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COMMUNITY LEGAL CENTRE

Balancing dignity of risk, human rights and duty of care in practice

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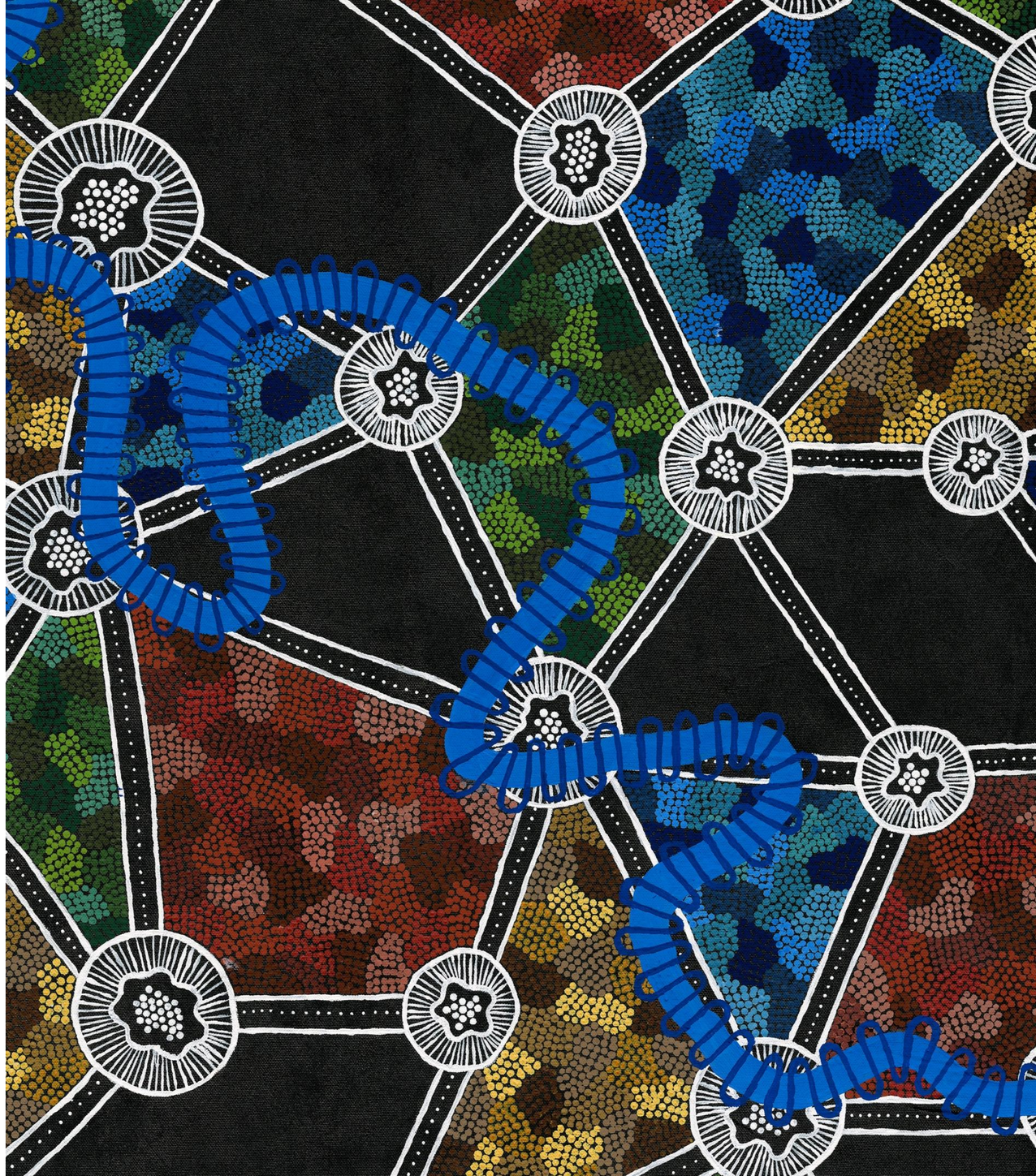
Acknowledgement of Country



Balancing dignity of risk, rights and duty of care?

Tension of promoting autonomy versus perceived risk (of harm)

Are these concepts of risk, dignity of risk, duty of care and rights compatible or incompatible?

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By the end of this session, you will:

Case study introduction

Keep this in mind as we go through the theory and discussion during the session.

You may want to jot down notes that seem relevant to this case study throughout

I have deliberately added in pointers throughout so if you listen, they will help you answer the activities based on Merv's case

We will unpack the case study at the end, taking into account all the concepts.

