

Policy

Duty of care

Please note this policy is mandatory and staff are required to adhere to the content

Summary

This document details the legal requirement for all DECD staff to exercise a duty of care towards children in their care and control.

Table 1 - Document details

Publication date	18 October 2016
File number	16/03168
Related legislation	<p><i>Civil Liability Act 1936</i></p> <p><i>Adoption Act 1988</i></p> <p><i>Children's Protection Act 1993</i></p> <p><i>Education Act 1972</i></p> <p><i>Education and Early Childhood Services (Registration and Standards) Act 2011</i></p> <p><i>Family and Community Services Act 1972</i></p>
Related policies, procedures, guidelines, standards, frameworks	<p>Child Safe Environments</p> <p>Families SA Duty of Care for Children and Young People in Care Practice Guide</p> <p>Standards of Alternative Care in South Australia</p> <p>DECD Risk Management Policy and Framework</p> <p>DECD policies and procedures</p> <p>Making Our Sites Safer</p> <p>Screening and Relevant History Checks</p> <p>Volunteers Working in Educational Sites and Settings</p> <p>Families SA Volunteer Coordinator Manual of Practice</p> <p>Workplace Learning Guidelines</p> <p>Information Sharing Guidelines</p> <p>Non-DECD service providers in preschools, schools and educational programs Procedure</p>
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Replaces	Duty of Care Policy 2007
Policy officer (position)	Manager, Policy and Strategy
Policy officer (phone)	8207 2552
Policy sponsor (position)	Director, Legal Services
Executive director responsible (position and office)	Deputy Chief Executive, Corporate Services
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Table 2 - Revision record

Date	Version	Revision description
18/10/2016	1.0	New policy: review of former guidelines on Duty of Care.

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1. Title

Duty of Care Policy

2. Purpose

This document details the legal requirement for all departmental staff to exercise a duty of care towards children in their care and control.

It assists staff as DECD employees to understand their duty of care obligations to children who are in their care and control and identify the standard of care necessary to fulfil this obligation in particular with respect to those staff, contracted agencies, volunteers, contractors and employees who come onto a site and/or have access to or interactions with the children and to determine:

- when a duty of care is owed
- the standard of duty of care required
- what may constitute a breach of duty of care.

This document does not detail DECD staff legislative obligations with respect to ensuring children are safe from harm as outlined within the *Children's Protection Act 1993* ("CPA"), however, DECD staff should be aware that those obligations are in addition to their general common law duty to care for all children in our care and control.

3. Scope

This document applies to all DECD employees working within or for the department and who enter or remain on DECD sites.

4. Policy detail

4.1 Definition of duty of care

'Duty of care' is a legal concept that was developed by the courts through their decisions. It refers to an obligation to take reasonable care to protect another from all reasonably foreseeable risk of harm.

According to common law, a duty of care will be found to exist between two parties where two criteria are met:

- it is reasonably foreseeable that the actions or omissions of one party may cause harm to another; and
- there is something about the nature of the relationship between the parties that justifies the imposition of a duty of care.

The question of what constitutes 'reasonable care' in any given case is ultimately a question of law to be determined by a court and will depend on the individual circumstances of each case.

The standard of care is the degree of foresight and caution required of DECD staff who owe a duty of care to the children and young people in their care and control.

The requirements of the standard will depend on the circumstances of the activities to be undertaken by those children and young people. When staff consider the risk of harm to the children in their care and control they will also need to consider factors such as age, experience and care needs. The greater the risk of harm, and the more serious the possible harm, the higher the standard of care owed.

4.2 How duty of care applies to DECD employees

DECD staff owe a duty to take reasonable care to protect those children and/or young people in their care and control from a reasonably foreseeable risk of harm. If harm results from a failure to exercise the required standard of care, a negligence claim may result.

The standard of care required of an individual is that of a reasonable person in the individual's position who was in possession of all information that the individual either had, or ought reasonably to have had, at the time of the incident.

It is generally accepted that individuals who comply with an established standard of practice, by exercising good judgement and common sense in dealings with those children and young people to whom this duty is owed will suitably fulfil their duty of care obligation.

The standard of care required can vary depending on an individual's position with respect to their level of control and direction over those persons in their care or with whom they are engaged.

4.3 Duty owed by an occupier of premises

The Minister for Education and Child Development is generally the owner of all premises occupied by the Department. As owner of these premises, the Minister owes a duty of care to persons using these premises which may extend but is not limited to persons using the premises subject to a lease agreement. The standard of care required will vary depending on a number of factors which relate to the nature and degree of the risk to users of the premises for example, local sporting clubs and/or parent groups. This includes persons working or volunteering in those premises, as well as persons visiting who do not have a formal relationship with the Minister.

The use of the Minister's land may be dealt with in a number of ways, for example, the execution of a lease agreement or other such agreement for the hire of school premises (see [Community Use of School Facilities](#)). For further information regarding these types of arrangements advice should be sought from [DECD Asset Services](#).

4.4 Mitigating Risks of Harm

There are a number of ways that staff may reduce the inherent risk of harm to persons in our care or control. These include but are not limited to:

- Trying to foresee any possible danger in the activities and taking appropriate steps to minimise or eliminate it.
- Ensuring staff have the required and necessary skills and abilities to perform their duties.
- Ensuring that all relevant DECD policies and procedures are complied with.
- Providing supervision of children to ensure that they comply with the rules and practices of DECD designed for their own safety and that of other persons in our care.
- Designing and implementing appropriate programmes, procedures, policies and rules to ensure the safety of persons in our care.
- Ensuring that buildings, equipment and facilities used for DECD purposes meet all relevant building standards and codes and are safe.
- Warning and discouraging firmly and at once any behaviour possibly likely to be dangerous and providing alternative forms of practices and procedures to minimise those dangers.
- Knowing and utilising relevant procedures for dealing with accidents.
- Ensuring a contractor is meeting their contractual obligations and raise concerns appropriately where those obligations and requirements are not being met.

