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Dignity of risk in aged care

***Anita Courtney**, **Felicity Iredale**, **Johanna Heaven** and **Emily Tang** RUSSELL KENNEDY*

Introduction

The question of whether the principle of "dignity of risk" can be maintained in our increasingly regulated and safety-conscious society becomes more pertinent as the number of aged care recipients grows in our ageing population. Aged care is progressively moving further from a purely health and safety-based lens to a more human rights and disability-based focus. Part of that means giving vulnerable older Australians actual and perceived personal control, and the respect and dignity that comes with it. However, as aged care providers and staff grapple with implementing the dignity of risk principle in reality, it becomes evident that even with the mandatory obligations imposed by the Charter[1] and Quality Standards[2] to require providers to honour the dignity of risk of their clients, the overriding consideration necessarily becomes about balancing dignity of risk with inevitable legal risks. It is a difficult tension of competing obligations to resolve, and one that requires practical incentives for providers if we are to truly support aged care clients to partake in conduct that may pose a risk.

Defining dignity of risk principles

Autonomy is central to the attainment of a high quality of life. A person expresses their autonomy to make their own choices and bear those risks through the principle of "dignity of risk". The principle embodies and maintains the dignity afforded by risk-taking, which often manifests in enjoying small pleasures and feeling at home. It is about the autonomy to pursue a person's own idea of joy and pleasure, even if this necessitates an increased risk of harm.[3]

It is a human rights issue for individuals to have the choice to take some risk in engaging in life experiences, particularly in making judgments about their own personal and lifestyle affairs.[4] However, a person's intrinsic dignity and their dignity of personal identity are especially vulnerable to violation within the residential aged care context.[5] Some examples where the dignity of risk plays out in the aged care context include:

- a client wishes to be given food that presents a risk of choking;
- a client wishes to use an electrical scooter despite the client having difficulty controlling it; and
- a client wishes to engage a worker/service provider that is not part of the provider's preferred supplier list.

Through these examples, it is evident that there is a need for aged care providers to continuously balance risk with autonomy to avoid circumstances where a client is seriously harmed as a result of their choices.

This issue is compounded by the fact that at times, representatives make the decision on behalf of clients who lack decision-making capacity. In these instances, representatives may make judgment calls on what their loved one historically enjoyed, even when it is contrary to their treating team's advice. Whilst this is not the focus of this article, we warn providers to be cautious of allowing representatives to make decisions on behalf of clients that are adverse to their health or wellbeing. Whilst acceptable in some circumstances, providers need to ensure that the person making the decision has the correct legal authority to do so.

From theory to legislation

The concept of dignity of risk has always received considerable attention within the disability services sector and is recognised as a useful concept within the mental health context.[6] As the direction of aged care has moved from a purely health-based approach to a disability and human rights-based approach, we have now seen the principle translated into the aged care context, to promote the human rights and quality of life for vulnerable older Australians.

The dignity of risk principle is captured within the Australian Commonwealth's *Charter of Aged Care Rights* (Charter), as set out in the Aged Care Act (1997) (Cth) (Aged Care Act) and its Principles. Among its 14 principles, the Charter specifically states that each client has the following rights to:

> be treated with dignity and respect
> (. . .)
> have control over and make choices about [their] care, and personal and social life, including where the choices involve personal risk
> (. . .)
> [their] independence

The Charter is supplemented by the Aged Care Quality Standards (Quality Standards), which were introduced from 1 July 2019. The Quality Standards require

mandatory compliance for organisations providing Commonwealth subsidised aged care services. It focusses on outcomes for consumers and reflects the level of care and services the community can expect from aged care providers. The Quality Standards put the consumer at the centre.

There are eight individual standards. Standard 1 reflects "consumer dignity and choice". It is a foundational concept that highlights the importance of the consumer being able to act independently, make their own choices and take part in the community. Broadly, it fosters social inclusion, health and wellbeing.[7]

Importantly, the dignity of risk is enshrined in Standard 1. It requires aged care providers to enable "the right of consumers to make their own decisions about their care and services, as well as their right to take risks". The Standard acknowledges that organisations also bear other responsibilities for the safety of the workforce and others, and expects that organisations will "look for solutions that have the least restriction on the consumer's choices and independence".[8]

The benefits of the Charter, Quality Standards and having standardised practical tools, resources and guidance, are that it provides clarity for aged care providers regarding their legal responsibilities.

Practical reluctance to honour the dignity of risk

Despite the virtuousness of the theoretical and codified principles of dignity of risk and enhanced quality of life for aged care clients, the practical reality is that there is an overriding preference for risk tolerance at a financial, legal and social level for aged care providers.[9] There is a disconnect between the theory (how dignity of risk is described) and practice (how dignity of risk is implemented).[10]

Mechanisms to mitigate civil legal risks certainly exist. Waivers and releases operate so the client essentially promises that they will not sue the provider if something goes wrong. An indemnity goes a step further, and says that if the provider is sued by someone *else* because of the client, then that provider can sue the client. For example, if a contractor were injured by a client riding an electrical scooter and sued the provider, the provider could then seek to recover its costs from the client.

However, while these legal documents can *theoretically* assist in mitigating the risk of providers being held civilly liable, waivers, releases and indemnities cannot protect providers from all legal risk, let alone reputational risk. These forms do not absolve the provider from being found non-compliant with the Quality Standards, the Aged Care Act and before the Coroner's Court. The fact is that providers must still ensure that they are complying with all their legal obligations, in particular in relation to duty of care and the assessment of clients' decision-making capacity.

