



Victorian Equal Opportunity
& Human Rights Commission

Rights and risk

> How human rights can influence and support risk management for public authorities in Victoria



**Risks
ahead**



Victorian Equal Opportunity
& Human Rights Commission

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Rights and risk: How human rights can influence and support risk management for public authorities in Victoria

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Introduction

The Victorian Equal Opportunity and Human Rights Commission (the Commission) engages with a broad range of public authorities in its day-to-day work, from organisations that are involved in policy development, to those delivering services to the Victorian community. A frequent issue that arises in this work is the challenge of considering human rights in risk management activities.

This paper considers how a human rights approach can influence and support risk management for public authorities that have obligations under the *Charter of Human Rights and Responsibilities Act 2006* (the Charter) – from large government departments to small community service organisations. It is designed to start a conversation about the role of human rights in risk management – both by the people who are responsible for developing risk management policies and procedures, and by the front-line workers who are responsible for managing risk on the ground.

The purpose of the paper is to consider the benefits of looking at risk management through a human rights lens, both in terms of outcomes for individuals and the management of organisations. It examines how a human rights approach can help organisations to identify the full range of risks – including by recognising that a breach of a person's human rights is part of the risk that needs to be managed. It also considers how looking at the whole picture, including human rights impacts, can open up options for managing risks in more effective ways.

Since commencing operation six years ago, the use of the Charter has matured. Today, it not only forms part of the legal framework of compliance obligations for public authorities - it prompts organisations to take a proactive, rather than reactive, approach to their operations. In this way, the Charter can positively influence the way an organisation manages risk before a problem arises. This contributes to effective government and better outcomes for the Victorian community.

The Commission is committed to working with public authorities and to helping public sector workers understand the practical impact of the Charter. If you need assistance or would like to discuss how the Charter is relevant to your work, please contact the Commission.

The Commission would like to thank the following people for their valuable contributions in preparing the paper:

- John Chesterman (Office of the Public Advocate)
- Lynne Webber (Office of Professional Practice)
- Bronwyn Naylor (Monash University)
- Anne-Maree Sawyer (La Trobe University)
- Paul Ramcharan (RMIT)
- Liz Samra, Carol Stuart, Mandy Walmsley, Stacey Vandveren (Seniors Rights Victoria)
- Richard Tan (Department of Treasury and Finance)
- Liz Cox and Jane Boag (Victorian Managed Insurance Authority).

The Commission developed this paper as part of its role in providing education about human rights under section 41(d) of the Charter.

The views expressed in the paper are those of the Commission, and do not necessarily reflect those of individual informants.

Recommendations

- The *Charter of Human Rights and Responsibilities Act 2006* should inform Victorian state and local government risk management frameworks.
- Public authorities should consider human rights in their risk management activities to support best practice decision making.
- Relevant oversight bodies should consider the impact of government activities on human rights when they assess legal compliance and effectiveness.

Part one: The human rights framework

The Charter underpins the work of public authorities in Victoria by creating a legal obligation for public authorities to act compatibly with human rights.

The Charter protects the fundamental rights and freedoms of all people in Victoria. It recognises that 'human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom'.¹

The Charter rights

The 20 Charter rights include 'freedoms' that reflect traditional civil liberties, 'substantive rights' that reflect human autonomy and dignity, and 'procedural rights' that apply to judicial and legal processes.

Freedoms

- Freedom from forced work
- Freedom of movement
- Freedom of thought, conscience, religion and belief
- Freedom of expression
- Freedom of association and peaceful assembly.

Substantive rights

- Right to recognition and equality before the law
- Right to life
- Right to privacy and reputation
- Right to protection of families and children
- Right to take part in public life

- Cultural rights
- Property rights
- Right to protection from torture and cruel, inhuman or degrading treatment
- Right to liberty and security of person
- Right to humane treatment when deprived of liberty.

Procedural rights

- Rights of children in the criminal process
- Right to a fair hearing
- Rights in criminal proceedings
- Right not to be tried or punished more than once
- Rights in relation to retrospective criminal laws.

These rights provide a framework to guide decision-making, to manage risks and to ensure the business of government is carried out in a balanced, transparent and accountable way. They can also help improve outcomes for individuals because the Charter requires public authorities to think about the impact they have on people in the Victorian community.

¹ *Charter of Human Rights and Responsibilities Act 2006* (Vic) preamble.

Section 38 of the Charter requires public authorities to act compatibly with human rights by providing that:


“ it is unlawful for a public authority to act in a way that is incompatible with a human right, or, in making a decision, to fail to give proper consideration to a relevant human right. ”

In practice, this means that public authorities have a legal obligation to consider human rights when they deliver services, manage risks, make decisions, develop policies and create laws.

Who is a public authority under the Charter?

