


INDEPENDENCE, CHOICE AND RISK, POSITIVE APPROACH

supporting, respecting and involving service users through decision – making process for delivering person – centred outcomes by positive approach to risk

VERSION No	2	
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NUMBER OF PAGES	6	

“The governing principle behind good approaches to risk is that people have the right to live their lives to the full as long as that does not stop others from doing the same.” (Independence, choice and risk: a guide to best practice in supported decision making – DH, May 2007.)

1. CONTEXT

This organisation strives to improve the life choices and quality of life of all adults to whom it provides support and services. It recognises that, for the majority of people, people make decisions affecting their lives on a daily basis. It is important that individuals are supported in making their own decisions and deciding for themselves how support and services should be organised to meet their needs. It is also crucial that those people lacking the capacity to make certain decisions for themselves receive adequate support when decisions are made in their best interests.

To this end, all services and support will be organised to allow individuals to direct their own support as soon as they are able and it is practicable for them to do so.

In all instances where issues of risk and choice are being discussed, it is imperative that accurate records are kept of these discussions, to ensure that processes have been properly followed and decisions recorded.

2. INFORMED CHOICE

An informed choice means that a person has the information and support to think the choice through and to understand what the reasonably expected consequences may be of making that choice. It is important to remember that too much information can be oppressive and individuals have differing needs in relation to how information is presented to them. *The staff in the home must be able to demonstrate that they have taken these individual needs into account.*

Enabling people to make informed choices does not mean the local authority or the staff of this home should abdicate its responsibility to ensure people have a good quality of life. For example if a person „chooses“ to stay in bed all day, every day, the local authority or provider organisation has a responsibility to explore what is happening and respond to this appropriately, working to ensure that the individual fully understands the consequences of their decision. It is not acceptable to simply accept such a decision at face value if this would put the individual at significant risk, as acts of omission can be considered to be abusive.

3. DUTY OF CARE

Duty of care requires everyone to „take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour“. Donoghue (or McAlister) v Stevenson ([1932] “You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called in question.” (26 May 1932, Lord Atkin)

Within this duty there is a responsibility to enable people to make informed choices and decisions as well as to take steps to minimise foreseeable risks, in liaison with the person and others who know and care about them. **Where the person you are supporting can make a decision with or without support, the process of risk assessing is advisory in nature rather than something which the individual is required to adhere to.**

In the event that there appears to be a clear risk that an individual will be harmed, or at risk of harm, or where there is a risk that they may harm another, then local adult protection / safeguarding procedures should be referred to. There may in some circumstances be a requirement to break confidentiality and act to report and intervene in such instances.

The duty of care requires you to consider the consequences of your acts and omissions and to ensure that those acts and / or omissions do not give rise to a foreseeable risk of injury to any other person. Clearly, one is not expected to guarantee the safety of others; one is expected to act reasonably.

4. STATUTORY DUTY

In addition to a common law duty of care, the local authority has a statutory duty under the NHS and Community Care Act 1990 to assess people's needs and to decide what services are called for. It decides whether services are called for by applying an eligibility system called "fair access to care".

People are eligible for help if the local authority believes there is a sufficiently high risk to their independence. If there is, it must arrange for services to meet their needs. Most commonly this involves provision of services in people's own homes under the Chronically Sick and Disabled Persons Act 1970, or of residential accommodation under the National Assistance Act 1948

5. COMMUNICATION

It is important to involve people in decisions even when they do not use speech as their main means of communication. Person centred planning techniques point us towards many ways of listening to people in different ways other than relying on what they actually say, using tools such as pictures, Macaton, body language and supported decision making agreements, and these should all be utilised if we are to demonstrate that we have truly attempted to communicate effectively with an individual.

It is also imperative that staff ensure that the views of others who know and care about the person are invited and taken into account in any decision-making process, without these taking precedence over the individual's views and wishes. **Where we are supporting people who have complex communication needs, person centred approaches are essential to ensure people's involvement in decisions which affect their lives.**

6. ABUSE

"Abuse is a violation of an individual's human and civil rights by any other person or persons." (,No Secrets", Department of Health 2000).

Abuse may be a single act or a series of repeated acts over a period of time. It may be physical, psychological, sexual, financial, neglect or discriminatory abuse. It may occur in a relationship and may result in significant harm to, or the serious exploitation of, the person concerned.

