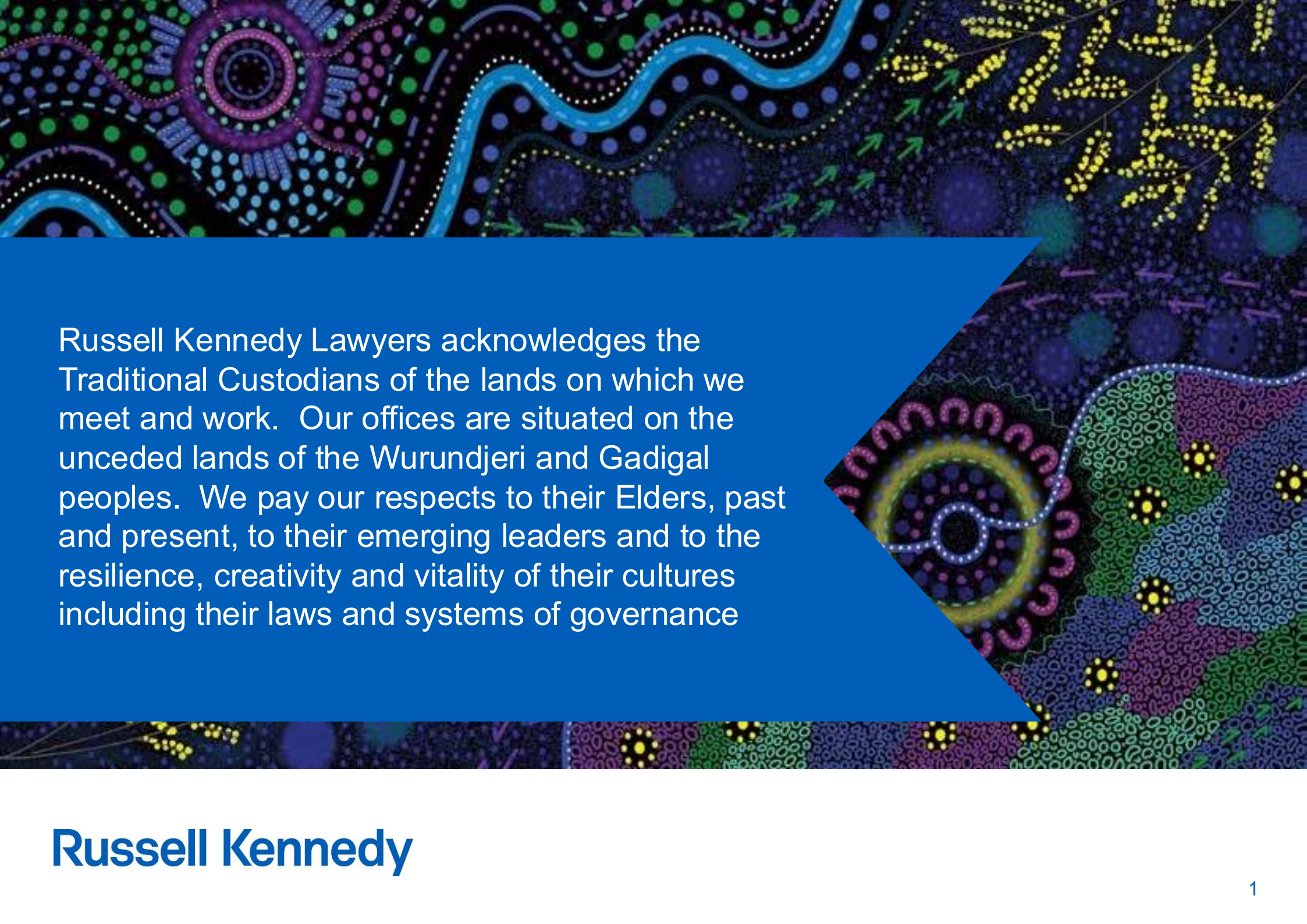


**Effective Strategies for Balancing
Dignity of Risk and Duty of Care**

23 May 2025



Russell Kennedy Lawyers acknowledges the Traditional Custodians of the lands on which we meet and work. Our offices are situated on the unceded lands of the Wurundjeri and Gadigal peoples. We pay our respects to their Elders, past and present, to their emerging leaders and to the resilience, creativity and vitality of their cultures including their laws and systems of governance