- A public official within the meaning of the *Public Administration Act 2004* (for example, a public servant employed in a department or agency, or a person appointed under statute like the Chief Commissioner of Police)
- A body established by a statutory provision that has functions of a public nature (for example, VicHealth, VicRoads, WorkSafe and many others)
- A body whose functions are, or include, functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (for example, a community organisation contracted by the State government to deliver disability services, or an organisation contracted to deliver public transport services)
- Victoria Police
- Courts and tribunals, and parliamentary committee members, when they are acting in an administrative capacity
- Local councils, councillors and council staff as defined by the *Local Government Act 1989*
- Government ministers
- Parliamentary Committee Members acting in an administrative capacity
- Any entity declared by government regulations to be a public authority.

The Charter is also part of the employment framework for Victorian public sector employees. The values in the Charter are reflected in the *Public Administration Act 2004* (as a public sector value) and the *Code of Conduct for Victorian Public Sector Employees* (as an employment principle). This means that public sector employees must respect and promote the human rights in the Charter as a condition of employment, and failing to do so can be misconduct.

 **Discussion point 1 - Which human rights are relevant to your work and the people you work with?**

A framework for limiting and balancing rights

The Charter recognises that in some cases, human rights have to be limited or balanced with other rights. An organisation may need to make decisions that limit a person's rights when it manages risk.

Under the Charter, a human right may only be limited if the limitation is lawful, reasonable and proportionate.² In a risk management context, this means that any proposed restriction on human rights must be proportionate to the level of risk, and reasonably tailored to address the risk.

When developing proposals, organisations should consider whether there is any other option reasonably available to achieve the policy purpose that imposes fewer restrictions on people's human rights. Limitations on rights must only go as far as necessary to achieve a legitimate aim.

² *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

Case study – Balancing human rights in guardianship decisions

This case study illustrates how the Charter provides a framework for balancing different rights and interests.

“Vera lives in a nursing home. She is moderately wealthy. She executed a financial Enduring Power of Attorney (EPA) to one of her sons, Marvin. Marvin then used the EPA to buy himself a new car with Vera’s money. VCAT revoked the EPA. Whenever Marvin visited his mother he pestered her for money. Staff at the nursing home caught him threatening Vera who was scared. The Public Advocate was appointed as Vera’s guardian to make decisions about access to Vera. Vera said that she wanted to see Marvin despite his threats.”

Vera’s guardian made a decision to restrict Marvin’s access to his mother so that he was only able to visit her when supervised or in a public area within the nursing home. In making her decision, the guardian had regard to Vera’s rights under the *Guardianship and Administration Act 1986* (Vic), as well as Vera’s rights under the Charter including the right to privacy (section 13), freedom of association (section 16), protection of families (section 17), and the right to liberty (section 21). The guardian’s decision also affected Marvin’s rights to privacy, freedom of association and the protection of families.

The purpose of placing restrictions on Vera’s right to see Marvin was to protect her from Marvin’s threats. The limitation was reasonable and justified because it did not prevent Vera from seeing Marvin, and was proportionate to the purpose of the limitation (to protect Vera).

Source: *Office of the Public Advocate, Submission to the Review of the Victorian Charter of Human Rights and Responsibilities Act* (July 2011)



Discussion point 2 – How do you ensure that risk management is proportionate and tailored to addressing the risk being managed?

Part two: The risk management framework

Risk management in the public sector

Risk management is an integral part of the work of public authorities in Victoria. However, it was not until the major corporate crashes of the late 1980s and early 1990s that the use of risk management in the public sector increased and broadened in scope.³ Today, risk management is not limited to financial risks, but is applied across all parts of an organisation. Human rights are relevant to this work.

While some organisations and public sector workers will have a greater understanding of risk management than others, this paper sets out the basic risk management framework to provide a background for the broader discussion on human rights.

The definitions of risk and risk management

Risk is 'the effect of uncertainty on objectives'.

Risk management is 'the combination of organisational systems, processes, procedures and culture that facilitate the identification, assessment, evaluation and treatment of risk in order to protect the organisation and assist in the successful pursuit of its strategies and performance objectives'.

Australian/New Zealand Risk Management Standard (AS/NZS ISO 31000: 2009)

In the Victorian public sector, agency heads (including Boards, Chief Executive Officers, and Departmental Secretaries) are responsible for the development and implementation of risk management frameworks and processes.⁴

As a minimum, an agency's approach to risk management must be consistent with:

- The Victorian Government Risk Management Framework (March 2011) (Framework)⁵
- The Australian/New Zealand Risk Management Standard: AS/NZS ISO 31000: 2009 (AS/NZS Standard)
- The directions issued under the *Financial Management Act 1994* (Vic).

³ Victorian Auditor-General's Office, *Good practice guide: Managing risk across the public sector* (2003), 15.

⁴ Department of Treasury and Finance, *Victorian Government Risk Management Framework* (2011), 4.

⁵ Note: the *Victorian Government Risk Management Framework* is currently being reviewed.

The Victorian Government Risk Management Framework

The Framework provides a common risk management standard for Victorian public sector agencies. It refers agencies to the AS/NZS Standard, which sets out a generic process for identifying, analysing, evaluating and treating risks. An agency's approach to risk management must be consistent with the AS/NZS Standard.

