Top legal Issues in residential and home care

Presented by
Julie McStay, Director
Regulatory risk - non compliance and sanction

- High risk clinical issues
- Resident's engaging in risky behaviours
- Prudential non compliance
- Security of tenure
- Discrimination and harassment
High risk clinical issues

- Lack of clinical oversight
- Medication management
- Medication errors
- Falls
- Swallowing
- Assaults
- Use of restraints
- Wound management
- Consent/pain management/palliative care
Risk prevention for APs

- Communication
- Documentation
- Hand over procedures
- Training
- Policies that are implemented and monitored
- Follow up complaints
- Incident management
- Engage with families
Defensible documentation – principles

• Include only necessary information
• Be concise
• Use appropriate language
• Document facts not opinions
Consider this scenario....

- A resident has been complaining of abdominal pain.
- There have been a succession of different agency RNs through the facility.
- Unfortunately no one reviews the resident's bowel chart for a number of days.
- The resident has a slow deterioration in her condition over the next week and it is ultimately revealed she has not moved her bowels for 9 days.
- She is transferred to hospital but dies 3 days later.
- Thoughts?
Recent Coroner’s inquest - documentation

• The Coroner’s examples of poor documentation included:
  – entries not in chronological order
  – retrospective entries not identified as retrospective
  – no entries for significant periods of time
  – crossed out entries without an explanation
Good documentation.

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Residents engaging in risky behaviours
Managing Duty of Care vs. autonomy of resident’s wishes

- Resident should be supported to be independent
- Providers owes overriding duty of care
- Balance of risk vs safety and quality of life
- Deed of release
Consider this scenario….

• A resident has dementia and his health and independence begins to deteriorate. He now requires assistance with toileting.

• The resident is resistant to care and is physically abusive to staff when they try to assist him.

• The care staff leave him to go to the toilet on his own him… on the basis that they say they have “a duty of care to respect his wishes”

• Thoughts???
Security of tenure
Critical steps

• Step 1 – a right to ask resident to leave
• Step 2 – follow the process
  • Assessment
  • Suitable alternative accommodation
  • Notice – 14 days
Circumstances where AP can ask resident to leave

- Service is closing
- Accommodation and care suitable to long-term assessed needs
- Resident no longer needs residential care (ACAT)
- Resident has not paid any agreed fee within 42 days for a reason within their control
- Resident has intentionally caused serious damage or injury
- Resident is away from service for 7 or more days other than as permitted under Act or in emergency
Take care!!

• You must not ask the resident to leave or imply that the resident must leave before suitable alternative accommodation is available.
• What does “imply” look like???
• Transfer for temporary assessment is ok, discharge is not.
Prevention is better than the cure

- Admission processes
- Assess resident and family
- Assess resident mix
Risk management

- What is reasonably foreseeable?
  - No aggressive tendencies on admission
  - Stage of dementia
  - Age/size of resident
  - Mix of residents in the facility
  - Documented strategies to manage aggression post admission
Case study - security of tenure

- Examples of behaviour
  - Kicking and punching staff
  - Hitting other residents
  - Verbal aggression
  - Attacks on staff and residents with objects such as a spade and a knife
  - Absconding from facility
  - Attempted to strangle another resident
Case Study - security of tenure

- **Issues involved**
  - The family did not accept the first alternate suitable accommodation place
  - The assessment of the resident’s doctor and the facility’s health practitioner
  - Be transparent when presenting the challenging behaviours and assessment of the resident’s long-term needs to the alternate suitable accommodation options
Substitute decision making
Powers of substitute decision makers

Capacity?
- presumption of capacity
- the more complex the decision the greater the capacity required
- capacity is decision specific
- capacity is fluid
- assess a person’s decision making ability – not the decision they make
- substitute decision making is a last resort

No Capacity?
- SDM makes health care decisions on behalf of a person whose decision-making capability is impaired.
- SDM may be either:
  - chosen by the person informally
  - formally appointed by person
  - assigned to the person or appointed for the person by a court
Decision makers - order of priority

- Advance Health Directive
- QCAT / NCAT (formally appointed guardian)
- Enduring Power of Attorney
- Statutory Health Attorney / Person Responsible
- Public Guardian
SDM – Statutory health attorney (Qld)

