“we’re supporting people who use services, and carers”

learning to live with risk

An introduction for service providers – abridged edition

skillsforcare

skills FOR BUSINESS

Contents

This is one of a series of web-based *Learning to live with risk resources*, all available at www.skillsforcare.org.uk/risk

Other products in the series include the longer version of this guide, which incorporates a further reading list, a set of PowerPoint presentation slides including some that can be used as a training resource, and a summary leaflet on the subject.

Learning to live with risk, an introduction for service providers – abridged edition

Published by Skills for Care, West Gate, 6 Grace Street, Leeds LS1 2RP www.skillsforcare.org.uk

Skills for Care reference no. DS025

Skills for Care is the employer-led strategic body for workforce development in social care for adults in England. It is part of the sector skills council, Skills for Care and Development.

This work was researched and written by CPEA Ltd, working to a commission from Skills for Care.

Bibliographic reference data for Harvard-style author/date referencing system:

Short reference: Skills for Care [or SfC] 2011

Long reference: Skills for Care, Learning to live with risk, an introduction for service providers – abridged edition (Leeds, 2011) www.skillsforcare.org.uk

Preface

The government's vision for adult social care[1] is that it becomes more personalised, more preventative, with services that are more focused on delivering the best outcomes for those who use them. This direction of travel requires renewed and refreshed creative thinking about who will be providing adult social care, as well as about support, management, skills development and commissioning. That is why Skills for Care has published its *"Capable, Confident, Skilled: a workforce development strategy for people working, supporting and caring in adult social care"* to support the development of an ever more capable, responsive, skilled and well-trained workforce.

An essential element of personalisation is helping people to make their own decisions as safely as possible, and supporting workers to better understand and manage risks. It is therefore appropriate that Skills for Care should also publish *'Learning to live with risk'*.

We are determined to foster a sector-wide commitment to work collaboratively and recognise the need for greater personalisation, choice & control[2]. However, providing real choice and control for people who use social care means enabling people to take the risks they choose, particularly in the use of self-directed support and personal budgets. To support service providers and commissioners with these issues, Skills for Care has developed a range of *'Learning to live with risk'* resources, comprising:

- This document: *'Learning to live with risk'* - an introduction to risk for employers providing services in adult social care.
- A leaflet and a web resource - introducing *'Learning to live with risk'*.
- A *'Learning to live with risk'* checklist.
- A series of PowerPoint presentation slides that summarise this document for use in learning and management settings. It includes 10 scenarios that can be used in different learning settings relevant to a variety of audiences.
- A summary of key references that itemise the sources used to produce the products, plus a schedule of further reading for those keen to go further.

I commend these products, which are free from our website, to all those working to give the people they support the greatest possible freedom and choice in their lives.

Professor David Croisdale-Appleby OBE
Independent Chair, Skills for Care
May 2011

[1] A Vision for Adult Social Care: Capable Communities and Active Citizens, DH. 2010
[2] Think Local, Act Personal, Putting People First. 2011

Introduction

Skills for Care realises that assessment of risk has often raised difficult questions for practitioners balancing empowerment with duty of care. The rights of adults to live independent lives and to take the risks they choose need to be weighed carefully against the likelihood of significant harm arising from the situation in question.

There is no generally accepted definition of risk, however it is often perceived in purely negative terms and used with reference solely to the chance of an adverse outcome or event occurring.

Choice and control are what everyone wants for themselves and those they care for but an increasing fear of being blamed if things go wrong has led to high levels of risk aversion. This very low tolerance of risk can act to dramatically reduce the ability to exercise choice and control of people who use services.

Changing this situation entails service providers and workers supporting people who use services to take control, and safely make informed decisions. At the same time, service providers and workers must be empowered to begin 'Learning to live with risk'. To work effectively, social care and healthcare practitioners and people who use services must be empowered to work and live with appropriate levels of risk.

The *'Common Core Principles to Support Self Care'* provides the underpinning values that need to be the bedrock for service providers in addressing these issues. Building on this foundation, the *Learning to live with risk* resources will help service providers begin to develop an appropriate risk policy that will be their cornerstone for supporting both practitioners and people who use services.

Such a risk policy must be a clear statement of purpose. It should be written so that people who use services will read it and understand it. It should be published widely, as it is far, far better to deal with issues before actual events occur, and it must offer a clear framework for risk management for people who use your services and for practitioners. Equally, your risk policy must make clear that you cannot predict the future.