The Framework acknowledges that 'risk needs to be considered and addressed by everyone, whether positive (opportunities) and/or negative (threats). Management of risk should be an integral part of an organisation's culture, reflected in the various policies, systems and processes used to ensure sound financial management and efficient and effective service delivery'.⁶

In addition to agency risks, the Framework emphasises the need to address inter-agency and statewide risks. The Victorian Auditor-General's audit report, *Managing Risk Across the Public Sector: Toward Good Practice*, highlights the increasing practice of 'joined-up government' and explains it as 'public sector organisations working together, across organisational boundaries, to deliver government services and programs or to share services'.⁷

Source: *Victorian Government Risk Management Framework*.⁸

The AS/NZS Standard states that risk management should create and protect value, be an integral part of organisational processes, be part of decision-making, explicitly address uncertainty, be systematic, structured and timely, be based on the best available information, be tailored, take into account human and cultural factors, be transparent and inclusive, be dynamic, iterative and responsive to change, and facilitate the continual improvement of organisations.⁹

The risk management process

Good risk management requires organisations to:

- Establish the context – understand the organisation's objectives and strategies (including all internal and external factors), and the organisation's risk tolerance and culture that could impact on achieving those objectives
- Identify the risks – determine what, where, why and how risks could arise, and document the risks and the process undertaken
- Analyse the risks – understand the nature of risks, likelihood and consequence, and effectiveness of existing control measures, to determine the level of risk
- Evaluate the risks – determine whether further risk controls/treatments are required to bring the risk exposure within the organisation's risk tolerance level, and prioritise the risks for treatment
- Treat the risks – identify the range of options for treating risks, assess these options, and assign responsibility for, and implement, the treatment plans.

Due to the dynamic nature of operating environments and risks, organisations should regularly monitor and review their risk management processes to ensure that they remain appropriate and effective.

A number of agencies play a key role in providing guidance and support to the public sector about risk management, including the Department of Premier and Cabinet, the Department of Treasury and Finance, the State Services Authority, and the Victorian Managed Insurance Authority. The Victorian Auditor General's Office conducts audits that deal with risk management across the Victorian Government.

Risk management in community services

Risk management has also become increasingly central to the operations of community service organisations. In Victoria, many community organisations also have obligations under the Charter (for example, if they are contracted by the Victorian Government to deliver public services). This means that they also have a legal obligation to consider human rights when they manage risk.



Discussion point 3 - Do your organisation's risk management policies and procedures refer to human rights?

6 Department of Treasury and Finance, above n 4, 5.

7 Victorian Auditor-General's Office, *Managing Risk Across the Public Sector: Toward Good Practice* (2007), 32.


8 Department of Treasury and Finance, above n 4.

9 Australian Government, *Fact Sheet, AS/NZS ISO 31000:2009, Risk Management – Principles and Guidelines* (2010).

Part three: How is risk managed?

What are the risks?

Delivering services to the community and managing the risks involved has become increasingly complex. An organisation may be faced with a number of different risks to its clients, its workers, the organisation and the community. These can include financial risks (such as liquidity, insurance claims, and budget risks) and non-financial risks (such as strategic, operational and legal risks).¹⁰

 **Discussion point 4 - What risks do you manage in your organisation? How do you identify them and respond to them?**

Human rights as risk

Human rights breaches can have serious consequences for an organisation (including its reputation) and can have serious impacts for an individual (such as depriving a person of their liberty). For this reason, possible human rights breaches should be considered as part of an integrated approach to assessing and managing risk.

Being proactive and considering human rights as part of risk management activities from the start makes good business sense – it can help an organisation to meet its legal obligations and it can prevent human rights breaches from happening in the first place. It can also have a positive impact on an organisation's reputation.

The interaction between safety and rights

Occupational health and safety risk is one of the key risks that organisations need to assess and manage. In Victoria, occupational health and safety is governed by the *Occupational Health and Safety Act 2004* (Vic) (OHS Act). The OHS Act requires employers to provide and maintain a work environment that is safe and without risks to the health of its employees and others, as far as 'reasonably practicable'.¹¹

Section 20(2) of the OHS Act sets out the matters that must be considered in determining what is 'reasonably practicable' (such as the likelihood of the risk eventuating, and the degree of harm that would result if it did eventuate). WorkSafe guidelines on the meaning of 'reasonably practicable' state that the 'test involves a careful weighing up of each of the matters in the context of the circumstances and facts of the particular case with a clear presumption in favour of safety'.¹²

The *Charter of Human Rights and Responsibilities Act 2006* (the Charter) interacts with the OHS Act in two different ways. Firstly, under section 32 of the Charter, as far as is possible to do so consistently with its purpose, the OHS Act must be interpreted compatibly with human rights. Secondly, section 38 of the Charter requires public authorities to act compatibly with human rights, including when an organisation makes decisions in relation to occupational health and safety.

