

CONSUMER DIRECTED CARE, LEGAL ISSUES, POSITIVE RISK TAKING AND MANAGING ORGANISATIONAL UNCERTAINTY

Jonathan Pietsch

Service Provider Consultant, Home Care Today, COTA Australia

Organisational anxiety can be heightened in periods of change and uncertainty. It is interesting to reflect on how such uncertainty might impact on the approach of services to risk-taking. Consumer Directed Care (CDC) emphasises consumer choice and flexibility, which may contrast to the way services were structured in the past. This may raise levels of anxiety by managers, advisers/case managers and personal carers as they work to balance what they consider to be their duty of care with the opportunity for consumers to make choices and take risks. Assisting older people to be as independent as possible is a part of the CDC philosophy and requires a positive approach to risk taking.

When I was asked to take on the delivery of the Legal Issues Project, which looked at the introduction of CDC in Home Care Packages, I was also struck by a high level of anxiety. The introduction of CDC was shifting the goal posts quickly and somewhat dramatically for providers. The level of apprehension for the sector as a whole field was also quite high, and organisations were seeking advice to try to understand the impact of consumers having more say in the care and services they receive. On the other hand consumers were questioning why their preferences could not be met when CDC promised them more choice and flexibility.

Over the past 12 months there has been considerable discussion around the legal issues brought about by CDC. This has included WorkCover requirements, employee status, liability clauses in home care agreements, agreements not being understood by consumers and providers seeking indemnity from consumer choices. In many respects the advent of CDC and levels of uncertainty may have been encouraging a risk averse approach from providers rather than a positive risk approach.

Questions considered by the legal issues reference group in the middle of last year included:

- What is the limit, if any, to the provider's duty of care when choice and control rests with the consumer?
- What is the provider's liability if a consumer makes choices that result in harm to themselves or a failure to achieve reablement and wellness goals?
- What liability does a consumer have, if any, if they choose services that result in injury or detriment to the provider's employees or the provider?
- If a consumer wishes to receive services in a way, place or context that might have an inherent and difficult to manage risk for the provider, does the consumer have a right to receive those services?
- What approaches can ensure:

- consumers and providers are aware of and protect their rights and entitlements
- consumers receive high quality services
- the consumer – provider relationship is mutually beneficial and productive?

It was within this context that the Legal Issues Project had been commissioned by Home Care Today in response to the high levels of uncertainty among providers about what CDC would mean for their service delivery.

BACKGROUND TO THE LEGAL ISSUES PROJECT

The University of Western Sydney was contracted to conduct a study that aimed to determine the central legal issues, concerns and questions associated with the transition to CDC in Home Care Packages. This project was undertaken by Sue Field and Lara Matkovic who have experience in community care, elder law and research, and was completed in August 2015. CDC aims for flexibility in consumer directed service delivery that can occur within legal parameters, balancing the provider’s duty of care with choice and dignity of risk for the consumer.

The boundaries for the literature review and qualitative study were to conduct:

- 1) A literature review that covered Australian and international literature and would include, but not be limited to the following areas:
 - the roles, responsibilities and challenges facing Home Care Package providers
 - the issues facing the consumer and/or their representative
 - supported decision-making and the determination of legal decision-making [in]capacity and the subsequent impact on the consumer, their representative, families, unpaid carers and the provider.
- A qualitative study through telephone interviews with 51 people in the roles of providers, legal experts, peak bodies (for consumers and providers), regulators and unions involved in aged care. This consisted of in depth interviews which aimed to determine the central legal issues, concerns and questions associated with the transition to CDC in Home Care Packages.

CONSUMER DIRECTED CARE

The philosophy and approach underpinning CDC is, “...to maximise the autonomy and independence of persons with physical dependencies by giving them greater choice and control over personal care and other in-home services and providers.”¹ Organisations over the past five years have been piloting approaches and models that enable greater consumer direction and have at different times encountered issues and concerns that are being addressed in varying ways. This project aims to create a deeper conversation that balances the provider’s duty of care and the consumer’s dignity of risk, and raises awareness of other legal issues related to the introduction of CDC.

¹ Polivka, L ‘The ethical and empirical basis for consumer-directed care for the frail elderly’ *Contemporary Gerontology*. 2000; 7(2): 50-2, as cited in Kodner, D ‘Consumer-directed services: lessons and implications for integrated systems of care’, *International Journal of Integrated Care*, 2003 Apr-Jun; 3 e12, p2.

THE LITERATURE REVIEW

The literature review focused on the care and financial models associated with the introduction of CDC primarily in the UK and the USA. Literature in the disability sector was also used, however not a lot of literature was found specifically on legal issues. The following paragraphs outline the key findings.

There is clear tension for providers in meeting duty of care and enabling consumers to exercise choice and flexibility. Buckley² and McStay³ note that CDC puts the consumer's preferences at the forefront. Providers need to avoid restricting the autonomy of the consumer as much as possible whilst at the same time protecting them from foreseeable risks. Each situation needs to be handled on a case by case basis.

