



Working with funding panels- putting the Care Act into practice

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Outline of this session

- Introductions
- Context
- What does the Care Act and statutory guidance say about funding panels, and has this been added to by decisions in judicial reviews and the Ombudsman? [**Jonathan**]
- How do funding panels work in practice? [**Pete**]
- What has to be taken into account to ensure that decisions about personal budgets are lawful and represent good practice? [**Jonathan & Pete**]

Jonathan Auburn

- Barrister specialising in adult social care, mental capacity / DOLS
- represents LAs & central govt / DoH
- some cases: *Davey v Oxfordshire (Care Act assessments & decisions)*, *KM v Cambs (Resource Allocation Schemes)*

Pete Feldon

- Freelance consultant and trainer
- Author of “The Social Worker’s Guide to the Care Act 2014”
- Background - social worker, trainer, manager and policy developer.



What do you know

Rate your experience of being involved with decisions about personal budgets:

- a) High
- b) Medium
- c) Low

Our approach

- Enhance your legal literacy
- Legal literacy is “the ability to connect relevant legal rules with professional priorities and objectives of ethical practice” (RiPfa – Research into Practice for Adults).

Legal Literacy – what it means

- Sometimes local authorities require an interpretation of the law in complex situations
 - lawyers role
- To get things right for adults with care and support needs (and carers)...
 - it is social workers who must take the lead in balancing:
 - legal requirements
 - with good social work practice
 - and being mindful of the context of local authorities' policies and procedures.

The context of austerity

- Many councils are “potentially in the position of being unable to comply with their Care Act duties and may therefore face legal challenges”.

[Lyn Romeo - March 2017]

- “We cannot continue to meet rising demand and the costs of care created by these conditions within our existing budgets”

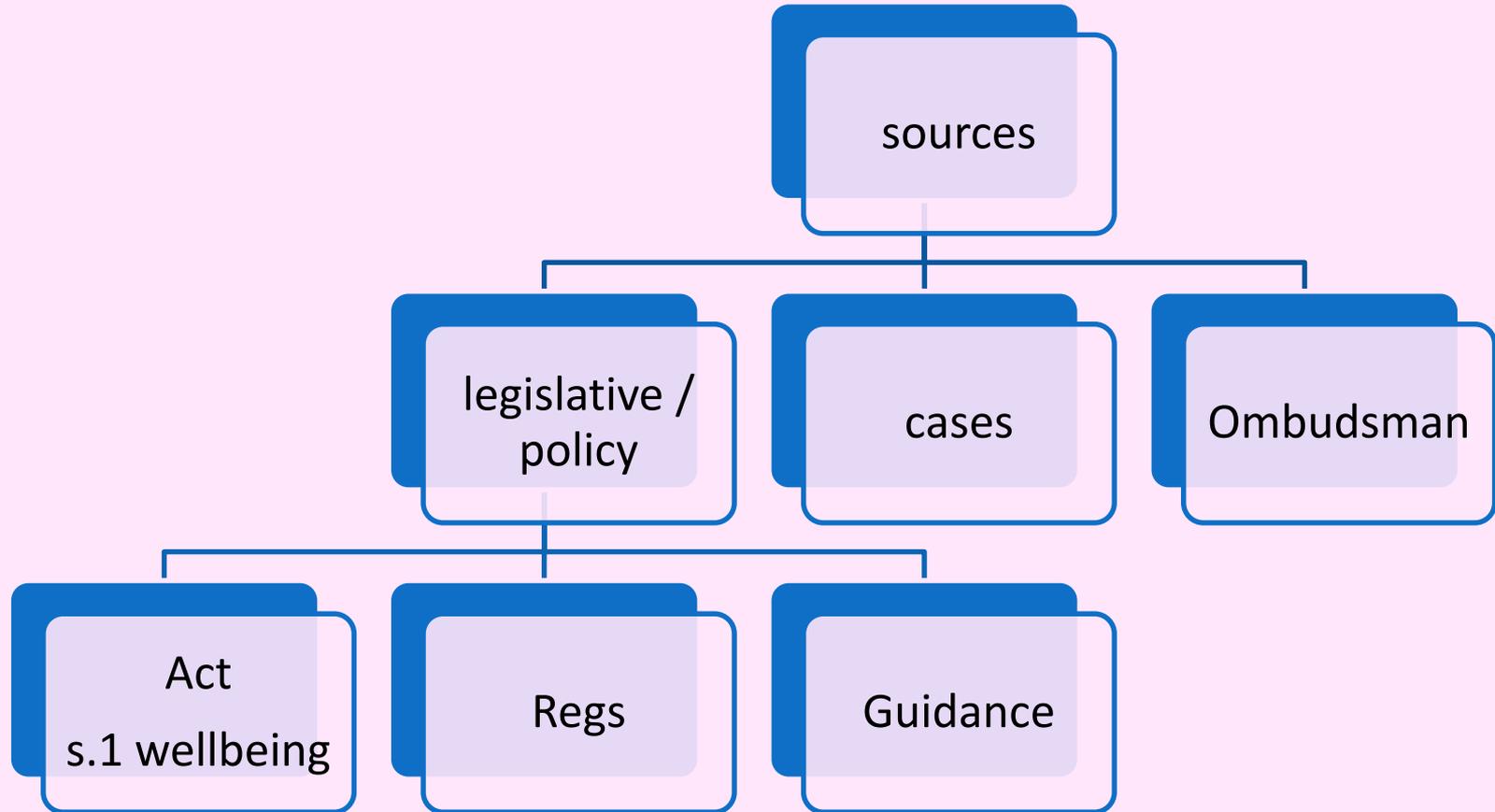
[Northamptonshire – March 2018]