10 Department of Treasury and Finance, above n 4, 25.

11 *Occupational Health and Safety Act 2004* (Vic) ss 20, 21 and 23.

12 WorkSafe Victoria, *How WorkSafe applies the law in relation to reasonably practicable – A guideline made under section 12 of the Occupational Health and Safety Act 2004* (2007), 2.

Case study – The use of restraint in Victorian schools

In September 2012, the Commission released a report on the experiences of students with disabilities in Victorian schools. Part of the report examined the use of physical restraint in Victorian schools to manage challenging behaviour.

The Department of Education and Early Childhood Development's (DEECD) Restraint of Student Policy provides that restraint can only be used when:

- the situation is an emergency and the danger of harm to the student and/or others is imminent
- the restraint is used to prevent the student from inflicting harm on him/herself and/or others, and
- there is no reasonable alternative that can be taken to avoid the danger.¹³

The use of restraint in schools engages, and can at times limit, the following human rights under the Charter:

- recognition and equality before the law (section 8)
- protection from torture and cruel, inhuman or degrading treatment (section 10(b))
- freedom of movement (section 12)
- protection of families and children (section 17(2))
- right to liberty and security of person (section 21).

The use of restraint poses a significant health and safety risk not only to the students who are subject to those practices, but also to the staff who administer them.

As noted in the Senior Practitioner's Physical Restraint Direction Paper in relation to disability services:

“ Physical restraint is a very serious form of restrictive practice that limits the human rights of people with a disability. It is associated with a high risk of injury and harm (including death) to those upon whom it is used. It is also associated with a high risk to the wellbeing of employees who administer physical restraint.¹⁴ ”

Using a human rights lens to consider options for managing challenging behaviour can prompt schools to consider *all* of the risks involved (including the risks to the student who is subject to the restraint and the person who administers it) and how those risks can be managed in the least restrictive way. This opens up a range of options for managing the 'risk'.

The DEECD has developed a range of new resources to support schools to manage challenging behaviour. For example the Student Engagement and Inclusion Guidance 2014 provides guidance on developing a Student Engagement Policy, promoting positive student behaviour (via the School Wide Positive Behaviour Support program) and responding to challenging behaviour.¹⁵

A key part of the DEECD's guidance is implementing preventative and early intervention strategies to support positive behaviours. Many schools now use positive behaviour support to help to address the triggers that lead to the use of restraint.¹⁶ The guidance recognises school-wide positive behaviour support as an effective, evidence-based approach to creating positive, safe and inclusive school environments.

Source: *Held Back – The experience of students with disabilities in Victorian schools.*¹⁷

13 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

14 Department of Education and Early Childhood Development, *Restraint of Student Policy* (2013) <<http://www.education.vic.gov.au/school/principals/spag/governance/pages/restraint.aspx>>.


15 Office of the Senior Practitioner, *Physical Restraint Direction Paper* (May 2011), 9.

16 Department of Education and Early Childhood Development, *Student Engagement and Inclusion Guidance 2014*. <<http://www.education.vic.gov.au/school/principals/participation/Pages/studentengagementguidance.aspx>>.

17 The DEECD is currently helping Victorian schools to implement positive behaviour support. For more information, see: <<http://www.education.vic.gov.au/school/principals/participation/Pages/wholeschoolengage.aspx>>.

Protecting safety can promote a number of human rights, including the right to life (section 9) and the right to personal security (section 21). Measures to protect safety can also limit rights. As discussed above, the Charter recognises that in some cases, human rights can be limited if the limitation is lawful, reasonable and proportionate.¹⁸ This means that where an organisation proposes to limit human rights to meet its obligations under the OHS Act, it needs to consider whether the restriction is reasonable in the circumstances and whether there are less restrictive ways of achieving its purpose.

Considering human rights as part of managing occupational health and safety can lead to better outcomes for an organisation and the individuals involved. A human rights approach prompts organisations to consider the full range of risks, and the least restrictive way of managing those risks, so that tools are more tailored for their purpose. In this way, the Charter can support and improve the way organisations manage health and safety in the workplace.

 **Discussion point 5 – Does your organisation consider individual human rights as part of managing occupational health and safety?**

Blanket restrictions on rights

In some cases, organisations assess a person's risk simply on the basis of an identifying characteristic (such as disability, age or race). Although it is important to recognise that particular groups of people may be 'at risk', assessing a person's risk simply because of an identifying characteristic (rather than their individual circumstances) can be discriminatory and may result in a blanket restriction on rights.

18 Victorian Equal Opportunity and Human Rights Commission, *Held Back – The experience of students with disabilities in Victorian schools* (September 2012).

Case study - The removal of children from parents with disabilities

Although parents with intellectual disabilities represent a small percentage of all parents in Australia, they are over-represented in child protection proceedings.¹⁹ According to the Office of the Public Advocate (OPA), a parent with a disability is up to ten times more likely than other parents to have a child removed from their care.

