

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*
25th 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”

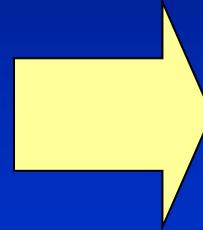
Basic human needs
Family needs
Social needs
Language & cultural
needs

3. Care Plan

Care Plan converts the
assessed needs into services

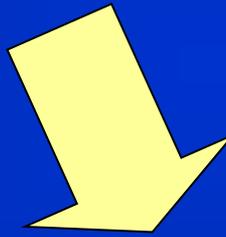
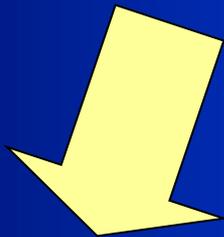
“Assessed Needs”

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 18th 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

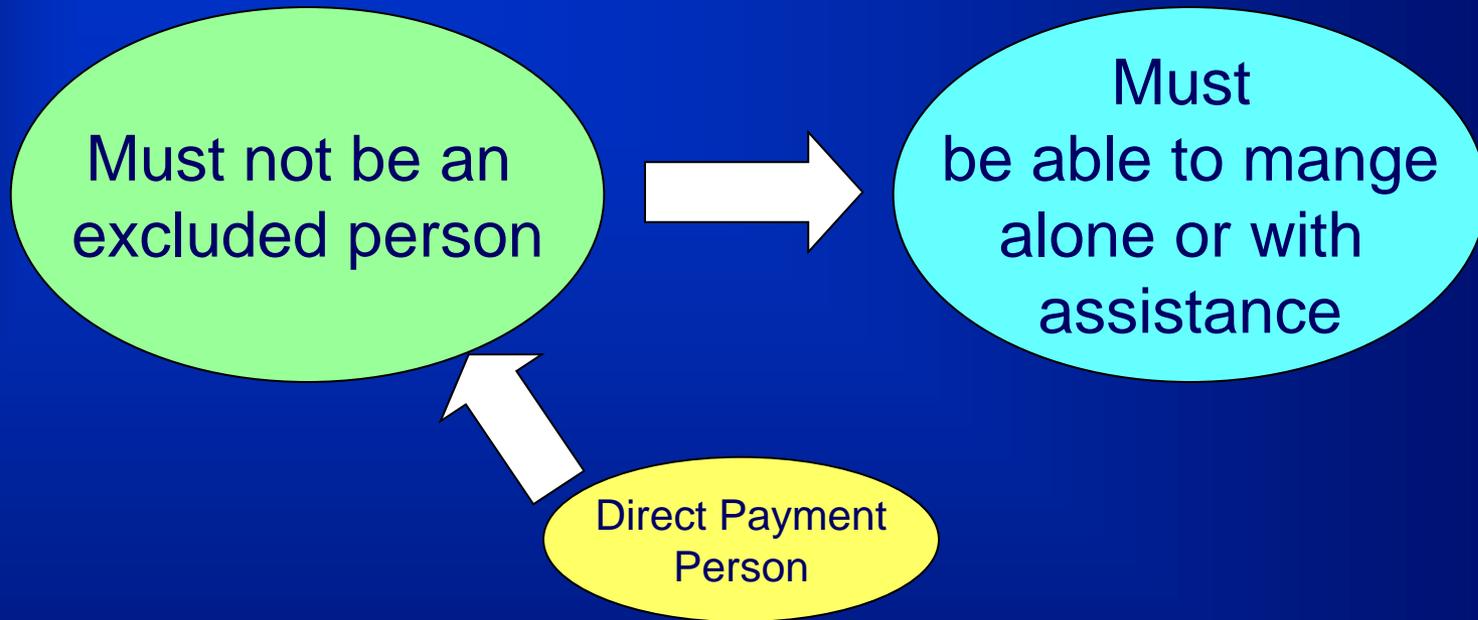
Unlawful to discriminate against a disabled person on grounds of disability