Merv lives in a rural community but was recently admitted to hospital after a fall at home. Whilst in hospital, he has been diagnosed with Parkinson's dementia.

He is 70 years of age.

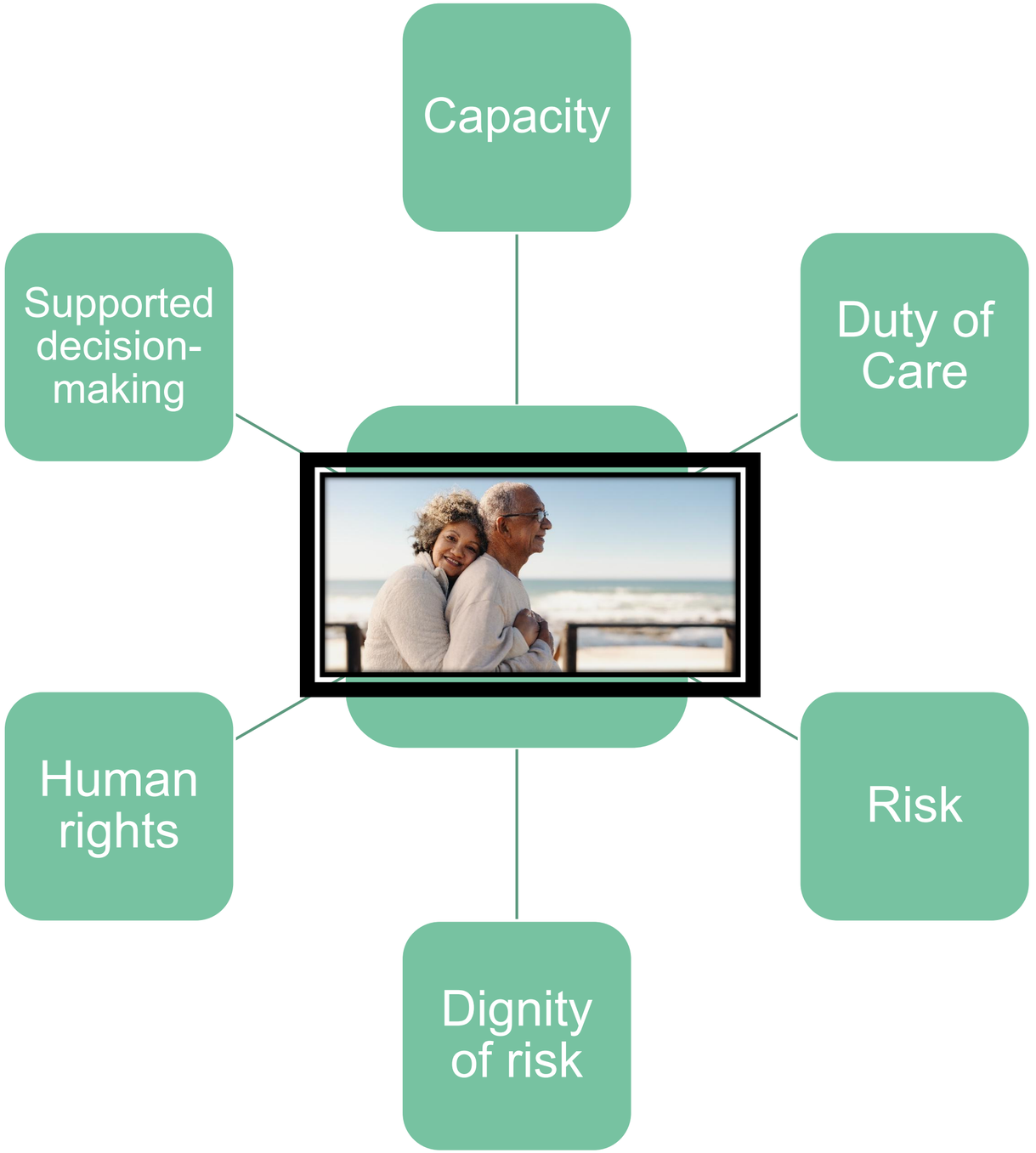
He has an EPOA and his daughter, Sue, is the appointed attorney for personal/health and financial.

He has a girlfriend (50 years) and expresses a wish to go on an overseas trip with her as a 'last hurrah'. He will pay for the girl-friend.

His daughter says this will 'not be good for him, will cost too much and is risky and may lead to harm', so she advises the staff that she does not consent to the trip or relationship.

She says that they have a duty of care to refuse discharge home and he should be placed into an aged care facility.

The Conceptual Balancing Puzzle: where do they all fit?