There are two main ways a child can be removed from their parents:

- Under the *Family Law Act 1975*, a court may order that a child be removed to a 'better parent' or be removed if it is in the 'best interests of the child'
- Under the child protection regime, if there is evidence of abuse or neglect.

Both OPA and the Commission are concerned that there is potential for children to be removed from their parents because of the parent's disability, rather than an assessment of actual neglect or abuse.

This practice is inconsistent with the rights of parents, children and families protected under the Charter and international human rights conventions.²⁰ It is also at odds with the considerable body of evidence that parents with intellectual disabilities can successfully parent their children.²¹

The Department of Human Services recently published the *Children, Youth and Families - Disabilities Services Operating Framework*,²² which emphasises that parents with a disability are first and foremost parents. It prompts workers to ask, 'Am I seeing the child's parent as a parent first and foremost?'

Source: Office of the Public Advocate, *Position statement on the removal of children from their parent with a disability*.²³

19 Alister Lamont and Leah Bromfield, 'Parental intellectual disability and child protection: Key issues' (2009) *NCPIC Issues* No. 31, 3.

20 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17.

21 For example, Lamont and Bromfield, above n 19.

22 Department of Human Services, *Children, Youth and Families – Disabilities Services Operating Framework* (2012).

23 Office of the Public Advocate, *Position statement on the removal of children from their parent with a disability* (December 2012).

Risk appetite

An organisation's risk appetite is usually guided by the organisation's board and/or executive team. It can be shaped by a number of factors including the type of organisation, its vision and values, its clients, its leadership and its risk culture.

In some cases, 'risk management' can turn into 'risk avoidance' and this can lead to rights-restrictive practices. Risk avoidance can be due to:

- perceived legal liability or the 'fear of being sued'
- staffing issues such as high turnover and the use of casual labour
- being focused on procedure and 'endless form filling'
- a lack of support to exercise discretion and professional judgment
- a focus on power and control, rather than empowerment
- a lack of funding and resources
- unwillingness by staff to engage with any level of difficulty or risk
- a lack of human rights awareness and knowledge, including uncertainty about how to implement human rights in a practical way, and
- fear of public criticism if things go wrong.

Although avoiding risks may be an appropriate response in some circumstances, a human rights approach to risk management prompts organisations to consider the positive and negative sides of risk. In particular, organisations should consider the possible benefits of risk, and ask whether the risk is something for an individual to decide on, rather than the organisation.²⁴

Developing a positive risk culture

A recent project about risk management in community services found that articulating a positive risk culture appeared to be related to:

- the degree of openness and trust amongst front-line workers and management across different levels of the organisation
- the importance of providing opportunities for reflection on risk management, including the impacts of risk management on clients and workers
- recognition of the importance of integrating risk management into the roles, functions and values of staff.

Source: *Managing Risk in Community Services: A preliminary study of the impacts of risk management on Victorian services and clients.*²⁵



Discussion point 6 - What is the risk appetite in your organisation?

24 Department of Human Services, Office of the Senior Practitioner, *Roadmap resource for achieving dignity without restraint* (2012), 17.

25 Professor Judy Brett et al, 'Managing risk in community services: A preliminary study of the impacts of risk management on Victorian services and clients, ARC Linkage Project final Report' (2006-2009), 3.

Defining 'acceptable risk'

“ [I]n community services and many other public services, risk management has to work in the absence of agreed understandings of what constitutes the limits of acceptable risk. While there is general agreement about duty of care and what constitutes negligence, there is great reluctance on the part of many parties to confront and agree on the levels of risk we can accept in community care. Acceptable risk, therefore, is defined by the media, public inquiries into adverse incidents and the courts. In the meantime services walk what some called a 'knife-edge' in making judgments about acceptable risk.²⁶ ”

In practice, there is a lack of common understanding about what an acceptable level of risk is - at a political, community and organisation level. The lack of a common benchmark for what constitutes acceptable risk can make it difficult for front-line workers who grapple with risk taking and risk management on a day-to-day basis.

Adverse incidents often shape what is acceptable or unacceptable practice. This can mean that risk may be assessed in terms of the outcome, rather than the decision-making processes involved.²⁷ Ultimately, this can lead to a reluctance to take risks or to support others to take informed risks. This can have a disproportionate impact on people's human rights.

When risk is overstated or no risk is tolerated, workers can become procedurally bound and may be discouraged from approaching risk creatively and flexibly. This can limit a worker's confidence to exercise discretion and judgment.²⁸ It can also muddy the view of people as individuals with unique needs, wants and circumstances.

Discussion point 7 – How does your organisation determine what an acceptable level of risk is?

26 Ibid. 9.

27 Anne-Maree Sawyer and David Green, 'Social inclusion and individualised service provision in high risk community care: Balancing regulation, judgment and discretion' (2013) 12:2 *Social Policy & Society* 300, 306.

28 Key informant interview.

Part four: A human rights approach to risk management

“ A rights-based approach engenders respect and trust which is both important for building positive relationships between staff and people with a disability, and improving the organisation’s reputation for caring and supporting people with dignity and care.