The same principles apply where a student is to attend and/or participate in a program brokered or perceived to be brokered by a school i.e. VET or work placement.

When engaging in activities which potentially may cause harm, it is particularly important for those under your care and control to be adequately supervised or instructed on the demands/needs of their individual task. The higher the risk of harm to an individual, the higher the need will be for careful supervision or instruction.

This list is not exhaustive but only an indication of the thought that should be given by staff to do what is reasonable in a given situation and to undertake and implement the DECD risk management framework.

4.5 Breach of duty

If an individual breaches a duty of care that they owe another, that breach may lead to the individual being sued for negligence.

In order to determine whether or not negligence has been established, it must be proved that:

- a duty of care was owed in the circumstances
- the duty was breached because of an act or omission on the part of the person owing the duty as they did not act as a reasonable person would have acted in the circumstances
- a loss or harm is suffered as a result of that breach
- the type of loss or harm suffered was a reasonably foreseeable consequence of the act or omission.

4.6 What damages a breach of duty may lead to

Assuming that liability can be established, there must be some demonstrable loss suffered by the claimant. This will usually take the form of economic loss (for example, a loss of future income, loss of opportunity, or the cost of medical expenses), or it may be non-economic loss (for example, pain and suffering and loss of enjoyment of life).

If liability is established, and such a loss is found to exist, then the court is able to award monetary compensation in the form of “damages”.

4.7 Indemnity

If in the event an incident occurred where a person in our care and/or control were injured on premises owned and/or operated by the Minister or DECD, the *Public Sector Act 2009* does provide for employees to be indemnified against future loss, damage, or liability by their employer against personal civil claims if their activities are lawful and occur during the execution of their duties provided that the employee was acting in good faith. This means that the Minister is legally responsible for any claims for damages rather than against an individual staff member.

4.8 Indemnity consent

Indemnity or consent forms may not create a legal protection.

A person cannot ask a parent or a child (a person under the age of 18 years) to sign a form on behalf of a child to participate in an activity and to waive a child’s right to sue for damages because neither have the authority to sign any such form.

Individuals, or where necessary their parent or guardian, should always be notified of, and expressly consent to, any potentially risk adverse activity, or aspect to which they may be exposed, and should be informed of the degree of assistance or supervision that will be provided. This is not, however, a defence against liability where negligence has been proved.

5. Roles and responsibilities

Table 2 - Roles and responsibilities

Role	Authority/responsibility for
All DECD staff	<p>All DECD staff will:</p> <p>Note that they have a duty of care obligation towards all persons in their care and control</p> <p>Develop and implement plans and processes that enable the requirements of this DECD policy to be met</p> <p>Ensure that all practices and procedures when being developed consider the duty of care that all departmental staff owe to all persons in their care and control</p>
Legal Services Directorate	<p>The LSD staff will:</p> <p>Provide advice and assistance to DECD staff regarding the implications of this policy on departmental procedures</p> <p>Raise concerns with the Director, Legal Services, requiring legal advice</p>
Director, Legal Services	<p>The Director, Legal Services, will:</p> <p>Maintain and review this policy</p>

6. Monitoring, evaluation and review

The Duty of Care Policy will be monitored and evaluated through the Director, Legal Services, ensuring regular review of the policy every three years or as required.

7. Definitions and abbreviations

Table 3 - Definitions and abbreviations

Term	Meaning
Breach of duty	A person is in breach of duty towards another if their conduct fell short of the standard expected under the circumstances.
Damages	<p>Means compensation or damages for harm and includes solatium but does not include—</p> <p>(a) workers compensation; or</p> <p>(b) compensation under a statutory scheme for</p>

Term	Meaning
	compensating victims of crime.
Indemnity	Legal protection against liabilities arising from one's actions for anything done bona fide in the performance of their powers, duties, or functions.
Indemnity consent	Where a person is asked to agree to keep the other person harmless against loss or damage arising from a person's action or the participation in a particular activity.
Mitigating risks	Any action to avoid or reduce the risk of harm.
Negligence	Means failure to exercise reasonable care and skill, and includes a breach of a tortious, contractual or statutory duty of care.
Occupier of premises	Means a person in occupation or control of the premises, and includes a landlord.
Reasonable care	The standard of care owed by those who have a duty to take care.

8. Supporting documents

[Child Safe Environments](#)

[Families SA Duty of Care for Children and Young People in Care Practice Guide](#)

[Standards of Alternative Care in South Australia](#)

[DECD Camps and Excursions Guidelines](#)

[DECD Guidelines on Community Use of School Facilities](#)

[DECD Risk Management Policy and Framework](#)

[Making Our Sites Safer](#)

[Screening and Relevant History Checks](#)

[Volunteers Working in Educational Sites and Settings](#)

[Workplace Learning Guidelines](#)

[Information Sharing Guidelines](#)

[Non-DECD service providers in preschools, schools and educational programs](#)

9. References

Civil Liability Act 1936

Peter Butt (ed), Butterworths Australian Legal Dictionary (LexisNexis Butterworths, 2003)

Des Butler and Ben Mathews, 'Schools and the Law' (2007)