- Queensland – Statutory health attorney
  - First available and culturally appropriate:
    - the resident’s spouse (provided the relationship is close and continuing);
    - the resident’s carer (not a paid carer);
    - a close friend or relation of the resident (not a paid carer); or
    - the Public Guardian.
End of life decisions

- Euthanasia and assisted suicide
- Palliative care
- Capacity or no capacity
- Consent
- Life sustaining measures
- Consent and acute emergencies
Powers of substitute decision makers – end of life care

- **Clients with capacity**
  - refusal of treatment
  - demand for futile treatment

- **Clients with impaired capacity**
  - need consent of SDM to withdraw or withhold life sustaining measures
  - consent can’t operate unless the decision to commence or continue treatment **would be inconsistent with good medical practice (GMP)**
  - Dr must certify GMP in records
  - General Principles and Health Care Principles:
    - best interests
    - least restrictive of adult’s rights
    - substitute judgment
Incident management

Investigation and reporting
Tip 1 - Inform your staff

- About their role in a crisis
- About the escalation process
- About external reporting obligations and who will comply
- About their right to release information to authorities
Define roles and responsibilities

• Internal roles in a crisis
  – Escalation process
  – From care staff to CEO – who does what?
  – Communicating with family
  – Communicating with your Board – risk committee
  – Media
  – Incident reporting/incident investigation
  – Dealing with authorities

• External reporting obligations
  – Department of Health
  – WHS
  – Coroner
  – Anyone else?
Tip 2 – Manage relationships

• Early and frequent contact with relevant parties
• Get advice – legal and PR
• Communicate with family/staff
Tip 3 – Resolve problems if possible

• Begin processes to resolve problems
• Regulator focus – risk to resident, systemic issues
• Communicate with stakeholders
• Be commercial…..sometimes you will need to make concessions.
Tip 4 – Manage the media

• Take PR and legal advice
• Media policy - control and delegations
• Speak up and speak early but in a controlled way
• Kill the story…don’t feed it.
Case study

- Challenging behaviours
- Dispute between residents
- On resident pushes another
- The resident falls, hits her head and passes away
- They have both displayed challenging behaviours in the past.
How did they avoid an inquest?

- They have documented all previous incidents
- The families were well informed of the incidents
- Behaviour management strategies were in place and documented
- They had explored all reasonable options
- Good documentation.
Issues with places and pricing – residential care
Financial arrangements - Common problem areas

- Room pricing
- Couples rooms
- Third party RADs
- Transfer of places/variations of conditions
- Applications to extend life of places
- Transaction documents that do not cover aged care specific issues
Plenty of scope to charge for additional services

Provided:

• providing care and services over and above what providers have been funded for
• the resident receives some benefit
• the resident agrees to pay for the services.
Debt management

• Admission
  – Disclosure obligations
  – Assessing capacity to pay
  – Informing staff about warning signs when admitting residents

• Steps for following up late and incorrect payments

• Security - eg guarantees

• Debt recovery procedures
Challenging ACFI downgrades

• Request for reconsideration s85 of the Aged Care Act
  – Internal review by the Department
  – New evidence can be taken into account
  – $375 / question fee (refunded if successful)

• Application for review in the Administrative Appeals Tribunal
  – Merits review
  – New evidence can be taken into account
  – $884 / resident
Issues in home care
Care recipient independence vs increased provider regulation

• More onerous obligations on home care providers
  – Eg policies and procedures
  – Monitoring, oversight, documentation, communication with client/representatives

• Balance with care recipient independence?
• Assumption of risk by home care providers
User Rights Principles 2014

• Home care agreement must contain certain provisions eg:
  – Level of care
  – Care recipient rights
  – Fees and charges
  – Exit amount (if any) – dollar figure
  – Complaints mechanisms

• Agreement must be in plain language and readily understandable
Aged Care Act 1997

• Fees and charges
  – Charge no more than the maximum set out under the act
  – Must not charge fee for entry to the service
  – Additional or “top up” services – fees to be agreed beforehand and itemised account given

• Financial hardship
Potential consequences of non-compliant home care agreement

• Limited enforceability of certain parts of the agreement
• Issues with recovery
• Compliance action
“Establishment fee”

• Charged during the first month of the package
• Case management
• Initial assessment, development of home care agreement, care plan and individualised budget, service coordination