Lynne Webber, Office of Professional Practice ”

The Charter requires public authorities to act compatibly with, and give proper consideration to, relevant human rights when they deliver services, manage risk, make decisions and develop policies.

Organisations are increasingly using the Charter as a practical tool to inform and improve service delivery and risk management. Looking at risk management with the benefit of a human rights lens makes good sense, both in terms of outcomes for individuals and the management of organisations.

A human rights approach means putting the person (the ‘rights-holder’) at the centre of things. It also means giving staff the ability and support to exercise discretion and professional judgment when making decisions.

The benefits of a human rights approach to risk management

Applying a human rights lens to risk management can:

- help organisations to better manage risk by identifying the full range of risks and the least restrictive way of managing those risks
- create better outcomes for members of the community by considering their individual circumstances
- improve the quality of life for service users, including by empowering and increasing autonomy for service users
- facilitate service-user participation in decision-making
- increase an organisation’s efficiency and legitimacy, and improve its reputation
- help to improve the options for managing safety issues
- provide for balanced decision-making and counter risk-aversion
- increase stakeholder engagement
- help organisations to meet their legal obligations.

A tool for considering human rights impact is included at Appendix A.

* Discussion point 8 - How do/could human rights inform risk management in your organisation?

A human rights approach to risk management is not just about meeting an organisation’s legal obligations. It involves building a positive culture of human rights, and using human rights principles to guide and inform risk management. This can help organisations to identify the full range of risks and to provide different options for risk management.

Case study – Income management – Building in human rights from the start

In 2012, the Federal Government implemented income management trials in five locations across Australia. Income management is a way to help people to manage their Centrelink payments to meet essential household needs and expenses (such as rent, bills, food and education) and to provide care and education for their children.

The Victorian Government agreed to participate in the Greater Shepparton trial using a consent-based model for child protection referrals (i.e. where a person is referred to income management by a child protection authority because their child is at risk of neglect). Participants in the trial were offered a BasicsCard to be used at a range of BasicsCard providers in the Greater Shepparton area.

In establishing its model for participation, the Department of Human Services (DHS) made sure that it would continue to meet its obligations under the Charter. For example, DHS ensured that clients were only referred to income management with their consent when it was in the child's best interest.

As part of the income management trial, DHS supported the protection and promotion of human rights by:

- Building human rights considerations into guidance material and training for staff
- Recognising the need to act in the best interests of the children involved
- Providing information about the scheme in a way that is accessible
- Considering the potential impact of income management on the particular family.

The trial engaged a number of Charter rights including protection of families and children (section 17), cultural rights (section 19), recognition and equality before the law (section 8), privacy (section 13), freedom of religion and belief (section 14), and freedom of movement (section 12).

By building human rights considerations into its model for participation from the start, DHS helped its staff to manage the risks associated with income management. This ensured that DHS met its legal obligations under the Charter and that staff achieved the best outcomes for their clients.

The right to take risks

“ Risk assessment should not be a process which is ‘done to’ a person. Rather, professionals should strive to ensure that the process adopts a collaborative approach ... collaborative in the sense that the professionals work, whenever possible, in collaboration with the individual with whom the assessment is concerned.²⁹ ”

Although risk is often viewed in a negative light, risk taking is:

- integral to learning, development and identity
- how we explore difference, new places, and new relationships
- central to an innovative, creative practice and the exercise of judgement
- a pathway to liberation from fears and dependencies.³⁰

Dignity of risk recognises that people should be able to do things that involve a level of risk. This is part of exercising the right to personal autonomy to make decisions about a person's own life. It includes supporting people to take informed risks to improve the quality of their lives.

Dignity of risk is a concept that is well established in the community services sector, particularly in the disability sector. Dignity of risk recognises that the ability to take risks can help a person to grow and develop, and can give meaning to a person's life. It also envisages that sometimes informed risk-taking will fail.

A human rights approach to risk management promotes the active participation of an individual in the assessment and management of their own risk. In this way, a service-user is viewed as ‘an active citizen with rights and responsibilities’ and as ‘an expert of his/her particular life circumstances’.³¹

29 Dr Beth Greenhill et al, ‘Human Rights Joint Risk Assessment and Management Plan (HR-JRAMP) – A Human Rights Based Approach’ (2011), 18.

30 David Green, ‘Taking risks and Managing Risks’ (Paper presented at the Risk and rights Forum, Office of the Public Advocate, 2005).

31 Anne-Maree Sawyer and David Green, ‘Risk management and individualised care in the community’ (Paper presented at the Annual National Conference of the Australian Sociological Association, Canberra, 3 December 2009), 9.

Case study – Dignity of risk in residential aged care services

In May 2012, the Victorian Managed Insurance Authority reported on the outcomes of a roundtable on dignity of risk in residential aged care services (RACS).

Roundtable participants identified the need for a change from risk aversion to risk tolerance in residential aged care services. As an example, 'the widely accepted incident reporting forms required after a resident falls requires an analysis solely focused on prevention of harm, but it does not explicitly consider whether the fall is a consequence of a decision for quality of life'.