- “Fewer older and disabled people with more complex care and support needs getting less long-term care.”

[ADASS budget survey – Spring 2018].

What does the Care Act and statutory guidance say about the role of funding panels, and has this been added to by decisions in judicial reviews and from the Ombudsman?

Funding panels & the law



Guidance

10.85 Due regard should be taken to the use of approval panels in both the timeliness and bureaucracy of the planning and sign-off process. In some cases, panels may be an appropriate governance mechanism to sign-off large or unique personal budget allocations and/or plans. Where used, panels should be appropriately skilled and trained, and local authorities should refrain from creating or using panels that seek to amend planning decisions, micro-manage the planning process or are in place purely for financial reasons. Local authorities should consider how to delegate responsibility to their staff to ensure sign-off takes place at the most appropriate level. In cases or circumstances where a panel is to be used, and where an expert assessor has been involved in the care and support journey, the same person or another person with similar expertise should be part of the panel to ensure decisions take into account complex or specialist issues.



10.27: In determining how to meet needs, the local authority may also take into reasonable consideration its own finances and budgetary position, and must comply with its related public law duties

11.10, 11.25: cost to the local authority, sufficiency

Court

- *JF v Merton* - finding that the decision about JF's proposed change of placement was unlawful
- court had not been provided with any evidence about how the funding panel operates which would enable him "to distinguish between the significance of decisions by social workers and decisions at a corporate level about placements of this nature"
- wider implications? – LA's should be able to guard against

court #2

- CP v NE Lincolnshire [2018] EWHC 220 (Admin), paras 94, 118
 - - had acted lawfully save in a limited respect
 - - the personal budget in a care and support plan had to be transparent, and the LA's earlier plans were defective in that respect
- correct? highly doubtful, but transparency is important in itself

Ombudsman

- Brighton and Hove Ombudsman finding of 2016:
- Councils should aim for panels to be used as an exception, “if at all”, and noted that...
the C&SSG says local authorities should refrain from “using panels that seek to amend planning decisions, micro-manage the planning process or are in place purely for financial reasons” (para 10.85)
- repeated in subsequent Ombudsman decisions



How do funding panels work in practice?

The extent to which panels are used

Report on FOI by Community Care - 2017

- 75% have a funding panel
- One third have no financial threshold in place for a case to come to any of their panels
- A quarter have a threshold of £500 +.