It is important to remember that many cases of "abuse" are in fact, criminal acts, and should be treated accordingly. There is a danger that the language of "abuse" can lead to a dilution of this fact, and it is imperative that the involvement of the police is requested at the earliest possible point where there are any suspicions of a criminal act having taken place. Financial abuse may be theft; sexual abuse may be sexual assault or rape; emotional abuse may be coercion or fraud

7. INFORMED DECISION MAKING

In relation to risk, as with any other decision making, if the person has capacity and has been supported to consider the potential consequences, both positive and negative, arising from the proposed course of action and has decided to take the risk, then that is their informed decision.

It is arguable that if the home withdraw services on the basis of disagreeing with that decision could potentially be seen as acting abusively. The home taking such action could be subject to severe scrutiny if the home withdrew or withheld services on the basis that they disagreed with the person's informed choice.

An example of this would be if the home unnecessarily and unreasonably denied a person's wish to be assisted manually, and insisted instead on hoisting which was detrimental to a person's independence and mobility.

However, the home can reasonably state that it cannot provide service which puts the physical welfare of carers and / or the person themselves at undue and unacceptable risk. In this instance, it should instead offer a reasonable alternative.

The key in all of these cases is to work in partnership with the individual to explore all possible mechanisms for managing the situation and to strive to arrive at a solution which is acceptable to both parties.

Where an individual's informed choice may put them at risk of abuse or neglect by another person or persons, this potential should be discussed with them, and these discussions must be clearly recorded. If there is a failure to reach an agreed course of action which both parties are happy with, then it may, if appropriate, action be taken under the safeguarding adults procedures.

If the person lacks capacity, and a decision has put her / him at risk of abuse or neglect from a particular person or persons then a referral should be made for action to be taken under the safeguarding adults procedures. An example of this might be a person who has a learning disability who has previously been sexually abused by a relative and is currently living in supported housing who expresses a desire to live independently. If this were considered to put her at risk from her previous abuser, a multi-disciplinary approach through „safeguarding adult procedures“ would allow for a full discussion of and subsequent actions, to facilitate a move to independence. Such actions may include direct intervention with the previous abuser and or the provision of personal safety equipment, alarms and household security provision.

8. CAPACITY ISSUES

Where capacity is in question, refer ***IN ALL CASES*** to the ***Mental Capacity Act (MCA) 2005, Code of Practice, which states:***

- a) *Every adult has the right to make their own decisions if they have the capacity to do so. You must assume that a person has capacity unless it can be established otherwise.*
- b) *Individuals should receive support to help them make their own decisions and all possible steps should be taken to try to help him / her to reach a decision themselves.*
- c) *Individuals have the right to make decisions that others might think are unwise. Making an “unwise” decision does not mean that a person lacks capacity.*
- d) *A person's capacity must not be judged simply on the basis of their age, appearance, condition or an aspect of their behaviour.*
- e) *It is important to take all possible steps to try to help people make a decision for themselves*
- f) *Any act or decision should be the least restrictive in relation to its purpose.*

If there are concerns that an individual may lack the mental capacity to make a decision, a competent person may complete an assessment of capacity: see the MCA Code of Practice (<http://www.dca.gov.uk/legal-policy/mental-capacity/mca-cp.pdf>) Primarily it is for the person who requires a decision to make the assessment. The MCA Code of Practice gives clear guidance on these issues.

“The person who assesses an individual's capacity to make a decision will usually be the person who is directly concerned with the individual at the time the decision needs to be made. This means that different people will be involved in assessing someone's capacity to make different decisions at different times.

For most day-to-day decisions, this will be the person caring for them at the time a decision must be made. For example, a care worker might need to assess if the person can agree to being bathed. Then a nurse might assess if the person can consent to have a dressing changed.

9. WHEN THINGS GO WRONG

Inevitably if we are supporting individuals to have more choice and control in their lives through positive approaches to managing risk, things are likely to go wrong from time to time. If this happens and the risk taken results in a negative outcome for the individual, there is no doubt that the risk-taking process will come under scrutiny and the way in which this process worked to minimise the foreseeable risks will be considered. Those scrutinising what happened will be looking at whether those involved in the risk assessing process:

- Acted reasonably.*
- Acted in an informed way, reflecting their expertise.*
- Acted responsibly in relation to their duty of care and were not negligent.*
- Assessed and took steps to manage and minimise the foreseeable risks.*
- Involved the person in the process and supported them to make informed decisions.*
- Involved and liaised with other people whom it would be reasonable to involve in the process.*
- Followed organisational policy, procedures and guidance.*

This does not mean that there should be a formal risk assessment document in place if this was deemed unnecessary, rather that the process of assessing the risk has been clearly documented and was reasonable and proportionate.