The paper identifies some of the requirements for cultural change, including:

- the 'debunking' of myths surrounding the overarching importance of risk management in aged care
- reframing the expectations of residents and their families by explaining that there are risks associated with activities that enhance quality of life
- reframing community expectations by explaining that the notion of keeping older people 'safe' is only one aspect to quality of life, and that injury or death may be a consequence of a resident actively participating in life
- reframing the perspective of RACS professionals from the notion of 'do no harm' to looking at what will enhance a resident's quality of life.

Source: *Risk Insight: Dignity of Risk in Residential Aged Care Services – Summary of priority outcomes*.³²

Risk-taking is part of a person's right to autonomy, which is protected by the right to privacy and reputation under section 13 of the Charter. The right to privacy protects people in Victoria from unlawful interference with their privacy. Any restriction on a person's privacy or autonomy must be lawful, reasonable, and proportionate.

32 Victorian Managed Insurance Authority, *Risk Insight: Dignity of risk in residential aged care services – Summary of priority outcomes* (May 2012).

Case study: The right to make decisions about your own life

An 85-year-old man who lived at an aged care facility was not allowed to leave the premises unaccompanied because his doctor thought that it was 'too risky'. Although the man was prepared to take the risk himself, the aged care facility argued that it had a duty of care to ensure that he was safe. While the man was allowed to walk inside the premises, he was not allowed to go on any outings by himself. The organisation had no appetite for any risk.

The resident has a number of rights under the Charter including:

- the right to recognition and equality before the law (section 8), which includes the right to enjoy other human rights without discrimination on the basis of age or disability
- the right to freedom of movement (section 12), which includes the right to move freely within Victoria
- the right to privacy, which includes the right to personal autonomy (section 13)
- the right to liberty and security of person (section 21).

The right to humane treatment when deprived of liberty may also be engaged (section 22). It provides that a person who is deprived of liberty must be treated with humanity and with respect for the inherent dignity of the person.

Although the aged care facility was concerned about the man's safety, its decision to restrict his freedom to leave the premises may not have been reasonable or proportionate in the circumstances. With the assistance of Seniors Rights Victoria, the man was allowed to leave the premises when he chose and to assume any risk himself as an adult decision. The man stated:

“ My life is more exciting and enjoyable as I am now coming and going from the facility as I please – with no questions or queries and, when I arrive home no one asks me where I have been! I now feel as though I am a fully respected citizen who is exercising my rights. ”

Source: *Seniors Rights Victoria*.³³

33 Key informant interview, Seniors Rights Victoria.

In practice, informal 'risk agreements' can be negotiated between carers and their clients. A risk agreement involves the carer facilitating and supporting decision-making to help a person to take informed risks. Once a decision has been made, it's about managing the risk – what checks need to be in place to make this happen?

Case study – Negotiating a 'risk agreement'

In this example, a woman in her early fifties with muscular dystrophy is a partner in the care she receives. She is actively involved in negotiations about how to manage her risk, and has the right to exercise choice. She says:

“ ‘Look, at the end of the day, my choice is to live at home – if I have to lie on the floor for two hours in the middle of the night if I've fallen out of bed ... that's the risk I want to take, because I do not want to go to a nursing home at fifty'. So look, we'll do the checks that we can, but she put it very nicely: 'That's my choice, if I have an accident in bed ... if I have to wait till the carer comes at eleven in the morning, I'll wait ... there are emergency services but if people can't come, that's the choice I make – not to live in a place where there's a nurse down the hall'. So it's about agreeing on risk and getting permission to put certain things in place to manage the risk. ”

The international Convention on the Rights of Persons with Disabilities recognises the importance of individual autonomy and independence for people with disabilities, including the freedom to make their own choices. The rights to equality (section 8), freedom of movement (section 12), privacy and autonomy (section 13) and liberty (section 21) under the Charter may also be engaged.

By taking a human rights approach to managing the risks associated with her disability, the woman participates in the decision to remain at home with appropriate supports in place to manage those risks. She has the right to risk-taking, independence and choice.

Source: *Risk management and individualised care in the community*.³⁴



Discussion point 9 - How does your organisation recognise and support a person's right to take risks?

The Commission's role

The Commission is an independent statutory body that is responsible for helping Victorians understand their human rights and responsibilities.

The Commission has a number of roles under the Charter that can assist public authorities to understand their obligations under the Charter. For example:

- The Commission conducts [human rights reviews](#) at the request of public authorities. A public authority may request a review to independently assess whether a policy or practice is compatible with the Charter or to provide input at the time new policies or programs are implemented or developed.
- The Commission provides [education and training](#) to public authorities and the community about Charter rights and responsibilities.
- The Commission develops [resources and publications](#) such as a guide to the Charter for public sector workers. The guide is designed to help public sector workers to understand the Charter and to take human rights into account in the work that they do.
- The Commission's new [VPS Human Rights Network](#) provides information, ideas and networking opportunities to public sector employees who are interested in applying human rights in their work. Members of the network receive email updates, invites to events and resources to assist public decision-making.

