



MOUNT HAWTHORN EDUCATION SUPPORT CENTRE

Duty of Care Policy

2021-2023

Duty of Care - Definition

In discharging their duty of care responsibilities, teaching staff must exercise their professional judgement to achieve a balance between ensuring that students do not face an unreasonable risk of harm and encouraging students' independence and maximising learning opportunities.

When non-teaching staff, volunteers and external providers agree to perform tasks that require them personally to care for Students (in the absence of a member of the teaching staff), they will also owe a duty to take such measures as are reasonable in all the circumstances to protect students from risks of harm that reasonably ought to be foreseen

Caring for students may assume different meanings depending on the context. However, examples include (but are by no means limited to) not putting students at risk by doing something or failing to do something that could cause the student to suffer injury or harm, taking precautions, intervening to prevent obvious hazards from causing injury or harm, following safety procedures and providing adequate instructions to students.

Reasonable care

The duty owed to students is not a duty to ensure that no harm will ever occur, but rather a duty to take reasonable care to avoid harm being suffered. A person suffering harm will be entitled to damages (compensation) if he or she can establish that a member of the teaching staff, non-teaching staff, volunteer or external provider was negligent – that is, failed to take reasonable care – and the negligence was the cause of the person's harm.

'Reasonable care' will vary according to the circumstances as well as:

- the student's age, experience and capabilities;
- physical and intellectual impairment;
- medical condition;
- behavioural characteristics;
- the nature of the school activity;
- the nature of the environment in which a school activity is to be undertaken;
- any conflicting responsibilities that the school or staff member may have; and
- normal practices within the school and departmental policies and procedures.

Assessing the risk involved in a school activity

When assessing the risk involved in a school activity, consideration will be given to the following factors:

- The probability of the risk occurring;
- The magnitude of the risk; and
- The expense, difficulty and inconvenience involved in alleviating the risk.

Teaching staff will care for or provide for the care of students whilst students are involved in school activities or present for the purpose of school activities.

A duty is owed whenever and wherever a student is involved in a school activity or a student is present for the purposes of a school activity. The teacher-student relationship is not necessarily confined to students enrolled at the school at which the member of the teaching staff is employed.

The duty encompasses a wide range of matters, including (but not limited to)

- provision of adequate supervision
- ensuring grounds, premises and equipment are safe for use by students
- implementing strategies to prevent bullying from occurring in school
- rendering medical assistance (if competent to do so)
- seeking assistance from a medically trained person for, a student who is injured or becomes sick at school

It is possible that the duty extends to acting on a strong suspicion of physical, sexual or emotional abuse or neglect. In any event, the Child Protection policy requires school staff to report to the principal instances of student disclosure or signs of abuse or neglect.

The Principal will confirm that all Department employees, volunteers, visitors and external providers in child-related work hold a valid Working with Children Check in accordance with the Department's *Working with Children Checks* policy available from the Department's website. External providers must provide both a current national police certificate and a current Working with Children Check.

External providers and volunteers will not be responsible for personally caring for students in the absence of teaching staff.

Non-teaching staff (education assistants) will not generally be responsible for personally caring for students in the absence of a teacher. However, in some circumstances, an education assistant may accompany a student without a teacher present, such as for shopping. Consequently, before entrusting these persons with the care of students, teaching staff will first obtain the agreement of the person to care for student/s without a member of the teaching staff also being present. Teaching staff must allow non-teaching staff an opportunity to refuse a request to

personally care for students, and respect that person's decision to refuse. When non-teaching staff agree to personally care for students (without a member of the teaching staff also being present), teaching staff must provide them with clear instructions as to the level of care required.

Non-teaching staff, volunteers and external providers (and indeed, all members of the community) must take reasonable care to avoid doing or not doing things that could reasonably be contemplated as causing injury to others (including students).

Liability

Liability in negligence may arise if an injured student can establish, on the balance of probabilities, that:

- at the time his or her injury was sustained, the person who was responsible for his or her safety owed the student a duty of care
- the person who was responsible for the student's safety breached the duty of care by failing to exercise reasonable care for the safety and welfare of the student
- as a result of the breach, the student suffered an injury which was reasonably foreseeable.

Employees

Injured persons may sue the State of Western Australia, which, as employer, is vicariously liable for the acts of negligence of teaching staff and non-teaching staff committed in the course of their employment.

The concept of vicarious liability does not mean that injured persons cannot sue the employee who was responsible for their safety, although this would be unlikely.

The State may pay an employee's legal costs incurred in defending the action and any other liabilities incurred (e.g. damages) if the conduct of the employee was in good faith and reasonable and in the discharge of official responsibilities. There is no guarantee, however, that an indemnity will be offered; each case will be assessed on its merits.

It is legally possible for the State, if its liability in negligence is established, to bring a claim for contribution or indemnity against an employee if a student was injured as a result of that employee acting outside the scope of his/her employment. Such action would occur only where there had been a deliberate act by the employee in total disregard of all instruction.

Volunteers

We tend not to have volunteers in our Centre as the risks involved with working with our students is a significant consideration on both sides. We do have students from TAFE and Universities but they are covered by the Insurance provided by their institutions.

The *Volunteers (Protection from Liability) Act 2002 (WA)* provides personal liability claim protection to certain volunteers, such as parent helpers, who, in good faith, undertake community work for State agencies and departments of the public service, such as the Department of Education.

Volunteers will not be protected under the legislation if they act outside the scope of the school's community work or contrary to the instructions given by the school. Protection will also not apply in respect of a volunteer whose ability to do the community work in a proper manner was, at the relevant time, significantly impaired by alcohol or drugs.

In addition to the protection afforded to volunteers by the *Volunteers (Protection from Liability) Act 2002 (WA)*, the Department's public liability and personal accident insurance arrangements with Risk Cover also extend to volunteers in schools. The definition of "Volunteer" used in this policy differs from the definition of "Volunteer" in the *Volunteers (Protection from Liability) Act 2002*. Accordingly, not all persons who fall within the definition of "Volunteer" in this policy will necessarily fall within the scope of the *Volunteers (Protection from Liability) Act 2002*.