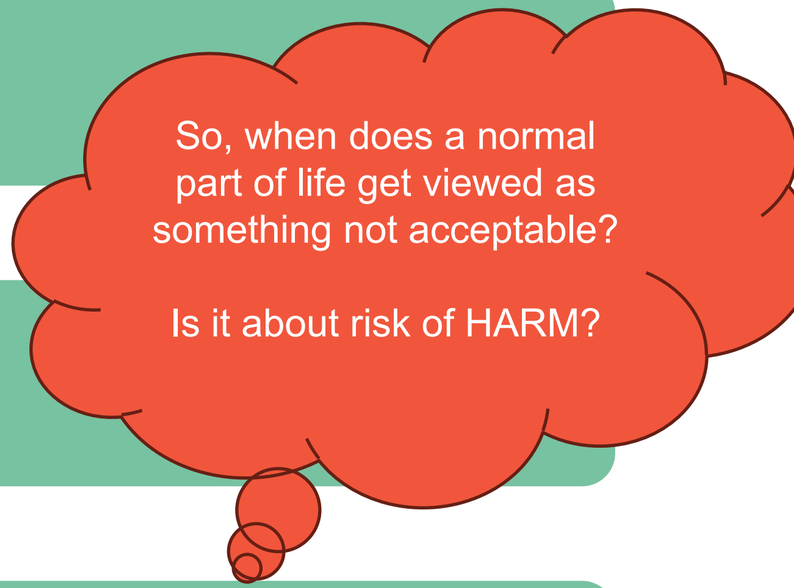
Let’s start with risk. What do we know about risks?

Risk is part of everyday life

- What is something risky that you did today?

Risks are on a continuum

- Some risks require more thinking, discussion and reflection



Accepting risks can enhance quality of life

- What is an example when that has happened for you?

Taking risks can help growth and risks can also be countered with safeguards

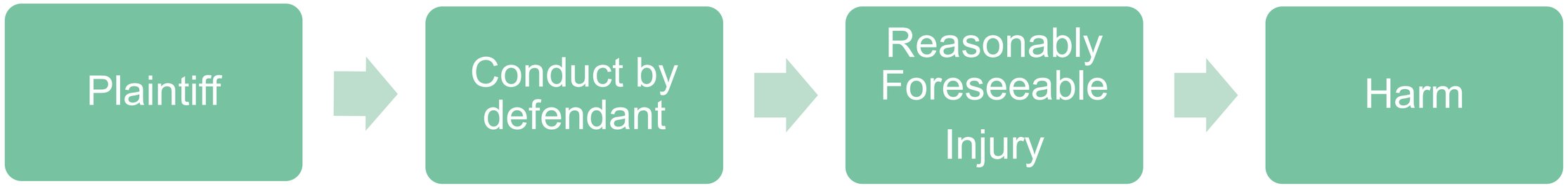
It is easy to say that we respect choice and people taking risks

But what may be the feared outcome that gets in the way?

- ‘The person may go home and break their hip’
- ‘They may choke on a piece of food’
- ‘They may buy alcohol or drugs’
- ‘They may spend their money on clothes rather than food’
- ‘They may fall’
- ‘They may burn down the house’

And that fear of adverse outcomes often gets viewed though the lens of duty of care to protect from all current and future harm – so let’s explore some basics around duty of care

What is duty of care?



Recognised relationships that give rise to duty of care:

- Landlord and tenant
- Doctor to patient
- Public authority to a member of the public etc.

Where defendant has a high degree of control over the risk and there is a special dependence or vulnerability on the part of the plaintiff, the defendant will be said to owe a ‘non-delegable duty”.

Cannot escape liability by passing the duty to take care for the plaintiff’s safety to a third party.

Example: Hospital to patient

QLD Law Handbook, Duty of Care, updated 3 July 2025, accessed 08/07/2026

So how far does a duty of care extend?

- Duty of care does NOT mean that you must protect the person from themselves or their own choices.
- Every person has the right to make decisions within their capacity to do so and so they may choose to make a ‘risky’ decision that you don’t agree with and that is okay.
- It is not about erring on the side of caution to prevent all risks – RISK AVERSE

A bit about capacity for decision-making or ‘vulnerability’ as pitfalls

Another elephant in the room……At times like this, capacity for decision-making or vulnerability gets raised as a way to question a decision that someone does not like

So often if people don’t like a decision that is being made by an older person, they may start assessing their capacity to make the decision. *“They are making an unwise decision, they must lack capacity…….”*

Or a false belief that they have a ‘vulnerability’ such as dementia and being older ….. and so automatically cannot make the decision…….

