

## **Community Care Law - Current Developments Workshop**

### **1. Resource Allocation Systems and the duty to assess**

#### **Introduction**

The lawfulness and functionality of Resource Allocation Systems (RAS) in the assessment process has been the subject of recent case law. This workshop aims to look at those challenges and the ways in which RASs are used or misused.

There is strong anecdotal evidence that the value of packages formulated using the RAS process is significantly below existing values, calculated in the conventional, professional-led way. The reasons for this pattern require examination. Is the process inherently “cost cutting”? If not, is the way in which it is being applied, or the financial climate in which it is being rolled out the explanation?

The RAS process is one which emerges from the Personalisation agenda. Using a points based system to estimate the value of a care package is not intuitively connected to the principles of “choice and control” which underpin the Personalisation agenda, but RAS is essentially a system which calculates the value of the package – the budget – before deciding on the services to be put in place, rather than deciding the services required, and then valuing them. The concept of reaching a budget figure and then handing over control of that budget (subject to rules or conditions) to the service user is at the heart of “self-directed support”. Associated is the process of “self-directed assessment” or “supported self assessment”, which guidance says seeks to put the service user “at the heart” of the assessment process.

In examining this process it is worth bearing in mind that many of the largest packages are for people who lack the capacity to articulate their needs, draw up a support plan or organise a care package. To that extent the descriptions “self-directed support” and “self- assessment “ are misnomers.

The duty to assess for community care services remains that set out in S47 NHSCCA 1990. Since 2004 the Community Care Assessment Directions issued by the DOH under NHSCCA 1990 have obliged local authorities to consult service users and carers and try to reach agreement with them about the services to be provided.

The provision of a budget fits in with the philosophy that local authorities and the NHS should “plan with regards to outcomes, rather than specific services”, however personal budgets are in law Direct Payments delivered under the Health and Social Care Act 2001. There is no new ‘vehicle’ in the legal framework called a ‘Personal’ Budget which is different from the funding invested within a Direct Payment or spent on local authority arranged services.

## **What is a RAS?**

The Prioritising Need guidance says:

*“The Local Authority Circular “Transforming Social Care”, describes as an essential component of transformation the “clear, upfront allocation of funding to enable (people) to make informed choices about how best to meet their needs, including their broader health and well being”. To support the delivery of personal budgets, many councils have begun to explore resource allocation systems as a way of determining how much money a person should get in their personal budget to meet their needs”*

*The aim of the RAS should be to provide a transparent system for the allocation of resources, linking money to outcomes.....It allows people to know how much money they have available to spend so that they can make choices and direct the way their support is provided”.*

The model of RAS adopted by most local authorities (certainly in the north of England) is one based on the Common Resource Allocation Framework developed by the Association of Directors of Adult Social Services. The steps in the process are as follows:

1. The service user (SU) fills in a Personal Needs questionnaire. They may be assisted by a LA staff member. The questionnaire covers various “domains” for example personal care, participation in the community, management of risk. Typically the SU is given a multiple choice format in which (in a style reminiscent of the FACS banding now in the Prioritising Needs guidance) there are 4 levels of need. The questionnaires have at least 2 columns to allow the SU’s and the assessor’s view to be marked; sometimes there is a third column to indicate the decision or consensus. All presenting needs are included, not just those which

2. The LA calculates the number of points accumulated by applying a certain number of points to each answer using a scoring sheet. The ADASS model allows for the reduction of the points total by 100%, 60% or 30% depending on the availability, ability and willingness of unpaid care. ADASS guidance says:

*“The indicative allocation should be adjusted to take into account the level of available informal support, but only after the situation of the informal carers has been fully assessed and it is clear that they are able and willing to continue providing this support.”*

3. The FACS bands are applied. Different LAs will have different means of doing this. It is important to understand that the FACS decision – as to which needs are eligible - is conceptually separate from the RAS process which is about allocation of resources to meet eligible needs.
4. The points total (once adjusted to reflect the provision of informal care, and to exclude any points arising from a need for which the LA's eligibility criteria do not mandate a service) is multiplied by the value of a point. LAs will develop an allocation table which converts total points into an Indicative Budget. Typically the table may be arranged in blocks of scores, for example a score of 46-49 points may attract a certain sum, 50-54 points the next sum up, and so on.