Key learnings



1. Legal obligations



2. Duty of care



3. RECORDS



4. Dignity of risk forms, waivers and indemnities



5. Dealing with representatives

What is dignity of risk?



Respecting an Individual's Self-Determination

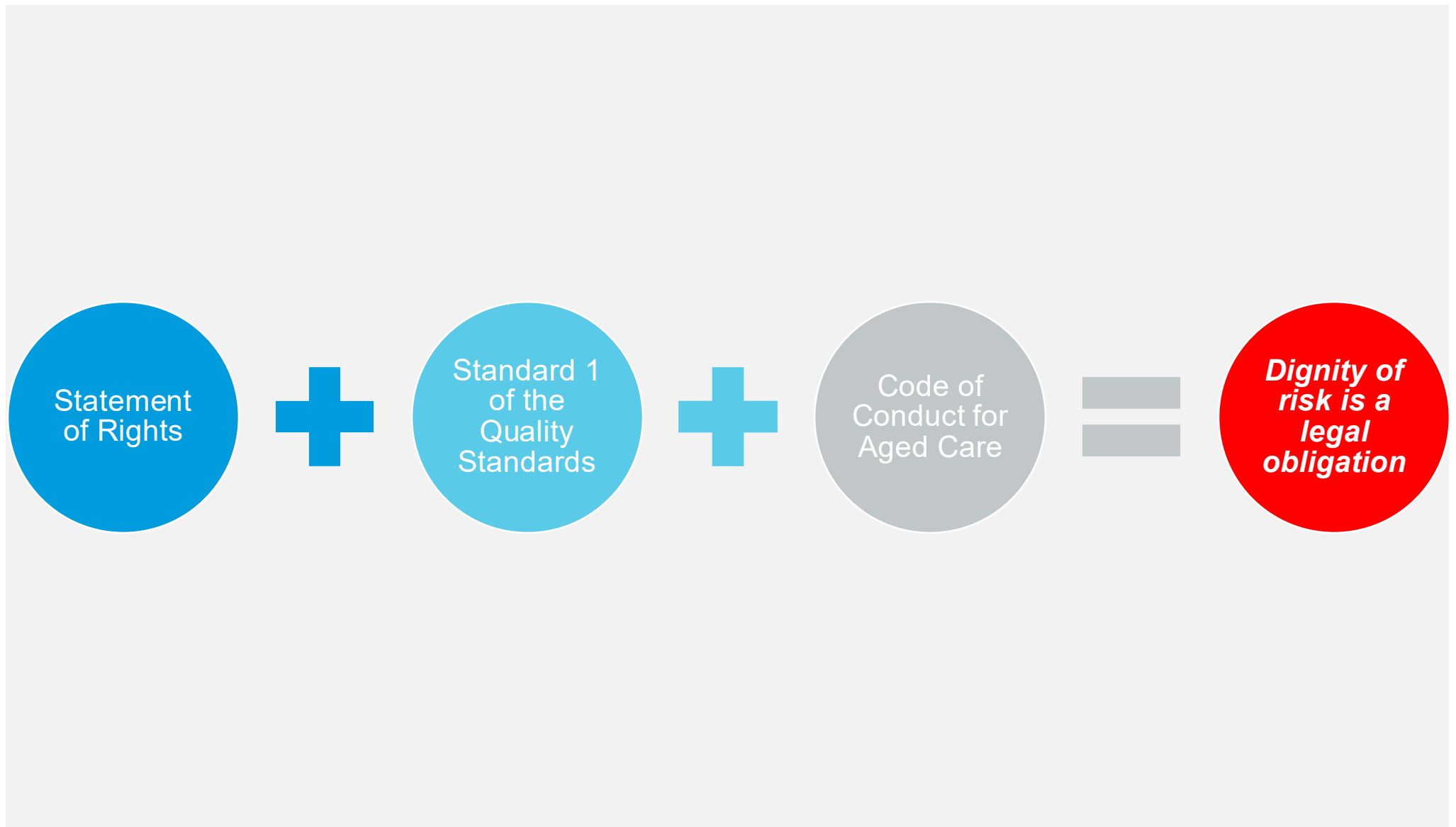
An individual's right to make their own decisions about how they live and to accept the risks associated.