There is no guarantee that those involved in the risk assessing process would be free from consequences if something went wrong. However there is unlikely to be an adverse outcome to the scrutiny of any decision if it is clear that professionals and organisations have acted reasonably and responsibly in partnership with the person, those who know and care about them and others involved in their support.

10. HEALTH AND SAFETY ISSUES

It is sometimes the case that a service culture can be seen to put safety at all costs above all other considerations, including people's rights to make informed decisions and live their lives in ways which work for them. It is a failure if staff do not take account of the risks to people's health and wellbeing of not taking a risk, as well as those associated with taking the risk.

This policy does not replace or ignore existing health and safety policies and if you are in any doubt about supporting the positive risk in relation to health and safety issues, it is responsible to stop, think and discuss with others before proceeding.

This process must not, however, be used as an excuse to unreasonably delay a course of action which an individual is choosing, nor be used to subtly dissuade people from wanting to try new things. *The process of assessing risk needs to be timely, inclusive and well documented. Where it is helpful in delivering support to an individual and positively managing situations which contain risk, then there may be a need for this to be written into a specific "risk assessment" document.*

SUMMARY:

A service-led approach to risk management can compromise individual's rights to make choices and take risks. Often concerns about minimising and attempting to eliminate risks are in the interests of the home, but not necessarily in the interests of the person they are attempting to support. This policy framework is designed to change the focus of risk management to one where the person is at the centre of all discussions, is enabled more fully to self-direct their support where able, and is supported in ways which are clearly in their best interests where they are unable to do so for themselves.

PROCEDURE:

1. Where an individual indicates a choice that you or others may consider to be a risk you should utilise your assessment skills to determine if there may be issues of capacity or safeguarding. If unsure, consult with your line manager. Record the decision / outcome and the discussion on the file. If there may be a safeguarding issue, refer to local Safeguarding Vulnerable Adults Procedures.
2. If there are thought to be Mental Capacity issues you, or a competent person, should complete an assessment of capacity.
3. If, having applied safeguarding procedures or capacity procedures, it is deemed that the person could not be supported in making their decision or choice, appropriate actions may need to be taken to protect the individual within Safeguarding Procedures or Mental Health legislation. However, a local authority has the power to refuse to fund a service which it believes, after a process of due discussion and exploration, would put the person at increased risk of harm.
4. If, having applied safeguarding procedures or capacity procedures, it is deemed that the person could be supported in making the decision or choice then they should be supported to do so.
5. Staff supporting people who use services will ensure that each individual they work with is given the support to understand the issues of risk connected with their decision or choice, in a way that is appropriate and accessible to them.
6. Staff must be able to show that they have done this in a reasonable and proportional manner, having regard to the communication and understanding needs of the individual concerned.
7. Where a decision is made not to support an individual to pursue a particular decision or course of action, they must be able to explain this and demonstrate that they have thought through and discussed in a balanced and proportional way the potential consequences of refusing to support the risk.
8. Health and Safety and risk assessment policies must not be used to prevent or inhibit an individual to think through the risks they want to take. Nor should these prevent or inhibit the person from having access to the support they need to take any reasonable risks they choose to take, following a supported decision-making process.
9. A Risk Assessment conducted with individual or significant parties to the decision or choice may be one method of demonstrating levels of risk once the decision or choice is made.
10. Where the individual is able to make an informed choice and still wishes to pursue a high risk decision or choice, having a signed risk assessment is one way of showing that they are aware of the risks and are willing to take them. This provides the home with a significant degree of protection for their support of the decision should things go wrong.
11. However, if the risk agreed on is unreasonable in all the circumstances, then the home may well be less protected. In principle, if the home actively supports an obviously hazardous course of action, then it could be legally liable should things go wrong, if what it agreed is considered to be too risky and therefore constituted negligence.
12. A recording of risk does not necessarily indicate levels of understanding. Therefore, the work you have undertaken to ensure that the risk is understood must be recorded and shared with the service user. Any such records should be signed by the service user where possible.
13. Additionally, you may ask the individual to complete a relevant record for your files. However, an individual's recording or documentation should be additional to your own.
14. Opting for a course of action simply because it carries least risk must not come before what is in the best interests of the individual concerned.
15. Where there are issues of capacity this policy could be applied to supporting legal representative to make decisions or choices or take positive actions which have the potential for risk.

16. Where supporting a legal representative, it is imperative that all parties are concerned with the potential gains and risks to the service user and that the decision is being made from the perspective of the service user. All such discussions must be recorded.