• ‘Entry fee’?
Exit amounts

• Exit amount may be deducted from unspent home care amount
• Must not exceed:
  – published amount
  – agreed amount
  – unspent home care amount
Termination clauses

• Consistent with security of tenure
• Notice period
• Certain obligations to survive termination eg payment of fees
• Unspent home care amount and exit amount
• Any assistance offered to transition to other services?
Review of decisions
Options for review – aged care “decisions”

- Internal review – DSS or Agency
  - confirm, vary, set aside or substitute a new decision
- Administrative review – AAT:
  - “Reviewable decisions” under Act
  - reconsider decision afresh
- Judicial review – Federal Court
  - catch all
  - all decisions of an administrative nature
  - to assess the legality of the decision
Grounds for review

- a breach of the rules of natural justice
- procedures required to be observed were not observed
- the decision was not authorised by the relevant statute
- making the decision was an improper exercise of the decision-maker's power
- there is nothing to justify making the decision
- that the decision-maker took into account irrelevant considerations or failed to take into account relevant considerations
- that the decision was made in bad faith
Grounds for review

- the person did not have jurisdiction to make decision
- the decision involved an error of law
- the decision was induced or affected by fraud
- that the relevant power was exercised for the wrong purpose
- the decision was made contrary to law.
## Notice of non-compliance

<table>
<thead>
<tr>
<th>Type of notice</th>
<th>Why?</th>
<th>Statutory basis</th>
<th>Review or reconsideration</th>
<th>How?</th>
<th>Grounds</th>
<th>Timeframe</th>
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</thead>
<tbody>
<tr>
<td>Notice of non-compliance (Department of Social Services)</td>
<td>Non-compliance with the Act or Principles</td>
<td>s67-2 of the Act</td>
<td>Internal review</td>
<td>Provide a written submission</td>
<td>Response can include any relevant information</td>
<td>Within 14 days</td>
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- **How?**
  - Provide a written submission

- **Timeframe**
  - Within 14 days
# Decision to impose sanctions

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<th>Type of notice</th>
<th>Why?</th>
<th>Statutory basis for issue</th>
<th>Review or reconsideration</th>
<th>How?</th>
<th>Ground/s</th>
<th>Timeframe</th>
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<td>Decision to impose sanctions (Department of Social Services)</td>
<td>Non-compliance with the Act or Principles</td>
<td>s67-5 of the Act</td>
<td>Internal – application to review decision to impose sanctions</td>
<td>Reviewable decision under s85-1 of the Act</td>
<td>Any relevant information</td>
<td>28 days</td>
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<td>Internal – Application to Lift sanctions</td>
<td>A decision to refuse to lift then becomes a reviewable decision</td>
<td>Any relevant information</td>
<td>No time limit</td>
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<td>Generally 28 days</td>
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<td>Eg: Procedural fairness, bad faith, failure to take account relevant info</td>
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Other decisions and options

- Serious risk report
- Notice of intention to impose sanctions
- Decision to refuse to lift a sanction
- Decision to revoke an approval as a provider of aged care
- Report of major findings from audit
- Site audit report
Findings:
• No resident suffered unexplained weight loss
• At worst a minimal risk of unexplained weight loss
• Referrals were made were appropriate
• Recommendations of dieticians were followed
• Residents were not denied any food they ought to have received.
Blue Care - 2010
Overturn decision to impose sanctions

• Serious risk report and then sanctions
• Internal review process to lift sanction – partially successful
• Appeal to AAT:
  – the decision to impose sanctions
  – the refusal to wholly lift sanctions
• Result in AAT
  – Sanctions should never have been imposed
“The costs involved in this matter were huge…I cannot help but think that all of this might have been avoided if a more measured approach had been taken at the outset…..a decision to impose sanctions on the basis that there exists an immediate and severe risk to safety and well being of residents is a step of enormous gravity. It has the practical effect that a provider is deprived of the opportunity to demonstrate before imposition of the sanctions, that sanctions are not called for…it is a great pity that a decision about serious risk was made so quickly”

“There were some shortcomings in information systems but they were no where near as serious as the Department and Agency [sic] suggests and did not threaten the health, welfare and interests of residents.”

Deputy President AAT P E Hack SC
Top tips

• Co-operate
• Document, document, document:
  – What was requested?
  – What did you provide?
  – Does the decision marry up to the information provided?
• No fair process?
Contact

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