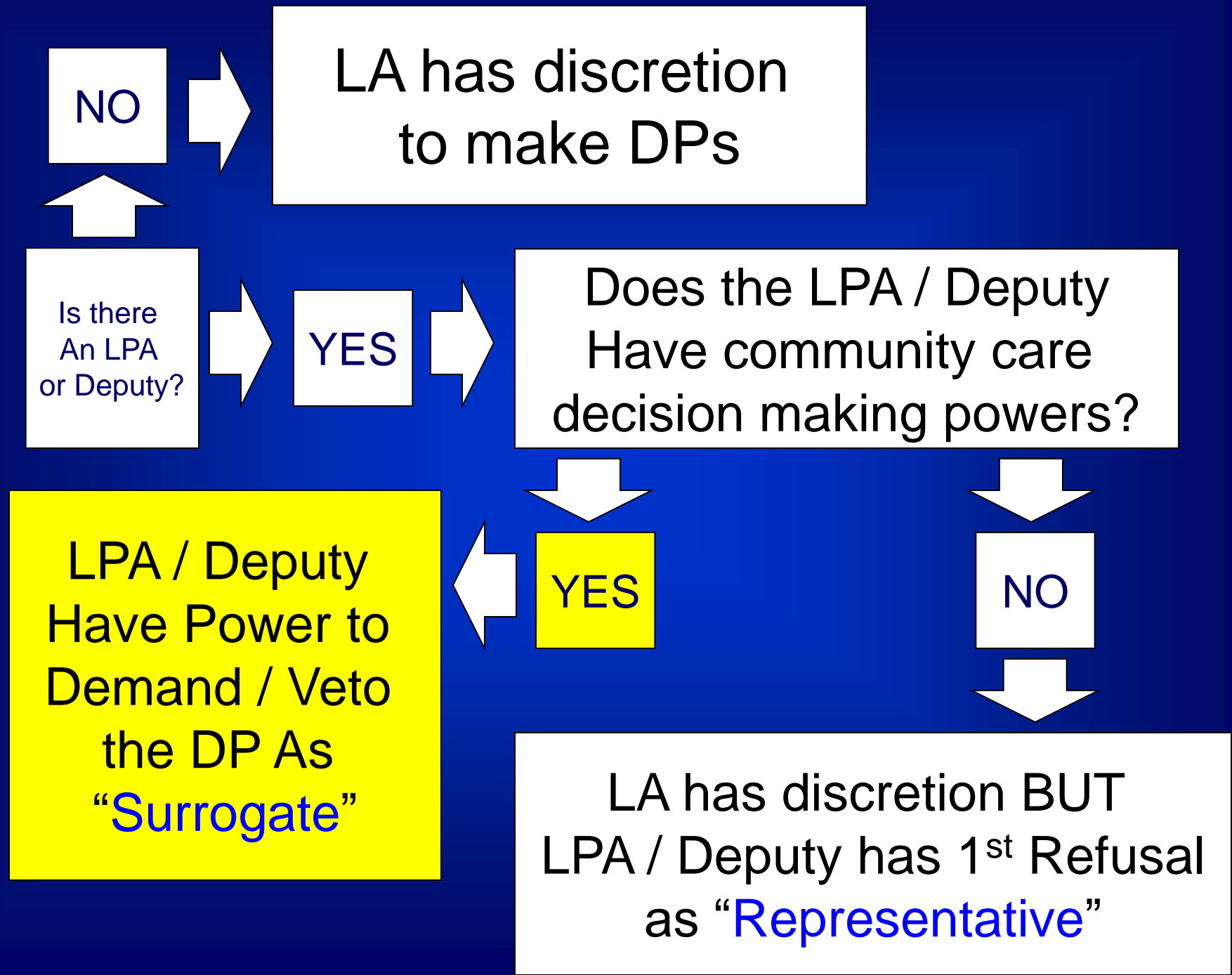
## **Equal Treatment Framework Directive**