The value of a point is calculated by looking at all of the social care costs of a significant (and statistically valid) sample of ongoing packages (according to the ADASS model across all client groups), excluding management, support (e.g. IT) costs and costs of equipment. What is costed is not just the attributed individual service costs but also the real cost of generic and subsidised services such as day centres. Subject to variance allowance, reasonableness tests and – importantly – a contingency allowance, which will reduce the total figure by about 20%, the total costs of care of the sample can be statistically analysed against the number of points of care of the sample group and so an allocation table produced.

In high cost cases there may be a supplementary calculator tool which is used to calculate indicative costs above and beyond the top figure in the allocation table (which typically is around £70k).

5. The Indicative Budget figure is produced. ADASS guidance refers to this as a “ballpark figure”. The Prioritising Need guidance says:

*“.....a RAS should be applied as a means of giving an approximate indication of what may reasonably cost to meet a person’s particular needs.....”* (my emphasis)

Case law refers to the Indicative Budget as a “starting point”.

6. A support plan is developed by the SU, with assistance from a social care professional if required, which describes how the Indicative Budget will be spent. The plan may propose spending money on services which address presenting but “non eligible” needs.

7. There is a process of checking that the support plan as drawn up will in fact meet the assessed eligible needs of the SU. If not the support plan may need to be changed and/or the Indicative Budget adjusted upwards. ADASS guidance says:

*“There may need to be adjustment because the outcomes must be related to the eligible assessed unmet needs; the risks arising from the needs must be managed within the authority’s local approach to FACS, and solutions for managing risk translated into a plan which the authority would otherwise make arrangements to implement if it was to be responsible for provision. Further, for those wanting Direct Payments, the sum of money to be given must relate to the authority’s estimate of what it would be prepared (in accordance with its obligations to meet need appropriately and lawfully) to spend to meet the eligible assessed needs, through services set out in the support plan. The duty to meet needs, appropriately and lawfully, is one that the authority must make the final decision about.”*

The personal budget is then signed off.

## Notes

Personal Budgets are to be made available to everyone, but that is not to say that they are compulsory. If a SU does not want Direct Payments for all or part of the package the budget will be treated as a notional budget, but the same process is adopted.

For those already receiving care packages who then undergo reassessment the following advice from ADASS to LAs is useful:

*“Councils need to develop ground rules for how they apply personal budgets to people who already receive services. Similar ground rules should apply to reviews of people who already have a personal budget. It is unlikely that a council could justify a reduction in resources following an individual review, unless the person’s needs had reduced, or eligibility criteria had changed.”*

*When updating a RAS, councils should check whether the changes mean that people who are new to the system will have lower levels of personal budgets than they would have done before. Such a change needs to be seen as a policy decision. It needs a clear rationale, include an equality impact assessment, and should be open to scrutiny.”* (my emphasis).

## **Challenges to the use of RAS**

In R (Savva) v Royal Borough of Kensington and Chelsea [2010] EWHC 414 Admin and [2010] EWCA Civ 1209 the High Court and then the Court of Appeal considered challenges to the RAS.

The claimant had various physical health problems and disabilities and could not leave her basement flat without support. On a RAS she scored 16 points which led to an Indicative Budget of about £83, but after adjustment the figure was about £133, and after further adjustment became about £170 i.e. more than twice the Indicative Budget figure.

After representations the LA redid the RAS this time scoring the claimant at 28 points equivalent to about £112, which was adjusted to about £142 and then further adjusted (by the LA’s panel) to exactly the same total as before, about £170.

The claimant’s challenge to the outcome was twofold:

1. She said that the particular RAS system used by the LA which involved fixing a price per point by reference to the relative costs of other SUs’ supported self assessment questionnaires was unlawful because it contravened the principle established in the R v Gloucestershire CC ex parte Barry case that once needs

2. She said that the information provided to her about the application of the RAS was insufficient to enable her to understand how the value of the budget had been reached. On this point she won in both courts, the CA saying:

*“When a local authority converts an established right – the provision of services to meet an assessed eligible need – into a sum of money, the recipient is entitled to be told how the sum has been calculated.....”*

*..... In many cases, the provision of adequate reasons could be achieved with reasonable brevity. In the present case, I would consider it adequate to list the required services and assumed timings (as was actually done in the FACE assessment), together with the assumed hourly cost.....”*

In R(KM) v Cambridgeshire CC [2010] EWHC 3065 Admin and [2011] EWCA Civ 682 the claimant was a 26 year old man who was blind, autistic, had a learning disability and a number of physical (lung and spinal) problems. After application of the RAS the LA had awarded a personal budget of about £84,600. The claimant who sought a budget of £120k attacked the LA decision on the basis that it had failed to assess him properly, had acted irrationally and had failed to give proper reasons for its decision.

