

## Information Sheet – Duty of Care for services licensed under the Child Care Act 2001

### What is ‘duty of care’?

Duty of care is the responsibility or duty to take reasonable care to avoid acts or omissions that could expose people, for whom there is a responsibility, to a reasonably foreseeable risk of injury. The level of duty of care will vary depending on circumstances, for example, managers or employers have wider responsibilities for their staff than do carers for their colleagues.

### Does the *Child Care Act 2001* refer to duty of care?

The *Child Care Act 2001*, Part 4, Duties and Offences, section 29, describes the legislative basis of duty of care in relation to children:

The holder of a licence, responsible person, person in charge and person employed by the holder of a licence to care for a child must ensure that, at all times during which a child is provided with child care under the licence -

- the child is provided with a safe environment and proper and appropriate care and supervision; and
- every reasonable precaution is taken to protect the child from a hazard likely to cause injury.

Please note that registered carers also have this same responsibility for children in care under their registration.

The penalty for not meeting this is a fine that may apply to any or all of the specified people.

The Act also states that the Standards may specify the measures, practices and procedures that those people named above must use to ensure a safe environment, proper and appropriate care and supervision.

Other legislation, e.g. Work Health and Safety Act 2012, outline further requirements in relation to duty of care for employees, fellow staff etc.

### Is there anything specific in the licensing standards about duty of care?

The licensing standards (Standard 1) require that:

- the licensee/licensee representatives be able to demonstrate their understanding of their duty of care and they must undertake to ensure that they meet their duty of care at all time;
- all staff demonstrate an understanding of their duty of care and undertake to ensure that they will meet their duty of care at all times.

It is important to recognise that all the licensing standards reflect duty of care, in relation to the appropriate management of specific risks and areas such as the development of appropriate policies and procedures.

Failure to comply with the standards will make it more difficult to argue that there is a reasonable standard of care being provided.

## Meeting your duty of care as a Licensee

Licensees should ensure that they:

- understand their obligations under the Act, regulations and Standards;
- are satisfied that the service is in compliance with the standards;
- meet timelines of Action Plan items for identified non-compliance with the licensing standards; and
- implement a process to ensure that staff have a sound understanding of their duty of care.

Please note, a licensee may hold other roles within the service and therefore may have additional responsibilities under other legislation.

## Meeting your duty of care as a staff member

The standard of care that must be provided for children is whatever a reasonable person (with similar experience, and qualifications/training) would do, or not do, in the same situation. Whether or not a particular act or omission is reasonable depends on all the circumstances surrounding it – including the nature of the task being done, and the skills, knowledge and experience reasonably needed to do that task.

The licensing standards provide a benchmark in relation to duty of care which could be used in a court of law and staff must:

- ensure that they are meeting the licensing standards in the areas for which they are responsible;
- ask questions if they are unsure whether they are meeting their duty of care;
- bring to the licensee's attention any situation where they identify that the service is not meeting its duty of care; and
- provide feedback to the licensee about the processes that have been put into place to assist staff in understanding their duty of care, and in implementing the standards.

## What may happen if duty of care is not met?

The consequences of duty of care not being met may range from minimal because no incident has resulted from this lapse, through to a child or other person being seriously or even fatally injured. The service also runs the risk of legal action being taken for negligence.

The Tasmanian *Civil Liability Act 2002*, sections 11 and 12, outline the factors involved in determining a breach of duty of care:

- (1) A person does not breach a duty to take reasonable care unless –
  - (a) there was a foreseeable risk of harm (that is, a risk of harm of which the person knew or ought reasonably to have known); and
  - (b) the risk was not insignificant; and
  - (c) in the circumstances, a reasonable person in the position of the person would have taken precautions to avoid the risk.
- (2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among other relevant things):
  - (a) the probability that the harm would occur if care were not taken;
  - (b) the likely seriousness of the harm;
  - (c) the burden of taking precautions to avoid the risk of harm;
  - (d) the potential net benefit of the activity that exposes others to the risk of harm.
- (3) For the purpose of subsection (2)(c), the court is to consider the burden of taking precautions to avoid similar risks of harm for which the person may be responsible.

### Other principles

In a proceeding relating to liability for breach of duty –

- (a) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and
- (b) the subsequent taking of action that (had the action been taken earlier) would have avoided a risk of harm does not of itself give rise to or affect liability in relation to the risk and does not of itself constitute evidence of liability in connection with the risk.

Please note that the *Child Care Act 2001* may be found on the website: [www.legislation.tas.gov.au](http://www.legislation.tas.gov.au)

Services should seek legal or insurer advice regarding duty of care concerns.