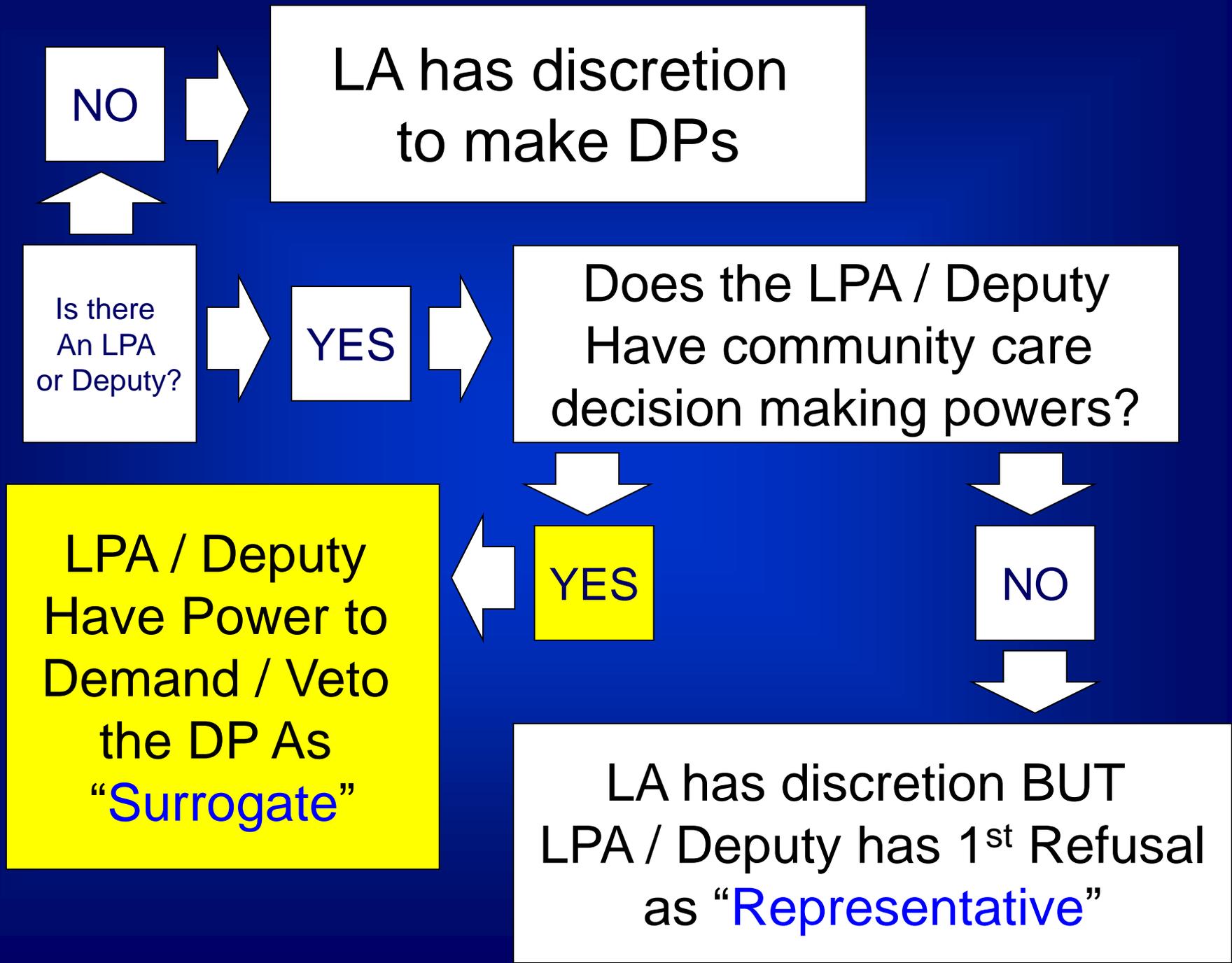
Equal Treatment Framework Directive

Unlawful to discriminate against a person for a prohibited ground

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

Direct Payments