Specifically the Judge summarised the claimant’s criticism of the LA as *“that the Defendant has failed to provide an explanation setting out the services required to meet the Claimant’s needs, timings and assumed hourly costs, the minimum required by the Court of Appeal in Savva”*.

The court rejected this. The core passage is :

*“54. Mr Wise criticises the Defendant for failing to provide an explanation setting out the services required to meet the Claimant’s needs. That appears to me to be a complete misunderstanding of the system of self-directed support. Both the RAS and the Upper Banding Calculator, compared as they were with the assessment and operated using the skill and experience of social workers, were assessments of needs and not services but the RAS was a tool for translating needs into a sum which was adequate to provide the services for those needs by reference to the average costs of the provision by the authority of meeting those needs for other disabled people.*

55. *The efficacy of the RAS in that translation process was checked by the authority and the figures in each individual case that were produced by the RAS and Upper Banding Calculator were also checked against assessments of the Claimant's needs and the experience of social workers. The self-directed support system, however, was designed to provide a sufficient sum to meet the Claimant's needs but it was up to the Claimant and his advisers to determine how to spend that sum.*

56. *Criticism of the Council for failing to provide an explanation setting out the cost of the services required to meet the Claimant's needs wholly fails to recognise how the self-directed support system works. The failure to recognise that characterises almost all of the correspondence from the Claimant's advisers. They were assiduous and persistent but they were consistently at cross purposes with the Defendant because of their failure to appreciate how the scheme worked. Savva indicates that the use of such a scheme, assuming that it is checked properly against an assessment of the Claimant's needs, cannot be criticized....."*

The Court of Appeal upheld the first instance decision although the reasoning is (to the writer) not clear. At paragraph 23 the Court said:

*In our view, the assessment of needs was adequate. It consisted essentially of Cambridgeshire's accepting [the expert's] assessment of KM's needs, although not of course his assessment of the services required nor their costings. There has of course to be a rational link between the needs and the assessed direct payments, but, in our judgment, there does not need to be a finite absolute mathematical link. This is because (a) **the local authority, whose funds are not limitless, are both entitled and obliged to moderate the assessed needs to take account of the relative severity of all those with community care needs in their area** – see paragraph 7 of Savva(1) ;(b) the local authority are not obliged to meet an individual's needs in absolute terms – see paragraph 18 of Savva(2) where the submissions in paragraphs 16 and 17 are rejected; (c) the use of the RAS as a starting point is lawful and the decision does not have to extend in every case to explaining the RAS in detail – see paragraph 21 of Savva; so that (d) as Mr Wise accepted, it was not necessary in this case to provide a mathematical justification of the indicative budget of £61,000. This last derives from the nature of the RAS, which is, as the evidence explains, a synthesis of Cambridgeshire cases, leaving out those few of the greatest severity" (my emphasis).*

- (1) "It is axiomatic that local authorities do not have a bottomless pit of funds at their disposal. It is permissible for them to take account of the relative severity of individuals' needs and the availability of resources when determining whether it is necessary to make arrangements to meet an individual's needs. However, once a local authority has decided that it is necessary to make such arrangements, it has an absolute duty to provide the

(2) “.....I do not think it can be said that the Council ever lost sight of the fact that, once Mrs Savva’s eligible needs had been assessed, it was under an absolute duty to provide her with the services that would meet those needs or a personal budget with which to purchase them. The Council was entitled to use methodology recommended by the Department of Health which, in my judgment, did not have the effect suggested on behalf of Mrs Savva. It has never been suggested that the Department of Health’s guidance is unlawful. For these reasons, I consider that the Deputy Judge was correct to refuse a declaration that the RAS is an unlawful basis for determining a personal budget. Its deployment as a starting point was lawful.”

It is understood that a petition is being presented to the Supreme Court.