Unlawful to discriminate against a person for a prohibited ground

*sex, race, disability, age, religion, sexual orientation*

# Direct Payments



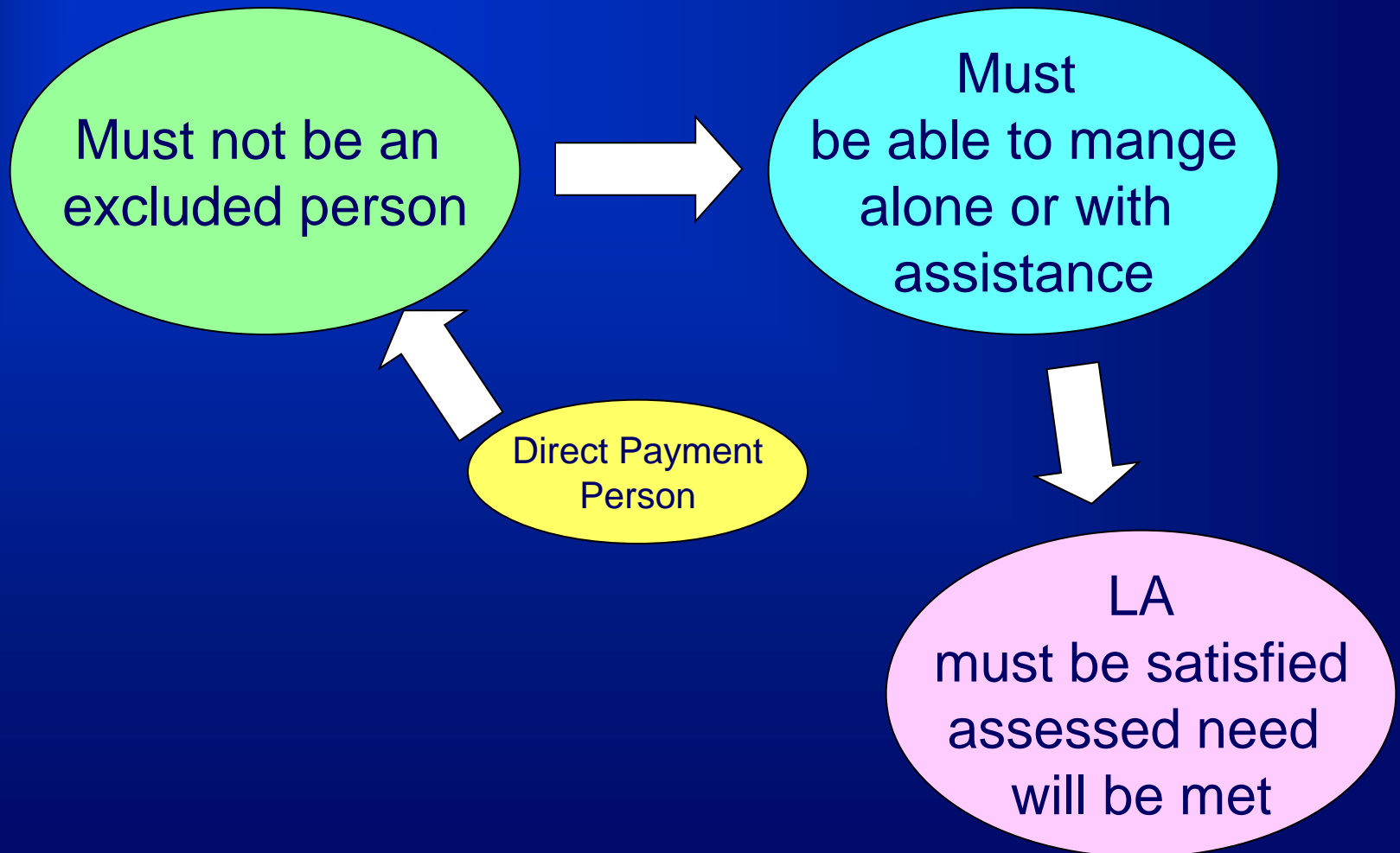


# Health & Social Care Act 2008, s146

## Where LA want to make DP:

- Consult family / friends;
- Obtain enhanced CR Certificate (unless a relative / friend);
- Be satisfied :
  - a) CC needs can be met by a DP;
  - b) recipient would act in best interests of s/u;
  - c) in all circs – it is appropriate.
- Standard / additional conditions

# Direct Payments





## **Excluded services**

- **Long periods of residential care  
= 4 “weeks”**
- **Local authority in house services**

## **Excluded service providers**

- **Spouses / partners**
- **Relatives living in the same household**
- **UNLESS**
- the social services authority 'is satisfied that securing the service from such a person is necessary to meet satisfactorily the prescribed person's need for that service'

## Amount of payment

- the direct payment should be sufficient to enable the recipient lawfully to secure a service of a standard that the local authority considers is reasonable to fulfil the needs for the service to which the payment relates.

## Obligations of DP recipient

- Councils should aim to ensure that the information that the direct payment recipient is asked to provide is as straightforward and the least onerous possible, consistent with monitoring requirements.