Choosing to Take Risks Regardless of Age or Disability

Being older or having a disability doesn't mean you can't choose to take risks.

Obligations to promote dignity of risk



Duty of care

Duty of care

- A **legal obligation** that we all have to take reasonable steps to not cause harm to those who could reasonably be harmed by our actions (or omissions)
- If you breach your duty of care to someone, you can be sued for negligence if they are harmed as a result of what you did (or didn't do)
- Duty of care is acting as a reasonable person in your role would act in the circumstances

Who has a duty of care?

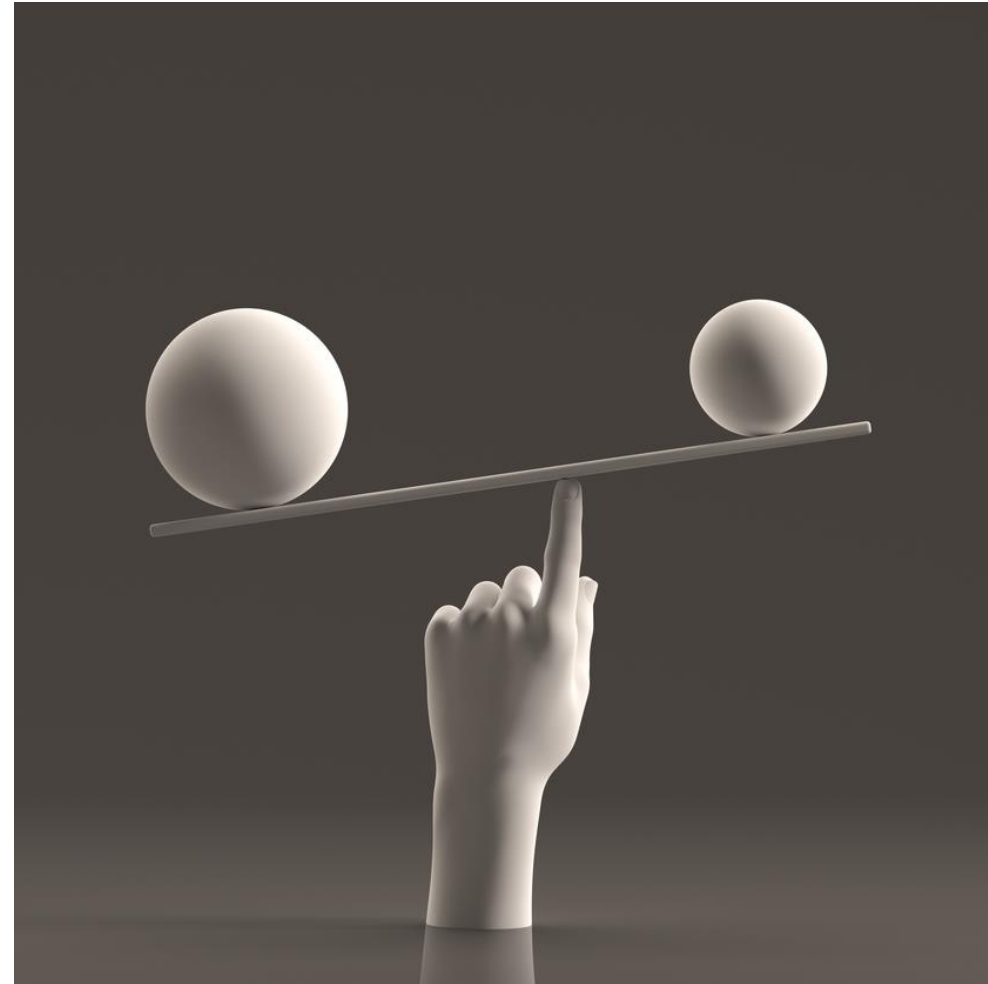
- Providers have a duty of care to clients and residents
- Providers have a duty of care to their workers
- Workers have a duty of care to the residents they are looking after and others they work with
- **BUT**, does a registered and its workers have a duty of care to:
 - A client's family member?
 - A stranger who is hurt by a resident while they are out of the facility riding their scooter?