Panels policies and guidance

FOI by Community Care published today

- Responses from 107 of England's 152 local authorities
- 60 councils said they had a terms of reference
- Some are poorly worded e.g. “needs not being met are critical”
- Some contradict the statutory guidance e.g. “No more than 14 days respite per year”.

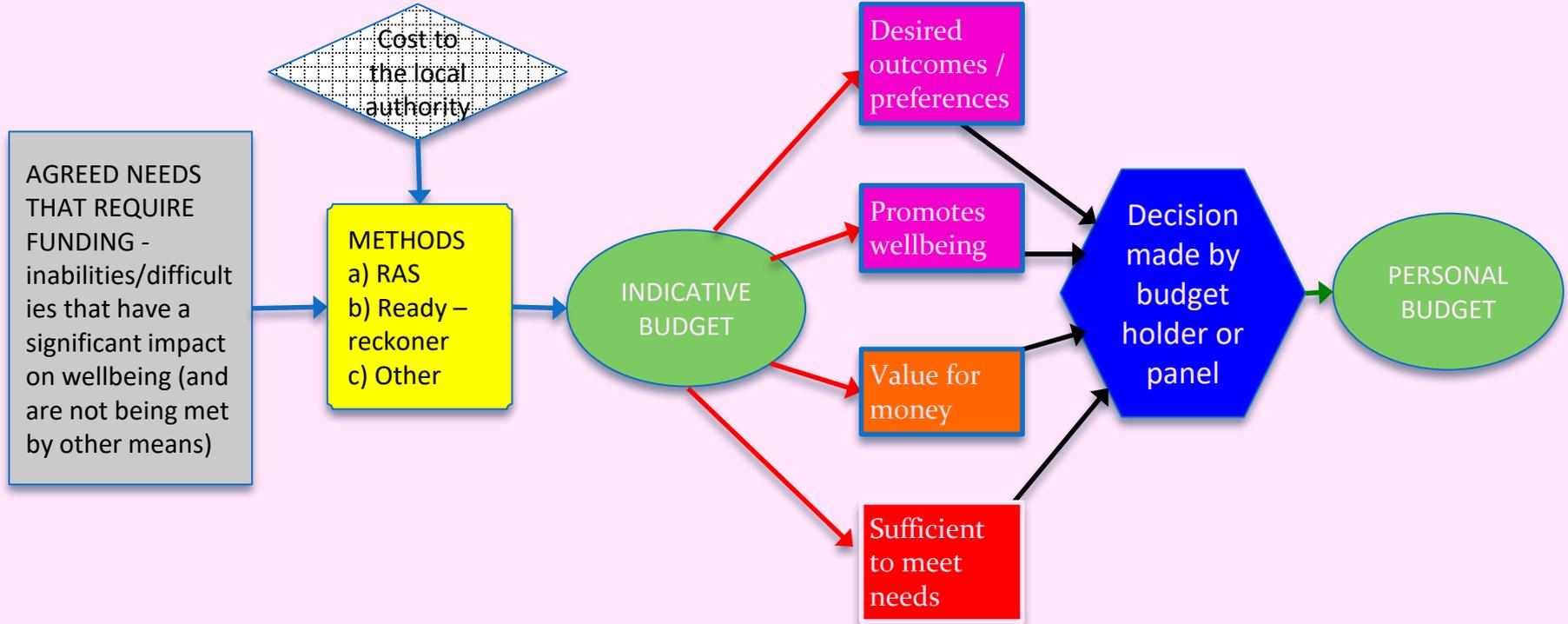
What has to be taken into account to ensure that decisions about personal budgets are lawful and represent good social work practice?

How to work effectively with funding constraints to achieve best outcomes for people with care and support needs and defend your proposed care plan if overruled by a funding panel or budget-holder.

What is a personal budget?

- It sets out the amount of money that is required to provide services to meet agreed needs that incur a financial cost
- Deciding on the personal budget is a key stage of the care and support planning process.