### **Questions/ Comments about the concept and implementation of the RAS**

1. The courts have thus far taken the view that as the RAS is used only to calculate a starting point, a basis for a support plan, which must then be checked against assessed individual needs, and if necessary adjusted, it does not breach the Section 47 NHSCCA 1990 duty to carry out an assessment of needs for services. The process of adjusting the Support plan (formulated on the basis of the Indicative Budget) will ensure that eligible needs are met.
2. When is the separate (FACS) assessment of need being carried out? If there is no professional-led assessment of need at the outset of the process, is there anything against which to do this check?
3. The Personal needs questionnaire is too blunt a tool. It does not allow for sufficient detail to be inserted e.g. no request to carers to estimate times of personal care which are necessary. Anecdotal evidence is that the points system may work better (i.e. may produce Indicative Budgets closer to what is required) for some groups than for others.
4. Insufficient professional support is in fact provided (although it is invariably said to be on offer) with the result that in filling out questionnaires SUs or family members may underestimate need for example because they do not want to confess to a need for support (the elderly especially), or because they are not aware of what services are available.

5. Most LAs follow ADASS guidance and do not differentiate between different client groups. Does this disadvantage those with more complex needs, for example those with ASCs, where e.g. hourly personal care rates may be higher?
6. The RAS calculation of the Indicative Budget has an in built reduction of about 20% contingency allowance. The rationale behind this is that when formulating their value per point LAs had to appreciate that the exercise was to have a means of calculating the Indicative Budget of a SU. Precisely because IBs are only starting points, and often adjusted upwards, about 20% of the total spend on disabilities had to be kept out of the RSA calculation so that it could be used in subsequent adjustments. This has the potential to disadvantage anyone whose Indicative Budget is not adjusted upwards by 20%.
7. The exercise of formulating the support plan is also one in which the quality of professional input might be crucial. Are LAs really assisting in this? For example if a plan was formulated by a SU on an optimistic assumption about market rates for personal care, or without taking all matters fully into account (say the need to pay for a carer to undergo periodic training), would that be corrected?
8. Is the process of checking the support plan against individual assessed needs one which takes place, especially outside those few cases where SUs have the support of community care lawyers or others with knowledge of the system? Are LAs even explaining to SUs that the Indicative Budget is just a starting point?
9. Is the provision of informal care properly dealt with? The ADASS says:

*“The indicative allocation should be adjusted to take into account **both** the level of informal care being provided **and** the impact on family members. The amount of any indicative allocation should only be reduced if informal carers have confirmed that they are able and willing to continue providing this support.”*

10. Is there confusion about the relationship between the process of RAS which ought to be a means of calculating a budget to meet (already) assessed eligible needs, and the actual assessment of those needs? See for example:
  - a. The CA’s statement at paragraph 23 of KM that “**the local authority, whose funds are not limitless, are both entitled and obliged to moderate the assessed needs to take account of the relative severity of all those with community care needs in their area**” – if this is a reference to individual assessed eligible needs it is wrong.

- b. ADASS guidance, for example:
- i. *“The service user will then be told roughly how much money they can expect to receive, via the Resource Allocation System. That system, in current terms, is already the manifestation of the policy of the authority as to what it regards as ‘appropriate’ by way of support to meet identified needs, and also of the policy of the authority towards the state of the local market.”* (my emphasis)
  - ii. *“It is important to understand that the purpose of a RAS is not to predict the amount of money that would be spent on a conventional social care package. This would risk reproducing the way money is allocated in the current social care system”.* (my emphasis).

What do the underlined passages mean?

11. Is the method of calculating the value of a point valid? The method is to calculate the value of a point by taking a sample of service users, scrutinising their care packages to see how many points they would get. You then have a total number of points for the sample (A). You then calculate the current value of their current care packages, and (simplifying) add them all together, take off (say) 20% for contingencies, and divide that net total (B) by A. You then have a £ per point value (C), but by definition it is 20% lower than what is (on average) required to provide the current levels of service

You then take an individual, do the questionnaire, multiply the points s/he gets by C and you have an Indicative Budget. You then use some part of the 20% deducted to do the adjustments necessary to ensure that the needs are met, and – assuming that neither eligibility nor level of needs has changed - you are back to square one! The capacity of such a system to generate savings – which is in fact what it is doing – may therefore rely upon adjustments not being carried out.

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