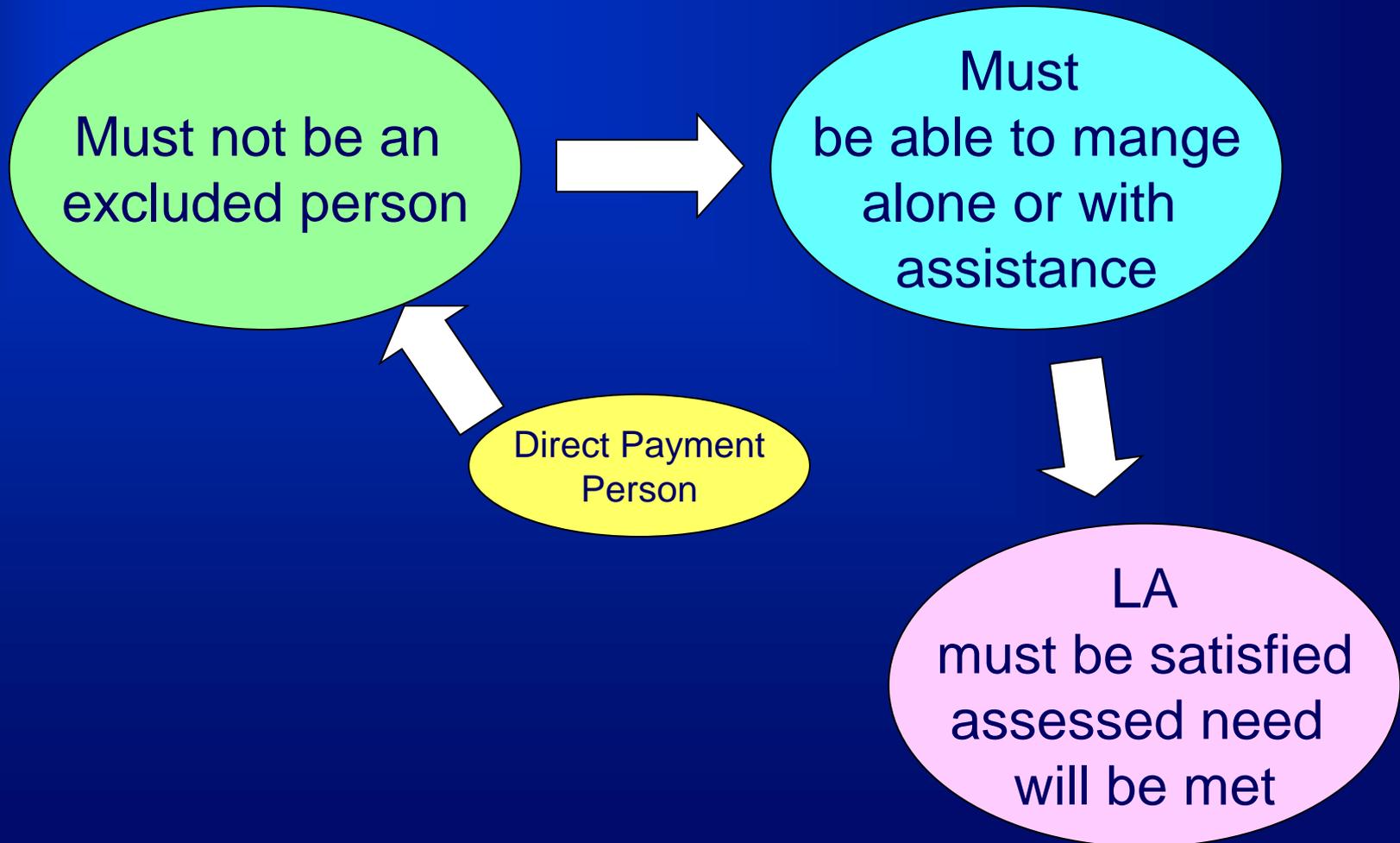


Health & Social Care Act 2008, s146

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

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

2nd 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