The application of dignity of risk in practice overwhelmingly focusses on the potential for harm, and quantifying the real or perceived risks that may cause physical injury.[11] Providers' high alertness to risk in practice results in prioritising the reduction of risk, rather than the promotion of independence.[12] This leads to a conservative or defensive approach to the provision of care, where erring on the side of caution becomes the norm.[13] When a risk actually eventuates, providers and staff feel compelled to prohibit clients from engaging in normal/low-risk behaviours, because there is no true incentive to honour clients' dignity of risk. For example, if a client is recommended a moist/minced diet, however continues to eat solid dry food and experiences a choking episode, the provider's reaction is often to cease serving them this food.

The consequence of this is that despite the existence of and codification of dignity of risk values, decisions about a client's lifestyle choice are inevitably paternalistic and risk adverse.[14] It becomes a perpetual tension to ensure optimal quality of life for older people and complying with providers' obligations for ensuring health and safety too.

Potential practical solutions

The nature of honouring clients' dignity of risk while remaining compliant naturally lends itself to overly risk adverse restrictions in aged care settings. To maintain this balancing act, providers must, and are expected to, assist clients to understand and be well-informed of the risks of their decisions.[15] For example, does the client (or their lawful representative) who wishes to be given food that presents a risk of choking understand how traumatic and painful choking can be and that they could die? Does the client (or their lawful representative) understand that if they crash their scooter, it could lead to an injury that they may not recover from? Providers must ensure that the client (or their lawful representative) is well informed and together, they should look for tailored solutions to help the client live the way they choose.[16] It is not enough to provide sparse details or refer them to guidance material. These risks should be regularly explained to clients, particularly if the risk changes (such as if their physical or mental condition declines). This practice not only promotes the clients' independence over their decisions, but safeguards the provider, as failing to assist the client (or their lawful representative) to understand the risks may breach their responsibilities and render any waiver/release or indemnity ineffective.

Providers must also ensure that they are taking steps to mitigate risk, insofar as they can, to ensure they still comply with their responsibilities under the Aged Care Act. For example, the provider must provide appropriate supervision to the client while eating or using their scooter. Likewise, if a client chooses to use their own service provider, the approved provider must still implement appropriate screening and other requirements to ensure that the services provided meet the Quality Standards. To be clear, no waiver/release or indemnity form can absolve an approved provider of their responsibilities under the Aged Care Act. At most, these types of forms can reduce the exposure to being found financially liable for negligence.

It is also important and expected that the provider still show the client that it respects their decisions and choices, even when the provider feels uncomfortable with and wishes to mitigate the risk involved.[17] This may be demonstrated by the provider's policies and procedures which support staff in managing any tension between clients taking risks, or refusing care or services, and their professional or legal obligations.[18] Ultimately, the provider's policies and procedures should ensure that any restrictions imposed on the client are limited, tailored and proportionate to the risk,[19] to keep that fine balance between honouring dignity and ensuring compliance.

It is also important to consider that asking a client to sign a risk acknowledgement form *could* be seen as a restriction on their choice and it is possible the Aged Care Quality and Safety Commission may take issue with this. For this reason, it is critical that the provider considers whether asking the client to sign such a form is reasonable in the particular circumstances. For example, is the provider asking them to sign it because the client is asking the provider to do something that it would not normally do (eg provide food contrary to their assessed needs)? Or, is the provider asking them to sign a waiver because it does not have a service provider that can provide the service they require in their area? In the former case, the client is choosing to take on a risk. However, in the latter case, the client does not have a genuine choice, so the provider may be criticised for this as being inconsistent with its obligations under the legislation.

Providers will not always be able to accommodate situations where clients have unlimited choice, however, clients must still have options and information available to support their choice. The Aged Care Quality and Safety Commission will expect that the provider take reasonable steps to find alternatives that can help meet the client's needs and preferences.[20] A judgment call will need to be made for every situation.

It is important to note that no person can consent to a significant risk being placed on another person. As such, if the risk that the client wishes to engage in poses a risk to staff or others, providers should not be supporting or facilitating this conduct. Furthermore, if providers are particularly concerned about conduct that a client or their lawful representative is consenting to, they should consider seeking legal advice.

Conclusion

For aged care providers, the practical difficulties of balancing competing values in health and safety risks and the dignity afforded through autonomy will only become more prevalent as the number of aged care recipients grows, in parallel with increases in life expectancy and ageing populations. However, it is vital to keep the momentum and attention of dignifying aged care recipients at the forefront of public discussion, so that providers can tangibly promote the human rights and quality of life of vulnerable older Australians.

Anita Courtney
Principal
Russell Kennedy

Felicity Iredale
Senior Associate
Russell Kennedy

Johanna Heaven
Associate
Russell Kennedy

Emily Tang
Lawyer
Russell Kennedy

Footnotes

1. *Charter of Aged Care Rights*, as set out in the Aged Care Act (1997) (Cth) and its Principles.
2. Aged Care Quality Standards.

3. J Ibrahim and M Davis "Impediments to applying the 'dignity of risk' principle in residential aged care services" (2013) 32(3) *Australasian Journal on Ageing* 188, 189.
4. M Woolford et al "Applying dignity of risk principles to improve quality of life for vulnerable persons" (2019) 35 *International Journal of Geriatric Psychiatry* 122, 123.
5. Above n 3, at 189.
6. Above n 3, at 191.
7. Australian Government, Aged Care Quality and Safety Commission, "Guidance and Resources — Standard 1" (17 August 2021) 8.
8. Above n 7.
9. Above n 3, at 190.
10. Above n 4, at 126.
11. Above n 4, at 128.
12. Above n 4, at 128.
13. Above n 3, at 190.
14. Above n 4, at 123.
15. Australian Government, Aged Care Quality and Safety Commission, "Guidance and Resources — Standard 1" (17 August 2021), p 21.
16. Above n 7, at 21.
17. Above n 7, at 21.
18. Above n 7, at 22.
19. Above n 7, at 22.
20. Above n 7, at 18.