The *Learning to live with risk* resources will assist you on your journey towards delivering greater personalisation, choice and control, at the same time as supporting the development of an even more capable, responsive, skilled and well-trained workforce.

1.0 Why focus on risk now?

Supporting people who use care services to take informed risks has been at the forefront of national policy for the past five years as an essential element of personalisation, and encouraging 'choice and control'. 'Providing real choice and control for people who use social care means enabling people to take the risks they choose, particularly in the use of self-directed support and personal budgets.' (SCIE 2010)

Our health, our care, our say (DH 2006) directed the focus of care services toward empowering people to exercise 'choice and control', emphasising 'person-centred planning and self-directed support'. When consulted, people had made it clear that was what they wanted for themselves and for the people that they cared for.

That white paper also gave a commitment to develop a risk management framework to enable people to take greater control over decisions about the way they want to live their lives.

The first part of this framework, general guidance for 'anyone supporting adults using social care within any setting' on 'Independence, choice and risk: best practice in supported decision making', was issued by the Department of Health (DH, 2007), and can be considered alongside more focused guidance on supporting choice and managing risk for particular groups such as people using mental health services or people with dementia. (DH 2007b, DH 2010a)

The guidance is open about the potential downside of risk – 'Some choices might involve taking risks and while this can be a positive thing, it can also pose questions over people's safety, the safety of others and who is ultimately responsible if something goes wrong.'

The Coalition Government has given renewed emphasis to personalisation and the management of risk. "With effective personalisation comes the need to manage risk for people to make decisions as safely as possible", and "As we pick up the pace on personalisation, we need to ensure that this includes the most vulnerable members of our society, including those who may lack capacity. With effective personalisation comes the need to manage risk for people to make decisions as safely as possible. Making risks clear and understood is crucial to empowering service users and carers*, recognising people as 'experts in their own lives'." (DH 2010b)

SCIE meanwhile has pointed up some areas of potential concern that would need to be addressed in taking forward the personalisation agenda:

- the possibility of increased risk to those already shown to be at risk of abuse or neglect
- the possibility that people using services and their carers, may be reluctant to take advantage of new opportunities for choice and control because of fear of potential risks
- organisational and professional risk-aversion which can hinder choice, control and independent living
- practitioners possibly not being confident about sharing responsibility for risk if their organisation does not have a positive risk enablement culture and policies. (SCIE 2010)

* 'Carer' is used throughout to mean family and friends who provide social care support, as distinct from social care workers and volunteers.

2.0 What makes us so risk-averse?

There is a view that minimising risks or even avoiding decisions is the safest strategy to employ. For many of us 'risk equals harm.' This may be encouraged by concerns such as that:

- people may choose to make 'unwise decisions' for which the service may be held responsible
- many people don't have a good understanding of the choices they are considering and the risks involved, so they may not have the capacity to make a judgement
- safeguarding surely requires us to avoid exposing vulnerable people to unnecessary risks?

There may be undesirable and serious consequences for us as practitioners or service providers if 'something goes wrong':

- there may be people looking to find someone or some organisation to blame
- there may be anger from some carers and others who may say "we warned you that this would happen and you didn't listen"
- a service could be sued, and could be found 'negligent' and have to pay damages
- there could be criminal proceedings
- you might have to give evidence to a Coroner's enquiry
- the service could be the focus of enquiries and inspections by the regulation authorities, the Health and Safety Executive, commissioners and contract managers
- the service may experience problems with insurers covering claims and suffer increased insurance costs
- unwelcome media attention could result
- you might suffer a loss of reputation
- practitioners' career prospects could be adversely affected
- staff morale might drop and you might experience high staff turnover
- the business might suffer losses or additional costs and be exposed to financial risk.

Concern that these may happen to you if you support people to make choices is perhaps understandable. It is not hard to see why individual practitioners and services may react by failing to encourage choice and adopting an overly cautious approach to risk.

3.0 Risk-aversion analysed

Studies by Taylor (2006) of a broad range of professionals involved in the long-term care of older people have shown that they conceptualized risk and its management according to six paradigms "that seemed to be in a state of reciprocal tension."