Personal budget pathway



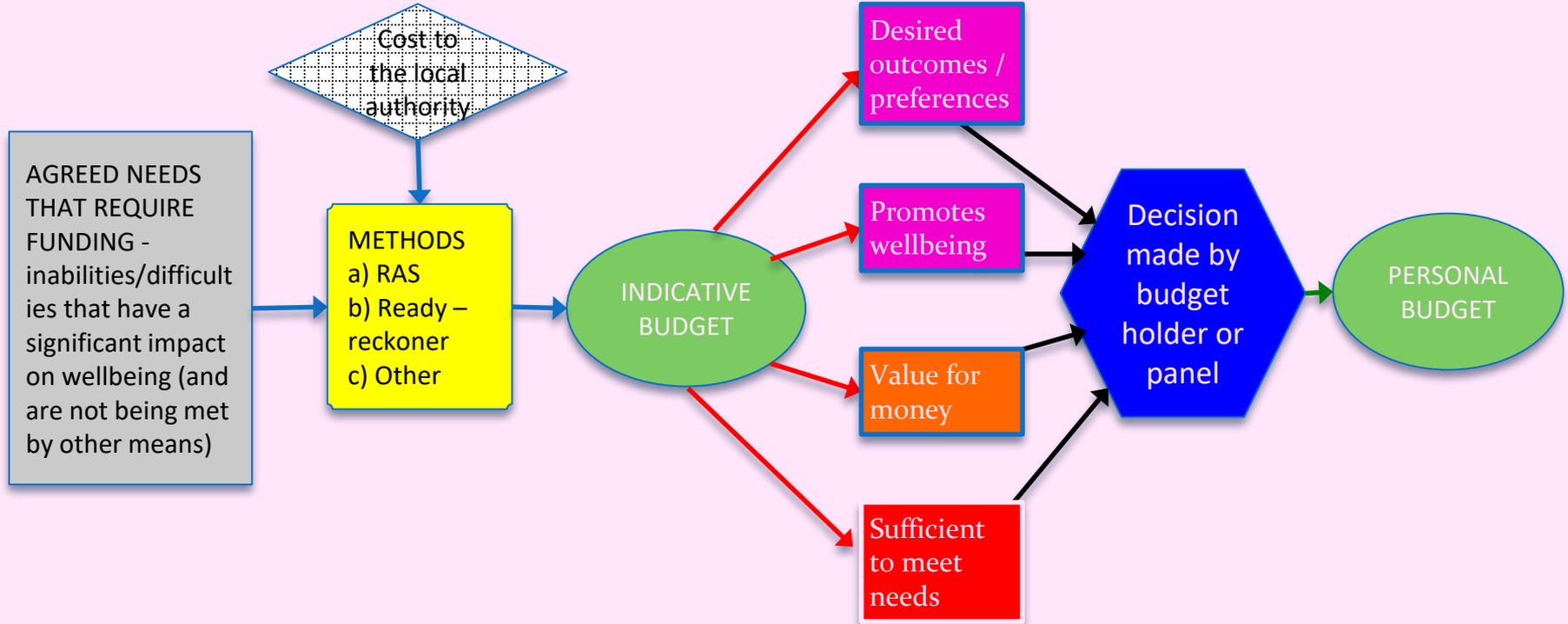
Indicative budget

- The first decision to be made in formulating the personal budget is deciding on the indicative budget.
- This should be an “indicative (or ‘ball-park’) allocation at the start of the planning process... (to) help people to develop the plan and make appropriate choices over how their needs are met” (paragraph 11.4).
- Suggest that ‘the cost to the local authority’ should be factored in at this stage
 - and not at the end of the process when a proposed personal budget is presented to a panel.

‘Cost to the local authority’

“... consideration should therefore be given to local market intelligence and costs of local quality provision to ensure that the personal budget reflects local market conditions and that appropriate care that meets needs can be obtained for the amount specified in the budget” (C&SSG para 11.25).

