**Personalisation and the Law**  
London Resource Allocation System support programme: Guidance series

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**What is the topic and why is it important?**  
It is important that Authorities have confidence that in implementing a personalised approach to social care they are doing so in a way which is legally fit for purpose, and pays attention to the current legal framework, and reduces the chance of expensive and inefficient legal challenge. Worrying about such challenges can become a block to undertaking the changes that are required to deliver choice and control for people.

This programme prioritised four areas relating to the law:

1. Equalities  
2. Indicative Allocation, Personal Budgets and Flexibility to change  
3. Risk and Liability  
4. Fair Access to Care Services

**Background**  
Between September 2009 and April 2010 the London Joint Improvement Programme (JIP) delivered a programme of bespoke support to authorities in relation to Resource Allocations Systems. During the delivery of this support authorities requested practical guidance on 4 common topics affecting their organisations.

This paper relates to one of these topics - Personalisation and the Law. It is 1 of 4 papers (see box 1) that offers tangible, practical and relevant guidance for London authorities. Each paper defines the topic and why it is important. It details the key issues that authorities believe are important and offers practical solutions and a way forward. Each paper should be seen as practical guidance and advice not competing with any policy, but trying to interpret existing policy and make practical implementation suggestions for London authorities.

**TOPICS**

1. Financial assessment and charging  
2. Informal support and carers  
3. RAS and managing resources  
4. Personalisation and the Law

Each paper was co-produced with input from London authorities with experience of the topic within a personalised system and utilises their knowledge. The solutions offered are intended to work now. Therefore, each paper is framed to have a shelf life of 6-12 months.
Priority areas and ways forward

Priority area 1: Equalities
A personalised adult social care system should treat all people equitably and not build discrimination into its working practices and how it responds to meeting people’s needs.

What are the key issues?
- The potential for different S.A.Q.s or other assessment tools tailored to different client groups
- Different policy drivers for different care groups
- Different costs of services and inflation uplifts, e.g. A.W.L.D. greatest cost increase.
- Potential for different RAS calculation even though same S.A.Q./assessment tool.
- Transparency – people seeing difference in spend across care groups
- Strong lobby from carers/vol. orgs to support status quo, as well as lobby to change it.
- How do we create a fairer market with similar prices for similar levels/type of support?
- Making change happen in strong face of opposition.
- Economic challenges – can we afford equality.

Recommended approach for London
Same approach to assessment and resource allocation across care group (same SAQ, same scoring framework and same amount of PB allocation for similar needs).

BUT

Time limited differentiated allocations that reflect reality of current market – but expectation that prices are managed down within agreed period.

It is worth taking into account:
- Quality of life services – explore contribution of 3rd sector, volunteers, universal services, SP services that can replace expensive conventional services as part of the transitional managing of costs downwards.
- SDS give people opportunity not to choose current and expensive patterns of service delivery that have created inequity.
- Carry on making inequity transparent – this becomes a useful lever for change not least politically.
- Encourage partners to behave equitably e.g.; N.H.S. and health services for A.W.L.D.; equitable access to housing and education for people who may have ended up as high costs to social care because of lack of good access
- Market Development – move away from standard cost by separating accommodation and care elements e.g. deconstruction of supported housing contracts = more personalised approach.

Priority area 2: Indicative Allocation, Personal Budgets and Flexibility to change.
This issue seeks to clarify the status of indicative allocations, when they should be regarded as a personal budget, and how to legitimise changes to the allocation, budget and methodology.

What are the key issues?
- What is the legal Status of indicative allocation
- Using Pilots before moving to long-term arrangements
- When is it the right time to move from ‘pilot’ to policy
• Changing resource allocation due to user / organisational / market dynamics
• What about issues such as balances, contingencies and claw back
• What about when people should access a personal budget (for instance if they are in receipt of an initial re-ablement service
• What about allocations that are not for one year, may be one-off, or temporary.

**Recommended approach for London**

• The allocation that is indicated through a completed SAQ/needs questionnaire should be regarded only as a starting point for support planning and needs to be able to flex and change both up and down as people learn from the reality of support planning.
• This means that a sign-off point where all this information is taken into account by a Authority is a crucial step in the customer journey.
• A system that tries to ‘fix’ the allocation too early will be open to legal challenge. This needs to be made explicit in information for people and families.
• This means that support planning becomes an integral part of a resource allocation system. It is important legally that the actual ‘buying power’ that an allocation represents is taken into account and this may explain why, for a transitional period, some people get more than others, despite an apparently similar level of need.
• The resource allocation system of a Authority needs to be regarded as a policy of the Authority. However in a learning phase it is OK to pilot different arrangements, flex and change them according to that learning before arriving at a readiness to formally adopt it as policy.
• Once policy, changes to the resource allocation system as a whole need to be made in the same way that other policy changes are made.
• The indicative allocation, the invitation to create a support plan with the appropriate amount of help to do so, and a reasonable sign off decision by a Authority together constitute an assessment – and are the process by which a personal budget is arrived at. Any changes to a personal budget will need a re-assessment – i.e. another opportunity to describe need, plan for support and agree that support. Significant deflationary pressures in the marketplace or a change in service user needs or circumstances, or changes in eligibility thresholds could all be reasons for re-assessment.