Six Paradigms		Risk Areas
1.	Balancing benefits and harms	Choice and empowerment
2.	Identifying and meeting needs	Needs for services
3.	Minimizing situational hazards	Health and safety
4.	Protecting the individual and others	Safeguarding
5.	Accounting for resources and priorities	Eligibility and resources
6.	Wariness of lurking conflicts	

The first five identified demonstrate the real expectations put onto practitioners through legislation, regulation, or organisational constraint, and correspond to 'risk areas' identified in much of the literature on care services. Services must discover which one – or ones – face them in any given situation. In addition to the tensions that may arise between the "risk paradigm" areas, care workers experience a "wariness of lurking conflicts." That is their concern at being at risk themselves—a practitioner's response to dealing with the "blame culture" and a "sixth sense of professional danger". The same 'lurking wariness' – and with it varying degrees of risk-aversion – is likely to be experienced by managers, commissioners and service provider organisations, though the particular perceived "lurking conflicts" may differ.

4.0 Overcoming risk-aversion

A service that adopts a 'safety first' approach and that does not appropriately support people to have choice and control will be "a major inhibiting factor in achieving good outcomes for people." In fact there is good reason to believe that "the most effective organisations are those with good systems in place to support positive approaches rather than defensive ones." (Taylor 2006)

As well as being more effective, organisations that can demonstrate good practice that is established on a foundation of professional standards will be in the best position to respond successfully to legal challenge (Carson & Bain 2008) and to the other concerns listed above.

To have confidence in this assertion we need to understand:

- the relevant issues in law and how to best, first, to avoid and, second, to prepare for, legal challenge
- what is meant by 'risk' and what is involved in 'risk decision making'
- the positive benefits of managing risk effectively in an organisation with a risk-decision policy.

5.0 Risk and the law

The two legal concepts most closely associated with 'risk' are 'recklessness' and 'negligence'. The former is most closely associated with criminal law, and therefore requires a case to be proven 'beyond reasonable doubt'. If proven the court can impose a suitable 'punishment'. Negligence is associated with civil law where the court has only to decide 'on the balance of probabilities' and then has the power to determine the level of 'compensation'. As the likelihood of care providers being charged with a crime as a consequence of the outcome of risk decisions taken in a professional capacity is considered by experts in the field to be very low (Carson & Bain 2008), our focus here will be on issues relating to civil proceeding. However, for those interested, a detailed account of the relevant criminal law issues can be found in Carson and Bain.

If care providers do find themselves facing legal action as a result of a risk decision, it is more likely to be through a civil action for negligence. It should be noted that liability may be demonstrated whether the risk decision involved action or inaction—doing nothing is a decision.

Care providers are vicariously liable for the negligent acts of their employees, provided those acts are related to their employment (Carson & Bain 2008). If negligence is discovered it is the employer who must pay the compensation. As civil law seeks to 'compensate', an action is more likely to be taken if it is believed that the named party has sufficient funds to meet the compensation requirements. As care provider organisations carry insurance, and may have greater financial resources than many front-line practitioners, they are more likely be named in civil proceedings. There is little point in suing someone who cannot pay any anticipated compensation.

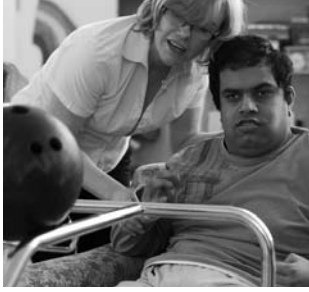
In a civil action about negligence, five requirements have to be met (Carson & Bain 2008):

1. You must have owed a *duty* of care to the person injured (victim)
2. You must have broken the *standard* of care that applies under that duty of care
3. Your breach of the standards of care must have *caused* the victim's losses
4. The losses which you caused must be of a kind that the law compensates
5. Those legally recognised losses must have been reasonably foreseeable.

If any one of these five requirements (or tests) is not satisfied then there can be no liability in the civil law of negligence.

However, to sue you in the civil courts for making a negligent decision, a claimant only has to have a more believable version of events than yours, or on the 'balance of probabilities' as it is more technically stated.

If an organisation or individual can demonstrate that their decision and the processes involved in reaching it were, as a matter of fact, consistent with contemporary professional practices, then they have not been negligent. If they can demonstrate that fact with ease then fewer people will begin proceedings against them, because it will be clear that they will lose and have to pay higher legal costs.



To demonstrate the consistency of its actions with professional practice, it is advisable for an organisation to have a risk-decision policy, often referred to as a 'Choice, Empowerment and Risk' (CER) policy.

