

Duty of care to children and young people policy

This is a mandated policy under the operational policy framework. Any edits to this policy must follow the process outlined on the [creating, updating and deleting operational policies](#) page.

Overview

This policy aims to make sure department staff understand:

- they have a duty of care to children and young people in their care
- the reasonable steps they must take to meet their duty of care
- the standard of care required of them
- they must not breach their duty of care
- what happens if they breach their duty of care.

It also identifies the separate responsibility of department staff to prevent and report institutional child sexual abuse under the [Statutes Amendment \(Child Sexual Abuse\) Act 2021](#).

This document does not detail department staff legislative obligations with respect to ensuring children are safe from harm as outlined within the [Children and Young People \(Safety\) Act 2017](#), however, department 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.

This policy complements the [duty of care to children and young people guideline \(PDF 171KB\)](#) and should be read in partnership with the guideline document.

Scope

This policy applies to all department staff, irrespective of job and person specification and/or role classification (ie teachers, principals, wellbeing leaders, SSOs, AEWs, etc) when children and young people are in their care.

It also applies to all individuals and entities ('other parties' engaged or contracted by the department to perform work and/or to provide support services, which involve interactions with children and young people or require close proximity to or access to children and young people (ie volunteers, contractors, employees from external agencies, third party service providers, etc). This policy does not detail the mandatory obligations of department staff with respect to keeping children and young people safe from harm as outlined in the [Children and Young People \(Safety\) Act 2017 \(SA\)](#). Mandatory reporting obligations exist in addition to duty of care. This policy also does not detail the obligation of staff to prevent discrimination, victimisation and harassment under various discrimination legislation.



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Detail

What is duty of care?

The department has a legal obligation to take reasonable steps to keep children and young people safe from risk of harm when they are in the department's care.

Who has a duty of care?

All department staff have a duty of care to make sure children and young people are safe and protected from reasonably foreseeable harm or injury when in the department's care.

Other parties also have a duty of care depending on the circumstances (see [definitions](#)).

Duty of care cannot be delegated to another person. This means the department is legally responsible for keeping children and young people safe from harm or injury even if department staff or other parties ask others to help care for children and young people.

What is standard of care?

Standard of care is the level of care expected of department staff and other parties to keep a child or young person in their care safe. Standard of care is determined by looking at what a reasonable person would have done (or not done) in the same circumstances.

The standard of care that is necessary will differ according to roles and qualifications. Not everyone will have the same standard of care. For example, while a teacher and SSO both have a duty of care to children and young people, the teacher is held to a higher standard of care than an SSO.

Meeting duty of care

The **reasonable steps** that department staff and other parties must take to meet their duty of care depend on:

- the individual circumstances of the situation (eg the type of activity taking place); and
- the level of responsibility that they hold in their position based on their job and person specification, qualifications, contractual obligations and terms of engagement (eg volunteer agreement).

What are reasonable steps?

Department staff and other parties must take reasonable steps to prevent or reduce the risk of reasonably foreseeable harm or injury to children and young people.

For example, they must:

- plan for and provide a suitable and safe environment appropriate for each activity. This includes activities held in school facilities (eg classrooms, sports gym, library, science laboratories), outdoor

spaces, excursion and camp sites, and activities that require transportation to/from an offsite venue/location

- provide adequate supervision with consideration of the number of supervisors necessary for the activity and the capabilities, skills and/or qualifications of the supervisors
- provide access to medical assistance in the form of appropriately trained/qualified supervisors, appropriate first aid supplies, phone coverage to contact emergency contacts, etc
- comply with relevant department policies and procedures.

When department staff and other parties are considering what reasonable steps to take to prevent reasonably foreseeable risk of harm or injury, they must turn their minds to numerous factors, including:

- the number of children or young people involved in the activity
- the age and ability level of the children or young people
- the nature of the activity
- the environment in which the activity will take place
- the burden of taking certain precautions (eg practical and financial burdens) and risk assessment outcomes (eg low risk vs high risk activities).

See 'preventing and reducing risk of harm or injury' section in the [duty of care to children and young people guideline \(PDF 171KB\)](#) for further information on reasonable steps.

How is a breach of duty established?

If loss or harm results from the department's failure to exercise duty of care to a child or young person, that breach may result in a negligence claim against the department. A negligence claim may be decided by a court.

For a court to determine whether negligence has been established, it must be proven that:

- a duty of care existed in the circumstances
- the duty was breached because of an act or omission by the person owing the duty
- a reasonable person in the same circumstances would not have acted in the same way
- loss or harm was suffered as a result of that breach
- the loss or harm was a reasonably foreseeable consequence of the act or failure to act.

Claims for damages resulting from a breach of duty

If it is proven that a child or young person suffered loss or harm due to the act or failure to act of a department staff member or other party, a parent of the child or young person may make a claim for damages, which is financial compensation. These claims are referred to, and managed by, Legal Claims. There must be evidence of loss or harm suffered by the child or young person. 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).

A court is able to award damages to a person where liability is found and loss or harm is proven.

Indemnification of departmental employees by the Crown

If a child or young person in the department's care is harmed or injured, and a civil claim is made, the [Public Sector Act 2009 \(SA\)](#) provides for department staff to be indemnified against the claim if their activities were lawful, occurred when performing their duties, and the department staff were acting in good faith. In these circumstances the Minister will be legally responsible for any claims for damages rather than an individual employee.