You can visit the Commission's [website](#) for further information.

The Commission and other organisations have developed practical tools and resources to help organisations implement human rights in their work. Appendix B includes a number of useful resources.

Summary of discussion points

1. Which human rights are relevant to your work and the people you work with?
2. How do you ensure that risk management is proportionate and tailored to addressing the risk being managed?
3. Do your organisation's risk management policies and procedures refer to human rights?
4. What risks do you manage in your organisation? How do you identify them and respond to them?
5. Does your organisation consider individual human rights as part of managing occupational health and safety?
6. What is the risk appetite in your organisation?
7. How does your organisation determine what an acceptable level of risk is?
8. How do/could human rights inform risk management in your organisation?
9. How does your organisation recognise and support a person's right to take risks?

Appendix A: Key questions to ask when considering human rights in your work

1. Gather the information you need

- what information do you need to make a decision?
- what are you trying to achieve?
- what laws and policies are relevant? Are you required to act in a certain way by law or is there discretion involved?
- who is affected and what are their individual circumstances?

How have you taken into account the views of people you could have an impact on – the ‘nothing about us, without us’ principle?



How have you taken into account the views of people you could have an impact on – the ‘nothing about us, without us’ principle?

2. Consider your impact

Which human rights are relevant? How does your action impact on human rights? This could be a limitation on human rights that has an adverse impact on someone or a decision that supports people’s ability to realise their human rights.

Common issues to consider:

- will you restrict people – their movement, where they live, are they detained in some way?
- are you responsible for someone’s care and protection?
- will you have an impact on people’s privacy?
- does your activity involve children?
- will you have a particular impact on different groups in the community?

3. Is it reasonable?

Is any proposed limitation on human rights reasonable as can be ‘demonstrably justified in a free and democratic society based on human dignity, equality and freedom?’ What is your evidence for this?

4. Is it necessary?

What makes you satisfied that the proposed action would help to **achieve your policy goal**?

- is the measure that limits a human right **proportionate** to what you are trying to achieve?
- is there another reasonable way of achieving your goal that is **less restrictive** of human rights?
- can it be done better or differently?



Where can you go for help to resolve these issues: your manager; your legal and policy advisers; the Commission?

Appendix B: Useful resources

Dr Anne-Maree Sawyer and Mr David Green

Risk management and individualised care in the community: www.nds.org.au

Department of Human Services

Supporting decision making: A guide to supporting people with a disability to make their own decisions: www.dhs.vic.gov.au

Inclusion Melbourne

Choice Toolkit:
www.inclusionmelbourne.org.au/resources/choice/

La Trobe University

Managing risk in community services: A preliminary study of the impacts of risk management on Victorian services and clients: www.publicadvocate.vic.gov.au

Monash University

Monitoring and oversight of human rights in closed environments: www.law.monash.edu.au

Mersey Care NHS Trust

Human Rights Joint Risk Assessment and Management Plan (HR-JRAMP) – A human rights based approach: www.humanrightsinhealthcare.nhs.uk

Office of the Senior Practitioner (now called Office of Professional Practice)

Enlivening human dignity and rights – The Senior Practitioner implementing the Victorian Charter of Human Rights and Responsibilities 2006: Guidelines for disability service providers and practitioners: www.dhs.vic.gov.au

Physical Restraint Direction Paper – May 2011: www.dhs.vic.gov.au

Implementing the Convention on the Rights of Persons with Disabilities (Plain English): www.dhs.vic.gov.au

Practice guide - Other restrictive interventions: www.dhs.vic.gov.au

Roadmap resource for achieving dignity without restraint: www.dhs.vic.gov.au

Office of the Public Advocate

Supervised treatment orders in practice: How are the human rights of people detained under the Disability Act 2006 protected?:

www.publicadvocate.vic.gov.au

The Australian Psychological Society Ltd

Evidence-based guidelines to reduce the need for restrictive practices: www.psychology.org.au

Victorian Equal Opportunity and Human Rights Commission

The Charter - A guide for Victorian public sector workers: www.humanrightscommission.vic.gov.au

Charter fact sheets on the operation of the Charter and the scope of individual Charter rights: www.humanrightscommission.vic.gov.au

Victorian Managed Insurance Authority

Risk insight: Dignity of risk in residential aged care services – summary of priority outcomes: [search.vmia.vic.gov.au/s/search.tml?query=dignity of risk &collection=vmia-vic-gov-au](http://search.vmia.vic.gov.au/s/search.tml?query=dignity%20of%20risk&collection=vmia-vic-gov-au)



Victorian Equal Opportunity
& Human Rights Commission

Contact us

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Hearing impaired (TTY)	1300 289 621
Interpreters	1300 152 494
Email	information@veohrc.vic.gov.au
Website	humanrightscommission.vic.gov.au