

Negligence and duty of care

Under *common law* principles of *negligence* and the *Wrongs Act 1958* (Vic), as amended by the *Wrongs and Other Acts (Law of Negligence) Act 2003* (Vic), care providers must exercise reasonable care to prevent service users and others from foreseeable injury. An employee can be charged with criminal negligence where there has been a considerable degree of recklessness and disregard for consequences (s 24 Crimes Act (Vic)).

The IDPSA (now repealed), DSA (Cth) and DSA (Vic) (also repealed) were intended to change the paternalistic or over-protective attitudes of some service providers by stating clearly that quality of life for people who have an intellectual disability can best be achieved when their lifestyle is the same as, or as close as possible to, the norms and patterns that are valued in the general community. The Victorian *State Disability Plan* reinforces this trend, as does the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Recent changes to the philosophy and practice of disability services provision and planning ("person centred planning") emphasise the individual and their right to choose and guide the services they receive.

The Disability Act continues this theme (s 6(1)) and also stipulates among its Principles that disability services should be provided in a way that reasonably balances safety with the right of persons who have a disability to choose to participate in activities involving a degree of risk (s 5(3)(n)). It also states that if a restriction on the rights or opportunities of a person with a disability is necessary, the option chosen should be the option that is the least restrictive of the person as is possible in the circumstances (s 5(4)).

Such provisions can lead to some confusion and concern on the part of care providers where they feel that there may be a high degree of risk if service users are given the opportunity to make decisions for themselves. For example, when a resident is perceived by staff as being sexually naive but has to be allowed to go out independently, staff may be concerned about the resident's vulnerability to potential sexual abuse.

It is important for care providers to remember that *duty of care* and the right to a lifestyle that is as close as possible to "normal" are not contradictory. However, the job of supporting people who, on the one hand, have certain vulnerabilities but who, on the other hand, have all the ordinary human rights to take risks and to make mistakes is a complex one that frequently entails difficult decisions. There are many different views of what is "reasonable" and what is "unreasonable"; however, the principles on which current disability *legislation* and philosophies are based make it very clear that it is not reasonable to unnecessarily restrict a person's right to independence.