In practice, competent risk-takers have only one thing to fear from the law: being unable to prove the facts of their case.

"Many people believe the law makes risk-taking more difficult. This belief is wrong: although the law requires reasonable professional conduct, it actually supports risk-takers." (Carson & Bain 2008)

Always remember the importance of being able to prove the facts of your case. Good record keeping will not only help you prove your version of the facts, if that should be necessary, but it will also help you to work through the complexities of risk-taking and maximise your opportunities to learn from the experience, whether it leads to harm or success.

Carson & Bain also note that the 'standard of care' is what a responsible body of co-professionals would do, which may be determined by the judge calling expert witnesses to give evidence about current professional practice. If there is disagreement about this between different expert witnesses the judge has to resolve such disputes.

If an employee breached the standard of care but did not break any of the four other requirements they cannot be sued for negligence, but the employer or professional body would be able to criticise their conduct and take action. Organisations should act on poor-quality decisions, amounting to professional misconduct, irrespective of whether any harm results. Failing to do so could cause problems in the future and contribute to a system or culture that does not learn from its mistakes.

An alternative to suing someone for negligence could be making a formal complaint or establishing a formal enquiry. If this then finds that the standard of care has been broken they can declare blame and responsibility.

The Department of Health's *Risk guidance for people with dementia* (DH 2010a) also provides helpful advice, intended to allay anxieties about supporting risk-decisions, on the key factors that underpin 'defensible decisions'. It says that an action or decision is deemed defensible if an objective group of professionals would consider that:

- all reasonable steps have been taken
- reliable assessment methods have been used
- information has been collated and thoroughly evaluated
- decisions are recorded, communicated and thoroughly evaluated
- policies and procedures have been followed
- practitioners and their managers adopt an investigative approach and are proactive.

6.0 Working with risk

Negative conceptions of risk

There is no generally accepted definition of risk, however it has often been defined purely in negative terms and used with reference solely to the chance of an *adverse* outcome or event occurring. (Carson & Bain 2008)

This observation is confirmed in *Independence, Choice and Risk* (DH 2007a) which sees it as contributing toward risk-averse behaviour:

"Choice and control are what everyone wants for themselves and those they care for, but sometimes the decisions they make may seem to others as too risky. Risk is a concept that tends nowadays to have mainly negative connotations. We live in a world where, when things go wrong, the media and society in general are quick to look for someone to blame, and this is particularly the case when people using health and social care services are involved. But avoiding risk altogether would constrain the choices people can make."

Choice, rights and responsibilities

To make good choices, people need to understand the consequences and take some responsibility for them. So services should promote a culture of choice that entails responsible, supported decision-making.

The Better Regulation Commission's report on risk calls for a redefinition of society's approach to risk management, to recognise that, within the right circumstances, *risk can be beneficial*, balancing necessary levels of protection with preserving reasonable levels of choice and control. (BRC 2006)

Capacity and consent

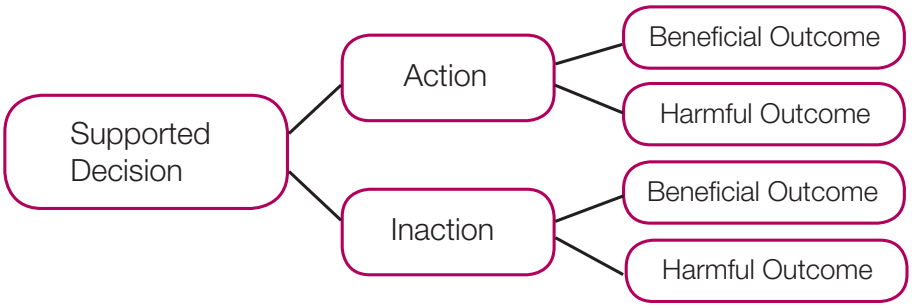
A person who has the mental capacity to make a decision, and chooses voluntarily to live with a level of risk, is entitled to do so. The law will treat that person as having consented to the risk and so there will be no breach of the duty of care by professionals or public authorities.

Where services are risk-averse and as a consequence fail to empower people, this "Encourages individuals to be passive recipients and not to speak up. Services often only intervene when things become critical."