Dignity of Risk versus Duty of Care

It's a balancing act with Duty of Care.

You need to discharge your obligations by taking the following steps:

- **EXPLAIN** the risks
- **EXPLORE** mitigation strategies
- **ENSURE** those strategies are implemented and regular review occurs
- **EVIDENCE** every conversation and action taken



Dignity of risk: be CLEAR about your role

Understand your role – don't “overstep your boundaries” and extend your duty of care!!

In residential care this could mean:

- Families bringing in food
- Disputes with Services Australia about residents' assets

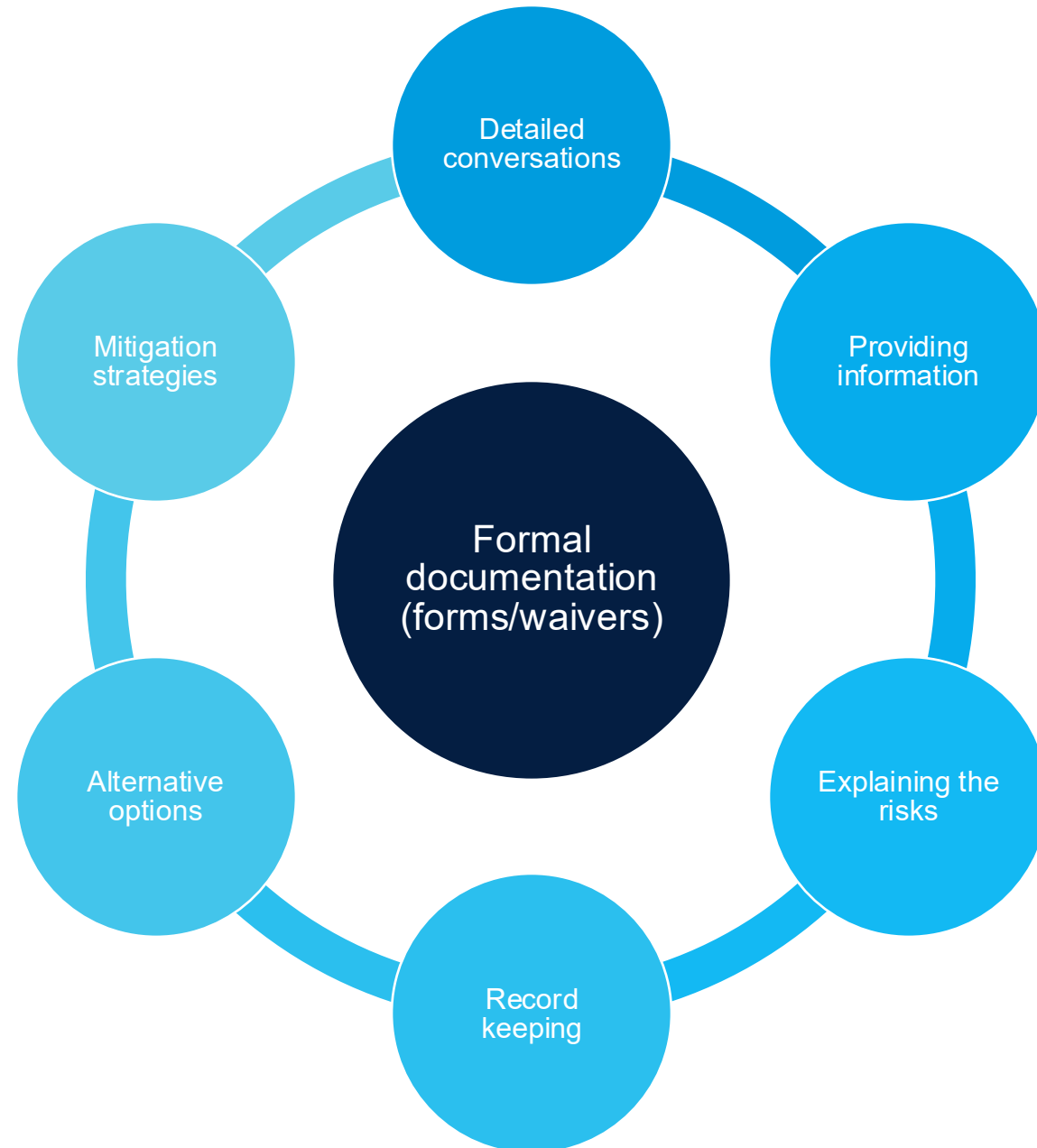
In home care this could mean:

- Meal delivery in retirement village
- Intervening in financial disputes



Complying with your obligations

What providing dignity of risk looks like



Documenting dignity of risk



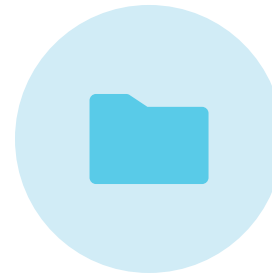
Care plans



Progress notes and
file notes



Emails and letters



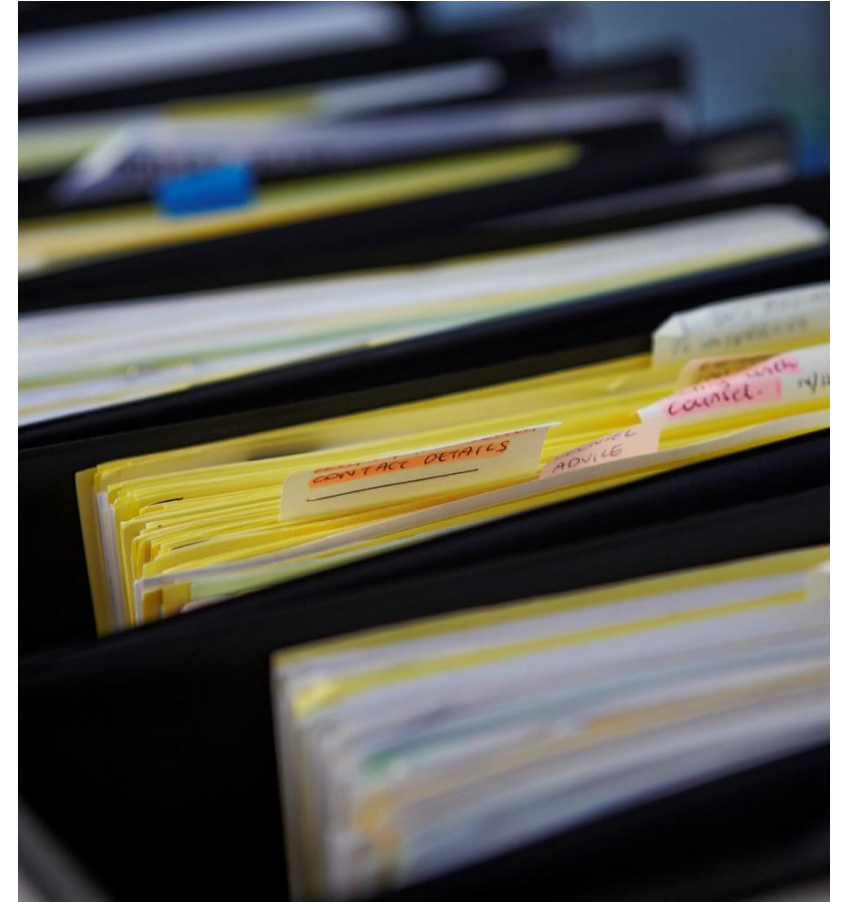
Dignity of risk forms
and waivers

Dignity of risk forms

- Documentation of the consumer's decision is critical
 - ACQSC
 - Coroner and other regulators
- **The form should:**
 - ✓ Define the key risks to the consumer
 - ✓ Discuss why the consumer wants to take the risk(s)
 - ✓ Discuss possible compromises/alternatives that reduce the risk
 - ✓ If applicable, state why the risk is not acceptable (eg risks to others)
 - ✓ Set a review date (the risk should be reviewed regularly as part of the care plan review and when things change)

Legal documents: waivers, releases and indemnities

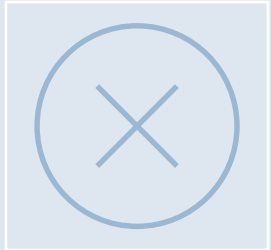
- Waivers and releases have similar effects – a promise not to sue if something goes wrong
- Indemnities go further - if the provider is sued by someone **else** because of the client's actions, they can hold the client responsible for this
 - For example, if another resident is injured by a resident riding a scooter, the provider could then seek to recover its costs from the client.
- Risk mitigation BUT, how often are they used?



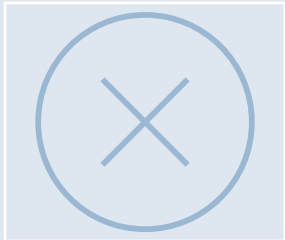
Limitations



Not a panacea, if the person doesn't understand them, they may be ineffective



May be effective in preventing civil litigation but matter may still be reviewed by regulators (eg Coroner, ACQSC, WorkSafe)



The ACQSC “[u]sing legal documents to discourage consumers from exercising dignity of risk with respect to day-to-day activities” is a breach of the Code of Conduct



Capacity issues and representatives