Personal budget pathway



Sufficient to meet needs

- Significant impact on wellbeing is part of the threshold test for eligibility, but it is also the key to the sufficiency test
- *Mr K's disabilities result in him being unable to cook for himself and do his cleaning and laundry this has a significant impact on his physical wellbeing and his control over day-to-day-life.*

Value for money

- Social workers have a role in this decision, as the statutory guidance is clear that this is not just about achieving the lowest cost
- Vfm is the “optimal use of resources to achieve intended outcomes” (paragraph 4.94).

Promotes wellbeing

Local authorities must always “have regard to...

the need to ensure that decisions about the individual are made having regard to all the individual’s circumstances”

[section 1 (3) (d)].

Takes account of desired outcomes and preferences

- Duty to take the individual's desired outcomes into account - but not be bound by them
- In the case of *Luke Davey v Oxfordshire*, Justice Morris stated: “There is no duty to achieve the outcomes which the adult wishes to achieve; rather it is a duty to assess whether the provision of care and support could contribute to those outcomes”
- It “must also take into account the reasonable preferences to meet needs as detailed in the care and support plan, or support plan” (para 11.24 C&SSG).

Mr K's desired outcomes and preferences

- *He wants someone to come in every day and prepare him a home cooked meal in the way that his daughter has been doing*
- Indicative budget – cost of home meals service
- Sufficient, vfm, promoting wellbeing?

Affordability

Practice implications of paragraph 10.27 “... the local authority may also take into reasonable consideration its own finances and budgetary position:

- “should not set arbitrary upper limits on the costs it is willing to pay”
- “weigh up the total costs of different potential options for meeting needs, and include the cost as a relevant factor in deciding between suitable alternative options for meeting needs”
- “does not mean choosing the cheapest option; but the one which delivers the outcomes desired for the best value”.



Reducing personal budgets
Implications of judicial reviews

JF & Luke Davey

- JF – Merton “failed to undertake a lawful assessment of JF’s needs” and “unlawfully decided to change or to propose **to change his accommodation**”
- LUKE DAVEY – “It is understandable that the Claimant... objected to the updated needs assessment, which has resulted in a **substantial reduction in the personal budget he previously enjoyed...** The result may impose change or even strictures upon the Claimant which are unwelcome, but that does not of themselves mean that the process has been unlawful.”

JF vs the London Borough of Merton

- High Court judge –
 - a) quashed Merton council's decision to move JF to a lower-cost placement
 - b) ordered that Merton must undertake a further assessment of JF's needs
- It was ruled that the decision by Merton that JF no longer requires access to an on-site MDT (multidisciplinary team) and the provision of a TCE (Total Communication Environment) - was neither rational nor lawful.

Can Merton lawfully conclude that there is a lower-cost placement that could meet JF's needs?

This would have to be on the basis of one of the following:

- a) there has been a change in JF's eligible needs i.e. he no longer requires access to an on-site MDT and TCE - to ensure that these eligible needs are met

OR

- b) if these needs have not changed, there would have to be other ways of meeting his needs that do not require on-site MDT and TCE - and result from other changes in his circumstances (in accordance with paragraph 13.12 C&SSG)

n.b. being cheaper is not one of the options.

But before a move is considered...

- The judge stated that Merton “will therefore need to manage any transition in a way which complies with section 1” - the duty to consider wellbeing and how this is promoted
- Professor Luke Clements commented:
“some individuals might not survive the transition – or might suffer such harm as to make wholly unreasonable any attempt to move them:
the mere fact that life can survive on Mars does not justify a journey that will kill them.”

Luke Davey v Oxfordshire

- Unsuccessfully sought to overturn the reduction to his personal budget, which was previously part-funded by the Independent Living Fund
- A reduction of 40% was proposed, as follows:
 - a) 6 hours less per week of support from PAs
 - b) Reduced hourly rate for the PAs
 - c) Reduced funding for day trips.

Luke Davey's case

Primary focus of the unsuccessful appeal (following an unsuccessful judicial review) was the contention that Oxfordshire did not have regard to “the need to ensure that decisions about the individual are made having regard to all the individual’s circumstances”.





Thank you for participating

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