(ADASS/SWRIEP 2010) Risk-aversion can similarly have adverse consequences for people with dementia: "Lowering or eliminating the risks of activities or arrangements that are important to people may reduce some risk but at the potential expense of their happiness and fulfilment. They may also affect chances of re-enablement or rehabilitation, such as regaining abilities to walk or to go to the toilet independently." (DH 2010a)

Positive risk-taking or 'risk enablement'

Nothing Ventured Nothing Gained: risk guidance for people with dementia (DH 2010a) contrasts what it refers to as broader and narrower approaches to risk. Broader definitions move away from negative notions of risk towards the idea of 'positive risk taking' in which part of the process of measuring risk involves balancing the positive benefits that are likely to follow from taking risks against the negative effects of attempting to avoid risk altogether.



The risk decision options that people will tend to choose and that we will tend to support actively – or through inaction – are those where the potentially beneficial outcomes outweigh the potentially harmful outcomes.

As well as evaluating the balance of negative and positive outcomes, however, a risk-decision needs also to take account of the additional dimension of 'likelihood' (DH 2010b). A decision which is considered to involve some possibility of a harmful outcome may be judged to be worth taking for the possible beneficial outcomes if the likelihood of the negative outcome is extremely low. Conversely, even if the *likelihood* of a harmful outcome is very low, if the harm in question is considered to be very great then the action may be considered inadvisable.

Toward a more balanced definition of risk

This leads us toward an understanding of risk that includes the concepts of *uncertainty*, *outcomes* that may be *harmful* and/or *beneficial*, and *likelihood* which is succinctly put in the following definition:

"Risk is defined as the uncertainty of outcome, whether positive opportunity or negative threat, of actions and events. The risk has to be assessed in respect of the combination of the likelihood of something happening, and the impact which arises if it does actually happen." (HMSO 2004)

A version of the resulting model can be seen in this figure from a risk enablement policy developed by Essex County Council.

Risk Impact	Critical				
	Major				
	Minor				
	Negligible				
		Hardly Ever	Possible	Probable	Almost Certain
		Risk Likelihood			

(Essex CC, 2008)

Supported decision making: person-centred planning

A person-centred approach will involve working alongside the person to encourage them to use their strengths and resources and to consider with them how their outcomes can be achieved and what risks may be involved.

A person's wishes should not necessarily be over-ruled by someone who thinks they are making an unwise decision. Risks need to be shared—no one person should take full responsibility.

Recording of decisions about choice and risk

An accurate record should always be kept of discussions that take place about areas of choice. Such documentation will be critical to protect the person in making their choices, as well as the position of the provider of care in the event of any complaints or litigation, and will encourage an open discussion with the individual about the consequences of particular choices.

7.0 Sharing power

Putting People First encouraged services to progress the transformation of adult social care through the involvement of people who use services and of carers at every stage (DH 2007c).

When power is shared, services recognise and utilise people's expertise in shaping their own care and encourage their involvement in improving the service on offer. It challenges the dominant role of the professional and shifts the person from the role of passive recipient to that of valued participant in the process, on an individual and collective level. To work effectively, both care practitioners and people using the service must be empowered.

A whistle-blowing policy helps to empower workers and opens up a role for all in monitoring the quality of the service and ensuring people's human rights and dignity are respected. The practitioner workforce should be engaged in judging the risks.

There is a key role for managers in setting and maintaining professional standards.

8.0 Some complex risk-decision areas

Health and safety

There is a legal duty placed on all employers to ensure, so far as is reasonably practicable, the health, safety, and welfare at work of all their employees. In addition, there is a duty to protect the health and safety of other people who might be affected by their undertaking. Fears of breaching health and safety legislation can sometimes prevent people from being supported to do certain activities. The Department of Health guidance, informed by the Health and Safety Executive (HSE) is clear that health and safety legislation should not block reasonable activities, and it commends a helpful five-step guide to risk assessment provided by the HSE. (HSE 2006)

Mental capacity

Considerations concerning a person's capacity to make decisions should be made with reference to the Mental Capacity Act 2005 from which the following principles have been derived (DH 2007a):

- always assume a person has capacity unless established otherwise
- do not treat people as incapable of making a decision unless you have tried all you can to help them
- do not treat someone as incapable of making a decision because their decision may seem unwise
- do things or take decisions for people without capacity in their best interests
- before doing something to someone or making a decision on their behalf, consider whether you could achieve the outcome in a less restrictive way.