Who is making the decision

- If there are concerns about the person's decision-making, is a capacity assessment required?
- If a representative is making the decision:
 - Are they legally authorised to make the decision (are they a guardian, POA with authority for that decision?)
 - **Supporters are not representative**
 - Are they making a decision appropriately?
 - giving effect to the represented person's will and preferences if known
 - not overriding the person's will unless necessary to prevent serious harm
 - exercising the power in a way that is least restrictive

Challenging a representative making decisions

- Discuss with them
- Care conference
- Document your concerns in writing to them (eg email, letter)
- Involve the treating team
- Involve others if authorised
- Consider VCAT proceedings to appoint another decision-maker (or encourage the family to)

Bringing it together

Common dignity of risk situations



Residential

- Food choices
- Wanting to leave the home
- Wanting to spend time with someone
- Not wanting care (eg wound care, medication, assistance)

Home care

- Choosing own provider
- Not going to residential care
- Refusing 2 person assist

Key takeaways

Key takeaways



You have a legal obligations to promote, respect and support individuals in exercising dignity of risk



This must be balanced with your duty of care



You need to explain the risk in detail and implement risk mitigation strategies



If the risk is too high, you may need to say no

Key takeaways

Good records are your best defence

Questions



Disclaimer & Russell Kennedy Contacts

Today's presentation is intended as **general commentary** only and should not be regarded as legal advice.

If you require specific advice on the topics discussed, please contact the presenters directly:



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