**Priority area 3: Risk and Liability**

In a personalised system that indicates an allocation and invites someone to design their own support and fund it through a personal budget how do you manage risk and liability without cutting across someone’s choice and control

**What are the key issues?**

• How to share risk and responsibility between Authorities, people and families when people have more choice and control
• What about an Authorities legal liabilities
• How do you sign off a plan clearly and transparently
• How do you create an audit trail that provides evidence of reasonable decision making, duty of care?

**Recommended approach for London**

• The group of London Authorities felt that the legal advice available within the ADASS and common RAS products was sufficient to deal with these issues and provide a way forward for Authorities. Please see these documents published by ADASS.
  o Personalisation and the law: Implementing Putting People First in the current legal framework
Some important excerpts from these documents are:

- "Councils have a number of duties relating to assessment. The C.S.D.P. Act 1986 gives Authorities a duty to assess the needs of anyone perceived by the council to be disabled. The N.H.S. and Community Care Act 1990 Section 47(1) imposes a duty on local authorities to carry out an assessment of need for community care services for people who appear to them to be people who may be in need of such services. What constitutes an assessment is not prescribed by statute or case law. The Fair Access to Care Services guidance makes clear that assessment should be proportionate to the person’s presenting situation. The assessment process must include a decision by the council (or someone lawfully authorised by the council) on whether the person has eligible social care needs. Section 47 also requires councils to arrive at a conclusion about potential needs for other agencies’ services so that the person can be referred correctly for a decision by those agencies. An assessment incorporates both the decision about eligibility and the identification of what the authority thinks it is appropriate to do, provide or arrange for to meet those needs. The assessment therefore refers to the whole process of identifying needs and planning how to meet them. In an approach based on self-directed support, people take the lead in identifying their needs and the outcomes they want to achieve, and planning how best to achieve these outcomes. This process can involve completing a self-directed assessment and developing a support plan. The assessment, the personal budget and the support plan must be signed off by the council if the outcome is to be regarded as a completed community care assessment. The council must be satisfied that the proposed support arrangements will meet the person’s eligible assessed needs..... If all these things are in place it is not necessary to carry out another form of community care assessment in addition to the self-directed assessment and support planning process. The sign-off by the council of the self-directed assessment and the support plan is sufficient. (taken from Common RAS products)"

- "The council needs to ensure that it has discharged its duties under community care legislation. To do this it is essential for the council to agree the support plan and the final amount of the personal budget. This decision cannot be delegated to the person or to another organisation. The decision making process needs to be proportionate to the complexity of the person’s situation. For example, for lower cost arrangements, the sign-off might be by a team manager. High risk situations might require senior people (informed by discussion between from a range of agencies) to make the decision. It is good practice to have a written audit trail of showing how the council has reached its decision. The overall duty of care of the authority will be honoured through proper and regular but proportionate monitoring of the success of the plan in meeting the outcomes, and hence the needs, of the client.”

- To fulfil these requirements it is important that councils can demonstrate an audit trail that has satisfied the legal duties and can demonstrate the offer of a needs assessment, help to make a support plan, a positive but responsible approach to risk enablement, and the evidences of a reasonable council decision.
Priority area 4: Fair Access to Care Services

In a personalised system how do you integrate the requirements of FACS into a system of resource allocation, personal budgets and support planning?

What are the key issues?

- Is it desirable to merge the requirements of resource allocation and FACS together into one system/process
- How do you have in one customer journey a FACS judgement that is professionally led and remaining process that is trying to give people choice and control
- How do you give people more transparency about the FACS issues and decisions so as to allow them more choice and control over its impact

Recommended approach for London

- Authorities participating in this programme were unanimously comfortable with an approach that facilitates a first FACS judgement prior to offering potentially eligible people a supported self assessment and a personal budget.

- Authorities were mindful of the legal advice from ADASS that says “Screening and signposting – it is lawful and desirable to give apparently capacitated clients enough information, at first contact, to enable them to make an informed decision as to whether it is in their interests to continue with assessment, given the means test for any Authority subsidy of their care or support needs

- Participating Authorities were all exercising in addition to ‘screening’ an initial FACS test (which presumes some assessment activity) usually using a relatively brief checklist against the FACS criteria. It is important that as part of the overall sign off of the budget and the support plan the Authority also confirms FACS eligibility at the sign off stage.