Phillips suggests that:

*"The availability of precautions should be considered. If the risk of harm can be reduced or removed by taking simple precautions, then it will not be reasonable to continue without taking those precautions."*⁴

The authors of the report highlight that whilst providers express concern about what they perceive to be their "duty of care" to the consumer it is important to note that when discussing a "duty of care" it must be taken in the context of the laws of negligence. See definitions in Part 2 of this report.

The legal framework underpinning the Home Care Packages Programme (which includes CDC) is as follows⁵:

- the [Aged Care Act 1997](#)
- *Principles made under the Act, including:*
 - [Accountability Principles 2014](#)
 - [Allocation Principles 2014](#)
 - [Fees and Payments Principles 2014 \(No. 2\)](#)
 - [Quality of Care Principles 2014](#)
 - [User Rights Principles 2014](#)
 - [Approval of Care Recipients Principles 2014](#)
 - [Complaints Principles 2014](#)
 - [Records Principles 2014](#)
 - [Sanctions Principles 2014](#)

² Buckley, J 'Consumer directed care welcomed' YourLifeChoices, 19th December, 2013 @ <http://www.yourlifechoices.com.au/news/consumer-directed-care-welcomed>

³ McStay, J 'Changes to home care and moving to CDC – Compliance top 10' @<http://hyneslegal.com.au/news/aged-care-retirement-living-category-234-nal-0/changes-to-home-care-and-moving-to-cdc-compliance-top-10-nar-283>, accessed 21 February, 2015.

McStay, J 'CDC: balancing rights and obligations', Australian Ageing Agenda, January 22, 2015, p16 @ <http://www.australianageingagenda.com.au>, accessed 21 February, 2015.

⁴ Phillips, S 'How to protect your organisation in a consumer directed era' Consumer Directed Care Conference Melbourne, 3rd December, 2013.

⁵ The Home Care Packages Programme Guidelines (2014) have now been superseded but similar content will be included in Operational Manual soon to be released. <https://www.dss.gov.au/our-responsibilities/ageing-and-aged-care/programs-services/guidelines-0>

➤ [Subsidy Principles 2014](#)

- determinations made under the Act (for example, setting relevant subsidy and supplement levels)
- [Aged Care \(Transitional Provisions\) Act 1997](#)
- [Aged Care \(Transitional Provisions\) Principles 2014.](#)

There are also other legal requirements that cover the provision of all home care services, such as Consumer Law and Anti-discrimination Legislation.

The authors highlight that although the model adopted by the Australian Government permits more choice, flexibility and transparency for consumers than the earlier Community Aged Care Packages and Extended Aged Care at Home (EACH) and EACH Dementia Packages, the accountability for the funding currently remains with the provider. This limitation on who the consumer can choose to provide the actual service highlights the major differences between some models, particularly that adopted in the United States of America and the model implemented here. The Assistant Minister for Ageing has announced further changes to home care packages from February 2017 and the framework surrounding these changes is currently being developed⁶.

In concluding the literature review the authors state, *“it would appear that many of the legal issues raised are addressed through the Home Care Package guidelines⁷ and that much of the legal framework⁸ already in situ in Australia can address the issues raised.”* The author’s key concern is the current level of understanding of CDC by providers and consumers is the most immediate legal risk.

THE QUALITATIVE STUDY

The second and critical part of the project has been the qualitative study focused on listening to the concerns and questions of providers, legal experts, consumer and provider peak bodies and unions involved in aged care.

In brief the concerns raised in the interviews were:

- with a greater emphasis on consumer choice it is now more difficult to balance duty of care and dignity of risk
- providers were concerned about being able to meet the increased choice of consumers (such as requests for brokered services) because they bear the responsibility and risk for all services provided
- organisations will become more risk averse and this will actually reduce choice for the consumer
- the difficulties of creating a home care agreement that must protect the provider and consumer and be in plain language to cater to the variety of educational and cultural backgrounds of consumers
- negotiation of the agreement is an important part of the consumer making an informed choice and consumers can refuse to sign the agreement

⁶ Senator The Hon. Mitch Fifield, ‘Supporting greater choice for older Australians’, 2015

<http://mitchfifield.dss.gov.au/media-releases/supporting-greater-choice-for-older-australians>

⁷ The Home Care Packages Programme Guidelines which have now been superseded and the reference will be updated once the Operational Manual has been released. <https://www.dss.gov.au/our-responsibilities/ageing-and-aged-care/programs-services/guidelines-0>

⁸ This refers to the legislation listed on pages 3&4 above.