Duty to prevent and report institutional child abuse

Separate to the duty of care described above, the [Statutes Amendment \(Child Sexual Abuse\) Act 2021](#) introduces two new criminal offences under the [Criminal Law Consolidation Act 1935](#):

- Failure to report suspected child sexual abuse.
- Failure to protect child from sexual abuse.

These offences carry a period of imprisonment and impose a 'positive obligation' on prescribed persons (see Definitions section) to report to SAPOL, that they know or suspect another department employee is, has or is likely to sexually abuse a child.

The requirement to report to police created by this offence is a different obligation to reporting a child at risk of harm of sexual abuse to the Department for Child Protection which still must occur. The requirement is focused on reporting the actions of a suspected offender. It also includes any suspicion a prescribed person may have about behaviour outside the workplace and outside of work hours. A prescribed person does not need to know the identity of the child or young person.

It is a defence to the charge of failing to report if a prescribed person believes on reasonable grounds that the matter has already been reported to police or has been reported as a mandatory notification under the [Children and Young People \(Safety\) Act 2017](#). However, the department requires that a prescribed person always reports to police when they know or suspect that another department employee is, has or is likely to engage in the sexual abuse of a child.

Refer to the [managing allegations of sexual misconduct in SA education and care settings guideline \(PDF 610KB\)](#) for further information regarding the personal obligations of department staff to prevent and report institutional child sexual abuse.

Please note that in addition to the abovementioned criminal offences which are applicable to prescribed persons, a negligence claim can also be brought against the department relating to institutional child sexual abuse. In these circumstances, the burden of proof lies with the department to demonstrate the steps taken to prevent the abuse.

Roles and responsibilities

Department staff

Recognise they have a duty of care towards children and young people in their care.

Make sure they develop and implement plans and processes to fulfil their duty of care obligations.

Make sure that any other parties are aware of and act in a way that allows the department to maintain its duty of care.

Make sure all practices and procedures adequately address duty of care.

Legal Services

Provides advice and assistance to staff employed by the department about this policy, the guideline and the law, on department processes and procedures.

Director, Legal Services

Oversees advice being provided to the department and maintains review of this policy.

Definitions

damages

Compensation for loss or harm suffered as a result of a breach of duty of care but does not include workers compensation or compensation under a statutory scheme for compensating victims of crime.

department staff

All employees of the department, irrespective of job and person classification and/or role classification (ie teachers, principals, wellbeing leaders, SSOs, AEWs, etc).

negligence

Failure to exercise reasonable care and skill, including a breach of duty of care.

other parties

All individuals and entities engaged or contracted by the department to perform work and/or to provide support services, involving interactions or requiring close proximity or access to children and young people (ie volunteers, contractors, employees from external agencies, third party service providers, etc).

prescribed person

An adult who is an employee of the department, including:

- a person who is self-employed who carries out work for the department
- a person who carries out work under a contract of services for the department
- a person who undertakes practical training with the department
- a person who carries out work as a volunteer for the department.

Examples include (but are not limited to) a principal, teacher, SSO, ASEO, ECW, grounds person, student teacher, third party service provider/contractor, Governing Council employee, OSHC employee, Family Day Care operator and parent or Governing Council member volunteer.

Supporting information

Related legislation

[Children and Young People \(Safety\) Act 2017](#)

[Child Safety \(Prohibited Persons\) Act 2016](#)

[Civil Liability Act 1936](#)

[Civil Liability \(Institutional Child Abuse Liability\) Amendment Act 2021](#)

[Disability Discrimination Act 1992 \(Cth\)](#)

[Equal Opportunity Act 1984](#)

[Education and Children's Services Act 2019](#)

[Education and Early Childhood Services \(Registration and Standards\) Act 2011](#)

[Public Sector Act 2009](#)

[Statutes Amendment \(Child Sexual Abuse\) Act 2021](#)

[Work Health and Safety Act 2012](#)

Related policies

[Camps and excursions policy](#)

[Camps and excursions procedure](#)

[Duty of care to children and young people guideline \(PDF 171KB\)](#)

[Information Sharing Guidelines](#)

[Managing allegations of sexual misconduct in SA education and care settings guidelines \(PDF 610KB\)](#)

[Mandatory notification procedure \(PDF 204KB\)](#)

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

[Safeguarding children and young people policy](#)

[Safety management procedure](#)

[Sporting and adventure activities standard](#)

[Risk management policy](#)

[Screening and suitability – child safety policy \(PDF 217KB\)](#)

[Screening and suitability – child safety procedure](#)

[Vocational education and training policy](#)

[Volunteer policy](#)

[Work health and safety policy](#)

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Amendment(s): New policy: review of former guidelines of Duty of Care.

Contact

For general enquiries about duty of care please contact the Legal Services - Advice Team.

Legal Services - Advice Team

Phone: 8226 1555

Email: education.LegalRequests@sa.gov.au

For enquiries about claims please contact the Legal Services – Claims Team.

Legal Services - Claims

Phone: 8226 1555

Email: education.LegalClaims@sa.gov.au