NSW GOVERNMENT | Education & Communities

Legal Issues Bulletin

No. 19 reviewed June 2012

Legal liability and rights of staff in relation to serious incidents which involve potential risk of injury to persons on departmental premises

The procedures for dealing with serious incidents in schools and TAFE premises are governed by the **Incident Reporting Policy** (Intranet only) and associated **Incident Reporting Procedures** (Intranet only) documents. The policy and procedures provide a comprehensive regime that outlines a number of strategies to be implemented for a variety of serious incidents that may occur in schools and TAFE premises.

These documents are supplemented by a range of other policy documents that provide staff with guidelines on how to deal with a number of related issues - for example the **Suspension and Expulsion of School Students Procedures** and the **Occupational Health and Safety (OHS) Risk Management Policy** and associated documents.

Sometimes an incident that occurs at a school may need to be reported to the **Safety and Security Directorate** and or the police. Information about when an incident should be reported can be found in **Memorandum to Principals DN/10/00225 - Reporting Incidents Involving Assaults, Threats, Intimidation or Harassment (Intranet only).**

This range of policy documents supports the Department in meeting its duty of care towards students, staff and visitors who attend Department sites and activities on a daily basis. The duty of care towards these people arises from two sources - the common law and legislation.

What is the common law duty of care in relation to students?

Common law is law not contained in legislation but determined by precedents set by courts. The Department has a responsibility under common law to ensure that reasonable steps are taken to protect students from not insignificant risks that are reasonably foreseeable. This duty extends to taking reasonable care to prevent students from injuring themselves, injuring others or damaging property. While the duty is not to provide an absolute guarantee of safety, it does require that reasonable steps be taken to protect students. A foreseeable risk is one that is not "far-fetched or fanciful". The duty of care towards students is one that rests ultimately with the Department.

Can staff be liable if a student is injured during school activities?

Unless acting with serious and wilful misconduct, staff are not personally liable in respect of injuries sustained by students. In practical terms, however, the Department's compliance with its duty of care is assessed on the basis of the actions and omissions of its staff. The Department's liability for the actions of its employees is called vicarious liability. This long established common law principle is reinforced by the *Employees Liability Act 1991*. This Act requires employers to indemnify staff in relation to their negligent acts or omissions. The employee's right to an indemnity does not apply if the negligent act or omission arises from the serious and wilful misconduct of the employee.

To meet the Department's duty of care, principals and institute managers need to be able to demonstrate that systems are in place to identify risks and that once identified, precautions are taken to avoid or minimise those risks. **The duty means that**

staff cannot ignore potential hazards and are required to take firm, positive action to safeguard students from those hazards.

What is the situation with students or other people who are violent?

In matters involving violence, threatened violence (e.g. assaults, threats of assault, school invasions) and other identified risks to the safety of students, action that can be taken by staff may, depending on the circumstances, be limited.

Nevertheless, the **duty of care** owed to students will **generally not be met if no action at all is taken**. It has been a long held legal principle that staff have an obligation to take some action to prevent the risk of injury arising from fights involving students. Similar obligations would arise if staff are aware of students dealing in drugs or possessing illegal drugs on Departmental premises.

While members of staff should not place themselves at risk of physical harm, a number of basic strategies are available including:

- non-teaching staff bringing the matter to the immediate attention of relevant supervising teaching staff
- removing students not directly involved from the scene to a place of safety
- requesting the people involved to leave the premises or to cease whatever action gives rise to the threat
- arranging for other members of staff to attend the scene to assist in defusing the situation
- calling the police
- physical intervention or restraint of persons involved in the incident
- searching bags or lockers where reasonable suspicion exists that illegal drugs, weapons or other dangerous implements may be kept.

What action should or can be taken by staff will depend on the particular circumstances of the situation including the age and size of the persons involved, age and size of the staff, number of persons involved, number of staff, location and whether weapons or other dangerous implements are being used.

In assessing whether the Department has met its duty of care to students who are injured on Departmental premises, courts have historically imposed a very high standard on school staff. The standard expected is one that requires positive action to be taken.

Are staff members legally protected if they physically intervene?

Provided staff act without any serious and wilful misconduct, they will be entitled to be indemnified by the Department in respect of any personal injury claim that might arise if the duty of care is not met. At the same time the Department requires all staff to act in accordance with its policies which are designed to implement the Department's duty of care.

Staff should be aware that in any personal injury claims arising from serious incidents, in the absence of serious and wilful misconduct on the part of a member of staff, the Department will be liable for any action - not the staff member. The Department will also vigorously defend any action arising where appropriate strategies are in place and staff have acted in accordance with their obligations and Departmental policy.

If staff determine that physical intervention is an appropriate response to a particular situation, then any force used in that intervention must be reasonable having regard to the circumstances and any force used must be proportional to the nature of the threat. Reasonable force in dealing with a young infant or primary school student will be significantly different from that in dealing with a senior secondary school student.