- the guidelines are useful but there are still a lot of grey areas⁹
- the impact on the workforce is significant, affecting current roles and the relevance of many services
- CDC will potentially affect employment conditions, requiring more flexibility in the workforce
- limited availability of level 3/4 packages means that the package level that people are receiving does not always match their assessed need, creating a risk to the provider of breaching their duty of care
- contingency funds can be difficult to manage as consumers can be conservative in their expenditure and not receive the services they require now.

Other issues raised in the report that are not directly related to the introduction of CDC included:

- the introduction of consumer fees which has created some confusion and some consumers have been charged incorrect fees
- the non-payment of fees raises issues of security of tenure and debt collection.

These issues are not addressed in this practice guidance document.

The interviews also raised the following questions:

- Is CDC being explained to consumers, particularly in relation to the level of flexibility available to them?
- How do consumers receive independent advice? This is particularly problematic before an agreement is signed when they need the advice. What role do the advocacy services have and what is the role of consumer protection agencies?
- What if the consumer holds the funds, would this shift the responsibility completely to the consumer?

WAYS FORWARD TO ADDRESS THE CONCERNS AND ISSUES RAISED THAT AFFECT PROVIDERS AND CONSUMERS

At present many issues are being anticipated by home care providers with the introduction of CDC. In reality, many of the issues were already present in the provision of home care and the introduction of CDC has brought these into sharper focus.

The authors clearly state that improved communication between all parties is critical to the success of CDC to limit confusion and unnecessary legal involvement in potential disagreements and disputes. More specifically, improved communication is required on:

- balancing duty of care and legal responsibilities with the wishes of the consumer
- brokerage
- why individuals are finding their package levels reduced with the introduction of CDC
- matching resources to assessed need
- the use of contingency funds
- staff experience and education for new roles to implement CDC
- increasing organisational capacity to minimise risk
- managing differences of opinion and complaints

⁹ Note the soon to be released Operational Manual for Home Care Packages will clarify a number of these grey areas.

- the tension in providing a market driven approach/quality/increased choice/more personalised service
- decision making capacity of the consumer
- home care agreements.

Since these interviews were conducted the Department of Social Services has also issued additional information in their regular [Information for Aged Care Providers](#). This booklet is another tool for addressing the communication issues identified above. Providers can use this booklet as a basis for additional communication with all stakeholders. Information is also being prepared for consumers.

Each of the Practice Guides is designed to stand alone so there is some repetition between them. These will be further developed and these and additional guides will be posted on our website at www.homecaredtoday.org.au

In addition to these resources Home Care Today has developed some workshops that can be run across Australia over the next 6 months to assist organisations to discuss the report and consider its implications for their practice. These workshops are being run through the peak bodies in each state and are currently being organised with ACSA and LASA in each State.

A number of workshops have already been run to trial the resources and the feedback shows how uncertain the times are now. The recent budget announcement that consumers will be able to choose their provider from February 2017 certainly adds to the anxiety of provider organisations. However, the legal issues report has highlighted that we need to be tweaking, discussing and communicating as effectively as we possibly can across an organisation and with our consumers to achieve the dual goal of organisations meeting their duty of care responsibilities as well as encouraging dignity of risk for their consumers.

Finally, it is useful to also reflect on the issue of anxiety as raised in the beginning of this article. Andrew Day¹⁰ writes on *Living in uncertain times: Organisation dynamics in response to uncertainty*. In his article, Day addresses what happens in organisations when their environment moves from relative stability and predictability to one of turbulence, uncertainty and continuous change.

He highlights that we are undoubtedly living in uncertain times. Staff may experience painful emotions such as hostility, anger and fear and there can be a blurring of boundaries and fragmentation of roles, which can result in staff being overworked or experiencing loss and grief as workplaces change. This certainly was the experience in the five organisations that Day wrote about. His observations were that organisations that seemed to be best placed to manage the change recognised:

- that it is impossible to predict the future
- that leaders of the organisation should truly engage with the staff
- that emotions in the workplace are important
- the importance of being able “to live with uncertainty”

¹⁰ Day, A. (2007) 'Living in uncertain times: Organisation dynamics in response to uncertainty', 360° The Ashridge Journal, Autumn, pp. 29 - 34

- it is imperative that the organisation provides some containment/structure in a way that is supportive of staff and consumers in the uncertain environment
- that where there was openness to uncertainty there was a corresponding enablement of staff that allowed autonomy and encouraged creativity.

Day provides some interesting insights that highlight a significant shift from seeking certainty to living with an increased sense of not knowing. Rather than leading to more uncertainty it can lead to a different way of working. This different way of working, as encouraged by Day, may enable organisations, staff and consumers to work together so the organisation can meet its duty of care while still supporting the consumers' dignity of risk and the personalisation of care.

Jonathan Pietsch is the Service Provider Consultant for Home Care Today and his role is to support the providers of Home Care Packages to implement Consumer Directed Care. Jonathan has been involved in the Management of aged care and community services for the last 25 years and has a Masters in Public Health and a Masters in Organisational Dynamics.