# Personalisation

## 1. Individual Budgets

Mixed funding streams

## 2. Personal Budgets

Social services community care monies only

## 3. Direct Payments

Social services community care monies only  
–actually paid to the disabled person

# What are IB's?

1. Self assessment

2. Resource allocation

RAS ~ Resource Allocation System

3. Mixed funding streams

Memo Welfare Reform Act 2009

4. Service flexibility

SDS ~ Self Directed Support

# Welfare Reform Act 2009

## Timescales / choreography

February 2010 English 'Right to Control' Trailblazer sites

Barnsley MBC

Greater Manchester

Barnet LB

Redcar & Cleveland BC

Surrey County Council

Essex County Council

Leicester City Council

Newham LB

Sheffield City Council

Autumn 2010 Trailblazers go live

Major benefits reform (ILF; Social Fund PLUS??)

Health Act 2009 Pilots for NHS Direct payments

s48 WRA 2009 enables the Sec State by Order to lift the prohibition on mixing community care monies with DWP controlled monies

## Legal Duties

NAA 1948  
Social Services

NHS Act 1946



## ***Leeds Ombudsman*** case 1994

**had reached the stage where active treatment was no longer required but that he was still in need of substantial nursing care, which could not be provided at home and which would continue to be needed for the rest of his life**

# *Leeds Ombudsman*

## Government Response

- **HA's to prepare CC statements**
- **If in the light of the guidance, some HA's are found to have reduced their capacity to secure continuing care too far – as clearly happened in the case dealt with by the Health Service Commissioner – then they will have to take action to close the gap**

## ***Coughlan (1999)***

- She is tetraplegic;
- doubly incontinent,
- requiring regular catheterisation;
- partially paralysed in the respiratory tract,
- with consequent difficulty in breathing;  
and
- subject not only to the attendant problems of immobility but to recurrent headaches caused by an associated neurological condition

## **Coughlan judgement (1999)**

- **Unlawful for social services to fund unless:**
  - 1. Nursing merely ancillary or incidental to social care AND**
  - 2. Not complex or specialist**

**The Quantity / Quality test**

# ***Wigan Patient* 2003**

- **Several strokes**
- **No speech or comprehension**
- **Unable to swallow**
- **PEG fed**

## ***Wigan Patient* 2003**

I cannot see that any authority could reasonably conclude that her need for nursing care was merely incidental or ancillary to the provision of accommodation or of a nature one could expect Social Services to provide. It seems clear to me that she, like Miss Coughlan, needed services of a wholly different kind.

## *Pointon* 2004

- Advanced dementia, (ie ‘some of the severe behavioural problems, which had characterised his illness during its earlier stage, had now diminished’);
- Behaviour still challenging;
- Unable to look after himself;
- His wife cared for him at home.

## ***R (T, D & B) v Haringey LBC (2005)***

- Disabled child with complex medical conditions which required – a tracheostomy (a tube in the throat) which needed, suctioning about three times a night.
- If the tube became unstuck she would die within minutes. Child discharged from hospital and cared for by parent - trained to cope with the emergencies that may arise.



# ***R (Grogan) v. Bexley NHS Care Trust (2006)***

I accept ... that the extent of [the NHS] duties to provide health services is governed by the health legislation and not by the limits of the duties of local authorities. Thus I accept that there is potential for a gap between what the [NHS] ... is under a duty to provide, as part of the NHS, and "health services" that could lawfully be supplied by local authorities.

---

**Continuing Health Care  
NHS Guidance**

**notwithstanding the legislative potential for  
there being a gap ...**

**the policy is that there is to be no such gap ...**

---

**Limits of social services  
Power to fund  
S21(8) NAA 1948**

---

# **National Framework for NHS Continuing Care**

**October 2007 – revised July 2009**

**Decision support Tool**

**11 different care domains**

**Categories –**

**Priority, severe, high, medium, low  
and none**

# **NHS Continuing Healthcare - numbers**

Regulatory Impact assessment stated that

- 31,000 receiving NHS CC ~ 31 March 2007
- Expect 5,500 more people to qualify

## **Evidence**

3<sup>rd</sup> quarter 2007/08 - 29,092 (ie Dec 07)

2<sup>nd</sup> quarter 2008/09 – 40,449 (ie July 08)

Health Under Secretary in Parliamentary Answers on 22 Feb and 20 Jan 2009 respectively.

# 2009 Framework Core Values

**47...** The decision-making rationale should not marginalise a need because it is successfully managed: well-managed needs are still needs. ...

## 2009 Framework Core Values

**47...** Only where the successful management of a healthcare need has permanently reduced or removed an ongoing need will this have a bearing on NHS Continuing Healthcare eligibility.

## 2009 Framework Core Values

**49** The reasons given for a decision on eligibility should not be based on:

- the setting of care;
- the ability of the care provider to manage care;
- the use (or not) of NHS employed staff to provide care;
- the need for/presence of 'specialist staff' in care delivery;
- The fact that the need is well managed;
- the existence of other NHS-funded care;
- or any other input-related (rather than needs-related) rationale.