Staff who use physical intervention to diffuse dangerous situations are occasionally subject to complaint. The Department's actions in respect of such complaints are monitored by the Ombudsman. If staff encounter situations where they use physical intervention to meet their duty of care, they should be confident that provided the intervention is reasonable and proportionate, no adverse action will result.

It is also possible that staff who use physical intervention may be subject to criminal assault proceedings by the police or by private prosecution. If this does occur, the staff member can apply to the Department for Crown representation. That means the Government will provide defence lawyers to assist the staff member if the staff member was acting in accordance with their duty. It should be noted that such criminal proceedings are extremely rare. Given the defences available to staff, the probability of a staff member who has acted professionally and reasonably being convicted is virtually nil.

What duty of care arises from legislation?

The Department has an obligation under the provisions of the *Work Health & Safety Act 2011* to ensure the health, safety and welfare at work of all its workers. This duty includes an obligation to:

- ensure any Departmental premises are safe and without risks to health
- ensure that systems of work and the working environment are safe and without risk to health
- provide such information, instruction, training and supervision as may be necessary to ensure its employees' health and safety at work.

In addition to its obligations to workers, the Department is also obliged to ensure that people other than workers (e.g. students and visitors) are not exposed to risks to their health or safety arising from the Department's activities while they are at Departmental work sites.

While at work, workers are obliged to take reasonable care for the health and safety of people who are at the worksite and who may be affected by the employee's acts or omissions at work. Workers are also obliged to co-operate with the Department as far as is necessary to enable the Department to comply with its obligations under the Act.

The obligations imposed on the Department by the legislation are theoretically more stringent that those imposed by the common law. The statutory obligations in relation to other workers are, however, generally similar to those applying under the common law - i.e. reasonable care is to be taken for the health and safety of persons at the worksite.

In practical terms however, the obligations imposed on the Department and those in charge of worksites by the legislation equate to the standard traditionally applied by the courts in relation to the Department's common law duty of care.

What rights do principals and institute managers have to ensure safe worksites?

As well as having obligations imposed by both the common law and legislation, it can equally be said that staff have a number of rights.

Principals and Institute Managers have the right to:

- utilise relevant student discipline polices to, if necessary, remove students from schools or TAFE campuses
- invoke the provisions of the *Inclosed Lands Act 1901* to restrict persons from entering onto Departmental premises
- search the bags and lockers of students if there are reasonable grounds to believe that weapons, dangerous implements or illegal drugs are present
- request police to come to the school or institute to search students where there are reasonable grounds to believe that weapons, dangerous implements or illegal drugs are on the person of the student
- implement and enforce appropriate codes of conduct and behaviour for students and visitors of the school or institute site that are designed to minimise the risk of critical incidents arising
- place certain areas of the school or institute site out-of-bounds to students
- implement supervision rosters to adequately cover the needs of the entire school site and student population (relevant to schools only)
- seek Apprehended Personal Violence orders from the court against persons who pose an on-going risk to their safety or well-being
- indemnification by the Department in respect of any personal injury claims arising from students or visitors to schools or institutes provided the injury has not been caused by the serious and wilful misconduct of the principal or institute manager.

Other workers have the right to:

- expect fellow workers will act reasonably to ensure their health and safety at the worksite
- seek Apprehended Personal Violence orders from the court against persons who pose an on-going risk to their safety or well-being
- indemnification by the Department in respect of any personal injury claims arising from students or visitors to schools or institutes provided the injury has not been caused by the serious and wilful misconduct of the employee.

The implementation of any or all of the strategies outlined needs to be in accordance with any relevant policy requirements that apply. Principals and Institute Managers should also familiarise themselves with the provisions of the following Legal Issues Bulletins:

- **Legal Issues Bulletin No. 9 - Physical Restraint of School Students**
- **Legal Issues Bulletin No. 44 - Apprehended Violence Orders**
- **Legal Issues Bulletin No. 16 - Searches in Schools and TAFE NSW** (including the memorandum to principals dated 26 April 2002 - **Powers to Search Students' Bags and Lockers**)
- **Legal Issues Bulletin No. 31 - Unauthorised Entry onto Departmental Premises**

About Legal Services

Legal Services provides legal support and advice to staff in schools, colleges, regions, state office directorates and specialist boards and authorities. It arranges for the Department to be represented before a range of courts and tribunals and assists with the preparation of legal documents. It is also available to provide legal advice in respect of any departmental policies or procedures that may have a legal complexion.

The Legal Services Directorate can provide legal advice to departmental staff only.
It is not able to provide legal advice or assistance to parents, students or members of the public.

The Legal Services Directorate posts a large amount of information on the Department's intranet. This includes:

- all current Legal Issues Bulletins
- questions the Legal Services Directorate most frequently encounters
- information about the Government Information (Public Access) Act
- links to other related legal web-sites
- other information for the use of schools and TAFE

The Legal Services Directorate continues to offer its telephone advice service to DEC personnel.

The service is available between **9.00am to 5.00pm** weekdays.

Telephone **9561 8538** to log your call for the legal officer on duty.
Your call should be dealt with or returned within one business day.

Alternatively contact us by fax **9561 8543** or by email on **legal@det.nsw.edu.au**