Defences

Voluntary assumption of risk

- A defendant can avoid liability by establishing ‘voluntary assumption of risk’ by the plaintiff. The defendant must show that the plaintiff:
  - was fully aware of the risk involved in the activity
  - had a full appreciation and comprehension of the nature and extent to the risk
  - voluntarily accepted the whole of that risk.
- If the risk is an obvious risk, the plaintiff is presumed to have been aware of the risk unless the plaintiff proves otherwise

Echoes of supported decision-making ?

QLD Law Handbook, Duty of Care, updated 3 July 2025, accessed 08/07/2026

When did it all change? Time-line and key points of changes to service provision – focus on Rights to Dignity of risk, Autonomy and Supported Decision-making

Convention on the Rights of Persons with Disabilities – ratified Australia 2008

Article 12. '… States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life …

States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity ...

Guardianship and Administration Act Qld 2000 updated 2019

General Principle 2: same human rights and fundamental freedoms

- in particular, (2)(a), 'respect for inherent dignity and worth, individual autonomy (including the freedom to make one's own choices) and independence of persons...'

General Principle 3: Empowering adult to exercise human rights and fundamental freedoms

- 3(a) empowering an adult to exercise the adult's human rights and fundamental freedoms.

General Principle 4: Maintenance of adult's existing supportive relationships

- 4(1) the importance of maintaining an adult's existing supportive relationships must be taken into account and
- 4(3) the role of families, carers and other significant persons in an adult's life to support the adult to make decisions should be acknowledged and respected.

General Principle 8: Maximising an adult's participation in decision-making

- 8(1) an adult's right to participate to the greatest extent practicable, in decisions affecting the adult's life must be recognised and taken into account.
- 8 (2) an adult must be given the support and access to information necessary to enable the adult to make or participate in decisions affecting the adult's life. 3) support to communicate
- 8(6) an adult is not to be treated as unable to make a decision about a matter unless all practicable steps have been taken to provide the adult with the support and access to information necessary to make and communicate a decision.

Human Rights Act Qld 2019

A person has the right –

(a) not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and

(b) not to have the person's reputation unlawfully attacked.

The right to privacy is broad and protects various aspects of a person's private life, including:

privacy, personal information and data collection

physical and mental integrity

individual identity, including appearance, clothing and gender

sexuality

personal autonomy

establishing and developing meaningful social relationships

family

home

correspondence (for example, mail or communications).

This right protects against unlawful interference (violates another law) and arbitrary interference (may be lawful but is unreasonable, unnecessary or disproportionate).

Royal Commission on Violence, Abuse, Neglect and Exploitation of People with Disability – Australia – updated report September 2023

Recommendation 6.6

'States and territories which have not already done so should review and reform their guardianship and administration legislation to include the following supported decision-making principles ...'

Principle 1 – Recognition of the equal right to make decisions …

Principle 2 – Presumption of decision-making ability …

Principle 3 – Respect for dignity and dignity of risk …

Principle 4 – Recognition of informal supporters and advocates …

Principle 5 – Access to support …

Principle 6 – Decisions directed by will and preferences …

The Age Care Act (C'th) – commenced November 2025

The Statement of Rights makes sure older people can:

make their own decisions about their own life

have their decisions not just accepted, but respected

get information and support to help make their own decisions

communicate their wishes needs and preferences

feel safe and respected

have their culture and identity respected

stay connected with their community.

The new Act enforces obligations of aged care providers and workers

Dignity of risk

'Dignity of risk' refers to the concept of affording a person the right (or dignity) to take reasonable risks; acknowledging that impeding this right can suffocate personal growth, self-esteem and the overall quality of life (Ibrahim & Davis 2013).

- You can disagree with their decision
- You can tell them if you think it is a good or bad decision
- But you cannot make the decision for them
- Right to fail and make mistakes
- Risk comes with a bad decision but sometimes even with a 'bad decision' you may be lucky and not have adverse consequences

Guardianship and Administration Act Qld 2000

Section 5

An Adult's right to make decisions is fundamental to the adult's inherent dignity

Resources: Aged Care Quality and Safety Commission – what is Dignity of risk?

Ibrahim JE, Davis MC. Impediments to applying the 'dignity of risk' principle in residential aged care services. Australas J Ageing. 2013 Sep;32(3):188-93. doi: 10.1111/ajag.12014. Epub 2013 Jul 15. PMID: 24028460.

Dignity of risk and duty of care (from Australian Government Department of Health and Aged Care)

When people want to participate in activities and understand the risks involved, staff should be vigilant but not put blocks in their way by being overly cautious simply because we are concerned about our duty of care.