## 2009 Framework Core Values

79. PCTs should be aware of cases which have indicated circumstances where a finding of eligibility for NHS Continuing Healthcare should have been made, and where the same outcome would be expected if the same facts were being considered in an assessment for NHS Continuing Healthcare under the National Framework (e.g. *Coughlan*, and those in the Health Service Ombudsman's report NHS funding for long term care of older and disabled people). However, they should be wary of trying to extrapolate generalisations about eligibility for NHS Continuing Healthcare from the limited information they may have about those cases. There is no substitute for a careful and detailed assessment of the needs of the individual whose eligibility is in question.



## 2009 Framework Core Values

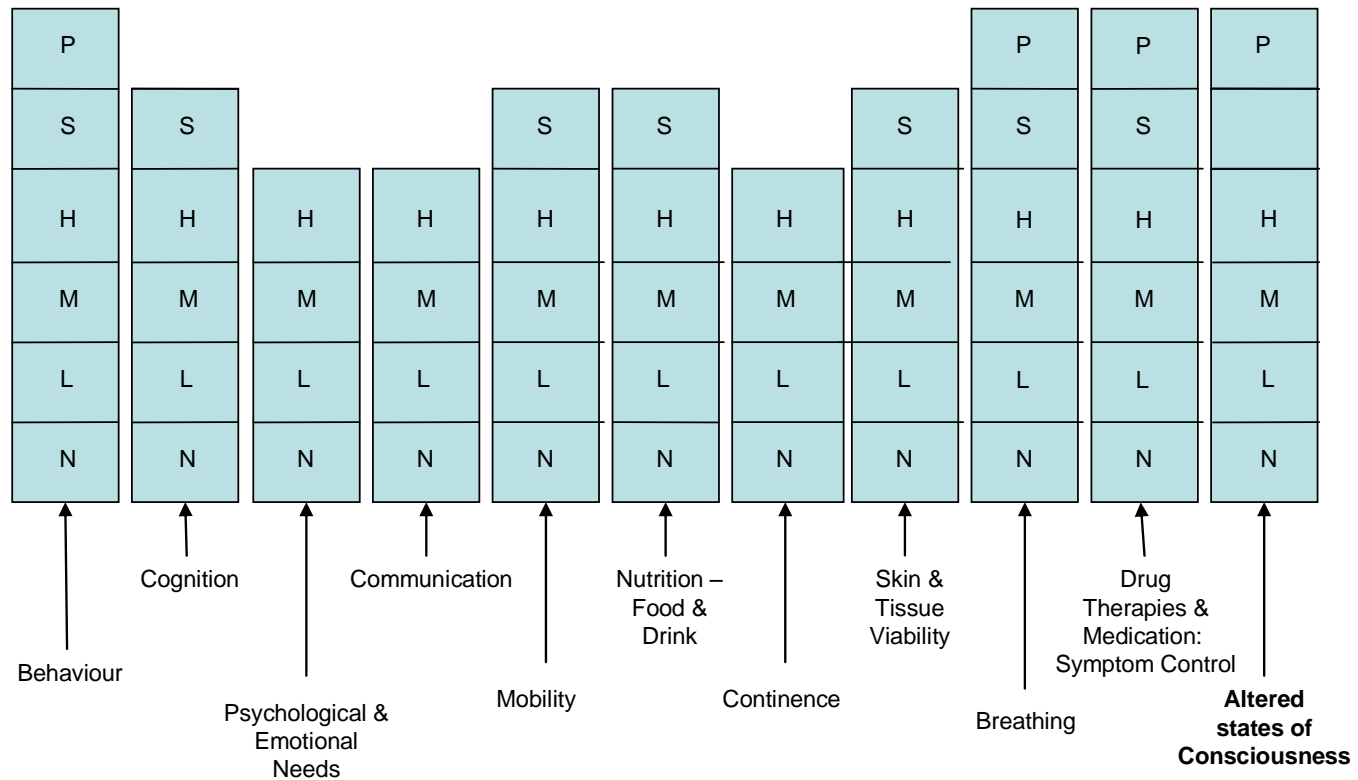
**80.** ... Only in exceptional circumstances, and for clearly articulated reasons, should the multidisciplinary team's recommendation not be followed.

## 2009 Framework Core Values

**80.** ... A decision to overturn the recommendation should never be made by one person acting unilaterally..

# 2009 Framework Core Values

82. ... Because the final eligibility decision should be independent of budgetary constraints, finance officers should not be part of a decision-making panel.



## Decision Support Tool

**22.** if there is difficulty in placing their needs in one or other of the levels, the MDT should use professional judgement based on consideration of all the evidence to decide the most appropriate level.

If, after considering all the relevant evidence, it proves difficult to decide or agree on the level, the MDT should choose the higher of the levels under consideration