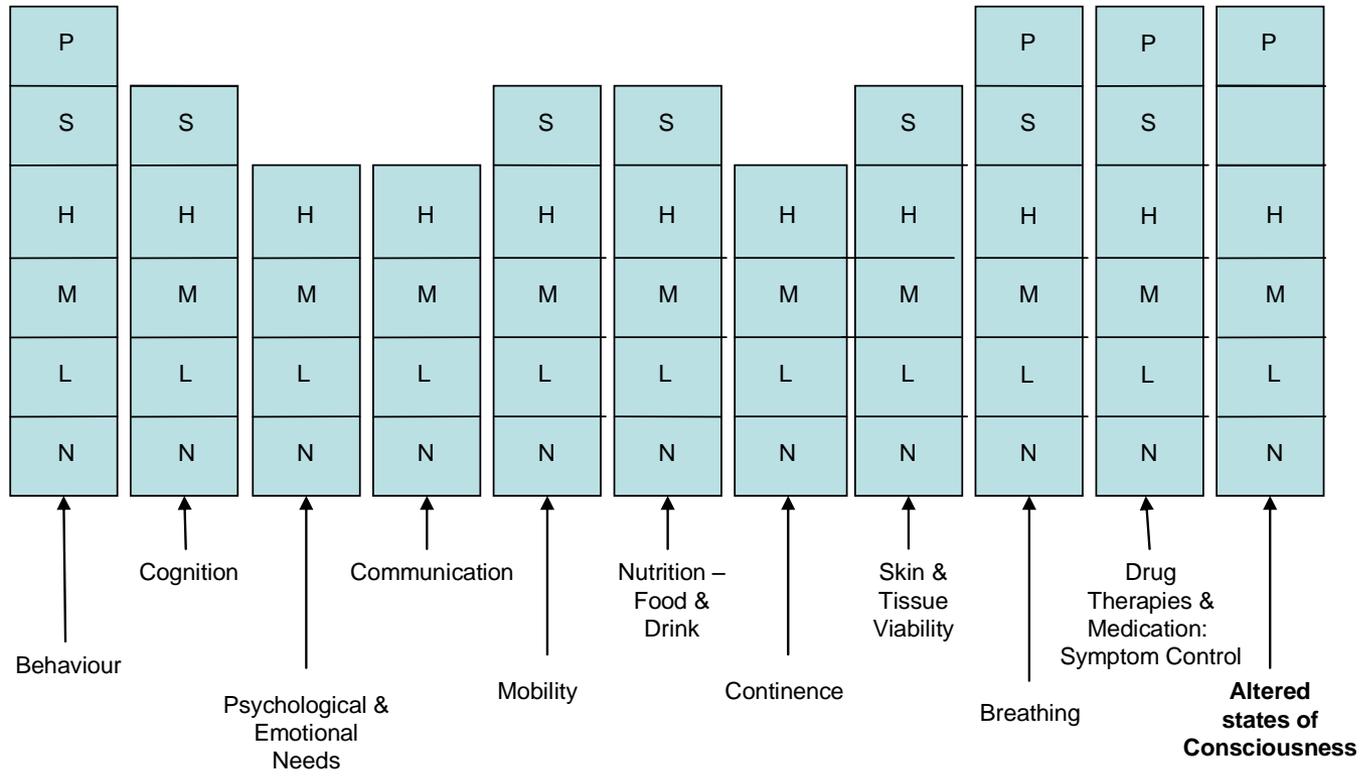
80. ... Only in exceptional circumstances, and for clearly articulated reasons, should the multidisciplinary team's recommendation not be followed.

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