Yes, we acknowledge our duty of care to people accessing our services, but it's not our right to control their actions or decisions, but rather to help by providing support and information so they can make 'informed choices about their care and services and live the life they choose.'

Pulling the threads together through a case

Activity 1

Merv lives in a rural community but was recently admitted to hospital after a fall at home. Whilst in hospital, he has been diagnosed with Parkinson's dementia.

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Activity

Does Sue have the right to make these decisions re discharge, RACF, trip or relationships **now**?

Write down some points as a group.

What evidence and facts are you relying upon to support your reasoning?

Activity 1 unpacking : Did we get them all?

Being 70 does not mean has capacity issues

Having dementia does not automatically mean does not have capacity

EPOA can only make decisions about personal and health when:

a) decision is needed and b)principal does not have capacity at that time to make that decision

Age does not restrict relationships

Deciding to travel and to have a relationship is a personal choice

His ability to afford travel and to pay for GF is a financial decision

Must presume capacity to make decisions – so daughter has not place to consent (unless he does not have capacity for the decision and it is proven)

What is daughter's motivation for her comments – fear of harm or other e.g. not want him spending money or potentially re-marrying? Elder abuse

He has capacity to make these decisions and so if the hospital follows the daughter's position, they are abusing Merv's right to autonomy and choice

Unwise decision does not equal lacks capacity

Anything missed?

Activity 2

Merv lives in a rural community but was recently admitted to hospital after a fall at home. Whilst in hospital, he has been diagnosed with Parkinson's dementia.

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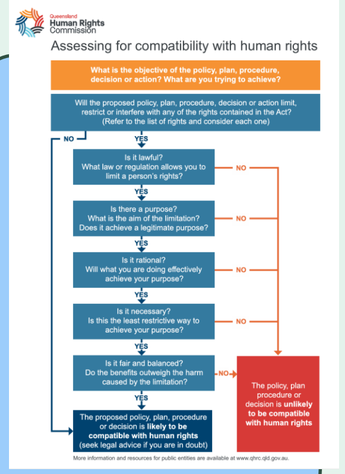
Activity

Use the QHRC Framework Flowchart to consider what rights are being considered and whether Sue is acting compatibly with human rights.

Reviews supported decision-making options, rights and rights' compatibility



Activity 2: Applying the QHRC Framework to Sue's decision and role of hospital

What is the objective of the decision?	• Sue thinks it is too risky for Merv. Wants to keep him safe from harm. May be other reasons such as elder abuse.
Will the proposed plan or decision limit, restrict, interfere with any of the Human Rights in the Act?	• Yes – right to autonomy /right to participate in decision-making and right to choose their own life/right to maintain relationships
Is there a purpose? What is the aim of the limitation? Does it achieve a legitimate purpose?	• Aims to prevent any risk of harm ? but is controlling Merv's wishes. Prima facie, it is not legitimate as Merv has capacity to express and follow through with his personal choices/decisions. We must presume he has capacity. An unwise decision does NOT mean he lacks capacity. And we have not evidence of risk of harm.
Is it rational? Will what you are doing effectively achieve your purpose?	• Just refusing is not rational. Prevention from harm can happen if Merv is controlled and not allowed to follow his dreams. His quality of life may be enhanced by the travel. • Re risk of travel: unclear as we don't know enough. Where is Merv intending to travel? How is he intending to travel?

Continued

Is it necessary? Is there a least restrictive way to achieve purpose?	• Least restrictive way: Find out more about Merv's plans/ explore how to support the plans in a way that enables risk but does not prevent him. He may have already considered the financial as well as health aspects of the travel. Having a relationship is a personal decision and not one that can be countermanded unless Merv lacks capacity for that particular decision. Communication is key. Freely and voluntarily?
Is it fair and balanced? Do the benefits outweigh the harm caused by the limitation?	• No. Just refusing to allow him to go is neither. It may make Sue feel better but not Merv. There is no evidence that Merv will get into trouble overseas and his GF may be a help rather than a risk here.
Is the proposed decision likely to be compatible with human rights?	• no

Summary

Some key take-aways

- People have the right to live the life that they choose.
- Policy and legislation has now shifted focus to people's rights rather than a conservative risk adverse approach.
- It should become usual practice to support people to make their own decisions – move towards helping them understand their options by providing information and in a way that maximises their participation.
- Substitute decision-making as a last resort
- Respect their rights to take risks – move to a risk enablement model
- You may not like their decision but as long as they have capacity to make that decision, even with support, then they can choose
- Reflect on your own perceptions of risk and harm and how it may adversely affect the rights of older people
- Duty of care is not a contradiction to rights and dignity of risk. They can complement each other.

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