Safeguarding

There is a delicate balance between empowerment and safeguarding, choice and risk. It is important to consider when the need for protection would override the decision to promote choice and empowerment.
It is essential therefore to engage in proper discussion with the person being supported, be sure they understand the consequences of the action, and document it. (DH 2007a)

Carers

Carers are vital to people living successfully in the community, though there may sometimes be understandable tensions for the carer in relation to their own needs and the interests of the person they care for. One person's needs, however, ought not be given automatic priority over another's, and the choices that each wish to make need to be considered and acknowledged. Where people's choices conflict with those that carers or family members might have made on their behalf, it is important to balance both sets of needs and ideally find a resolution acceptable to all parties.

9.0 A broader focus for employers of risk-taking practitioners

Employers in adult social care have a number of key areas of focus for policy and procedures. Empowering people who use services so that they can exercise choice and control with the support of risk-taking practitioners will require employers to be alert to policies, procedures, standards and operational challenges.

As an employer you will have policy and procedure about:	**As an employer of risk-taking practitioners you will need to be alert to:**
■ Recruitment	■ Professional standards
■ Reward	■ Inspectorate standards
■ Induction and training	■ Better ways of organising work
■ Supervision	■ Blame
■ Health and safety	■ Value conflicts
■ Equalities	■ Retention
■ Lone working	■ Consistency and continuity
■ Violence at work	■ Morale and satisfaction
■ Whistle-blowing	■ Dangerous people
■ Workload	■ Continuing professional development
■ Staffing ratios	■ Celebrating good practice
■ Skill mix	

10.0 Developing a model risk-taking policy

In developing a model risk-taking policy, consideration will need to be given to:

- The values and principles to be relied on by risk-taking practitioners – adoption (adaptation) of the Common Core Principles to Support Self Care (SfC/SfH 2008) is recommended.
- A statement of purpose—state the obvious, emphasising difference and exceptional aspects of your service.
- The beneficial outcomes you are expecting to achieve—their relative importance and the likelihood of achieving them.
- The applicable professional standards—in social work and in wider social care.
- Identified constraints—what you don't do and why.
- A position on controversial issues, especially where public and professional attitudes may differ.
- An associated procedure—either attach it or say where it can be found.
- Endorsement of professional associations, acknowledgement of where values, principles and standards have been drawn from and identification of consultations undertaken and contributions made to the final policy.

Style: It should be written so that people who use services will read and understand it.

Publicity: Let the public and press know about it—it's better to deal with issues before actual events.

Hindsight: Make sure your policy offers a clear framework of risk for both people using the service and practitioners, but make it equally clear that you cannot predict the future.

References

ADASS/SWRIEP 2010	*A safeguarding and personalisation framework* (ADASS and South West Regional Improvement and Efficiency Partnership, 2010)
BRC 2006	*Risk, responsibility and regulation – Whose risk is it anyway?* (Better Regulation Commission 2006)
Carson & Bain 2008	Carson D, and Bain A, *Professional Risk and Working With People, Decision-making in Health, Social Care and Criminal Justice* (Jessica Kingsley Publishers, 2008)
DH 2006	*Our health, our care, our say, white paper* (Department of Health, 2006)
DH 2007a	*Independence, choice and risk: a guide to best practice in supported decision making*
DH 2007b	*Best Practice in Managing Risk: Principles and evidence for best practice in the assessment and management of risk to self and others in mental health services*
DH 2007c	*Putting people first: a shared vision and commitment to the transformation of adult social care* (DH 2007) www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_081118
DH 2010a	*Nothing Ventured Nothing Gained: Risk Guidance for people with dementia*
DH 2010b	*A Vision for Adult Social Care: Capable Communities and Active Citizens*
HMSO 2004	HM Treasury, Orange Book: *'Management of Risk: Principles and Concepts.'* (HMSO, 2004)
HSE 2006	*The Health and Safety Executive, Principles of sensible risk management*, www.hse.gov.uk/risk/principlespoints.htm
SCIE 2010	*Enabling risk, ensuring safety: Self-directed support and personal budgets* (SCIE, At a glance 31 - November 2010, www.scie.org.uk)
SfC/SfH 2008	*Common Core Principles to Support Self Care*, Skills for Care & Skills for Health, www.skillsforcare.org.uk/developing_skills/selfcare/self_care.aspx
Taylor 2006	Taylor B., *Risk Management Paradigms in Health and Social Services for Professional Decision Making on the Long-Term Care of Older People*. (BJSW, 36, pp.1411–1429, 2006)