

DUTY OF CARE

PURPOSE:

To make Management Committee, staff and clients aware of the legal duty of care Breakaway Toowoomba has to their clients and to each other.

SCOPE:

- Duty of care to and between staff, clients and visitors

POLICY:

The members of Breakaway Toowoomba Inc. accept that they have a duty of care to all staff, clients and visitors to the service, and that all staff, clients and visitors have a legal duty of care to each other. The organisation will ensure that all staff employs safe practices and that the workplace is physically safe. Staff working in the private homes of clients will be made aware of their legal duty of care, and will be provided with adequate training for the care-giving role.

PROCEDURE:

1. All staff will be made aware of their legal Duty of Care to clients and to each other. This will be via staff training.
2. Every attempt will be made to ensure that the workplace is physically safe. This is to be done by the Workplace Health and Safety Officer carrying out regular safety checks.
3. All staff members will be provided with training for their care-giving role to ensure the safety of the client and of the worker and that safe work practices are employed at all times.
4. All Direct Support Workers must complete and keep current a First Aid Certificate.
5. The organisation will provide protection for all staff members through insurance cover for professional liability and negligence.
6. Clients of the organisation who are receiving a service in their own homes will be advised of their legal duty of care to the safety of those working in their homes, and where possible, assistance will be given to ensure the protection and safety of Support Workers. It is accepted that this organisation has no authority over clients in insisting on provision of a safe working

environment for Support Workers and we therefore reserve the right to refuse service if the environment is considered potentially hazardous or dangerous for staff.

STATEMENT OF DUTY OF CARE

The following statement on Duty of Care is divided into four sections:

1. Some principles and background.
2. The concept of duty of care.
3. Informed decision making.
4. Some suggested steps in a risk management process related to duty of care.

This statement seeks to provide a general position on duty of care.

SOME PRINCIPLES AND BACKGROUND

(This material is taken substantially from *Duty of Care in Client Services, A Brief Guide*, Division of Intellectual Disability Services, Department of Family Services and Aboriginal and Islander Affairs, September 1994.)

Breakaway Toowoomba Inc. recognises that people with a disability have the same human and civil rights as other members of the community. In common with the rest of the community, exercising these rights may entail risks. However, or clients are often vulnerable to risks to their personal safety, security and wellbeing, and may require some level of protection and personal assistance or support from staff. Breakaway Toowoomba Inc. therefore has an obligation to assist clients to understand and exercise their rights, and also a duty to ensure that this occurs with safety for all concerned.

In fulfilling their service provision role, Breakaway Toowoomba Inc. owes a duty of care to anyone who may be reasonably affected by their activities. The law relating to duty of care can be stated relatively simply, however, applying the law to individual circumstances and actions can be difficult and complex. Staff may have difficulty weighing their perceived duty against the rights of the client and others who may be affected.

Duty of care requires Breakaway Toowoomba Inc. to act in a way that does not expose others to an unreasonable risk of harm. These risks may exist for the client, the client's family, the service provider and the community.

The principle of the least restrictive alternative can assist staff to understand how duty of care fits in to the service philosophy. The principle requires that programs and individual services should intrude on a client's autonomy to the least extent compatible with meeting the client's need and achieving the objectives of the service. This means that in fulfilling duty of care, actions taken should be those which involve the least infringement of the fewest rights; and the least important rights of the fewest people possible.

THE CONCEPT OF DUTY OF CARE

(The following material is from Parsons, I., *Duty of Care - Who's Responsible?* Villamanta Publishing, Geelong, 1996. Similar material is presented in numerous other places.)

Duty of care as a concept is part of the larger legal concept of negligence.

There are four key factors in negligence:

- Duty of care
- Standard of care
- Breach of duty of care
- Harm or loss

A **duty of care** exists when someone's actions could reasonably be expected to affect other people.

You therefore need to:

- (a) be clear about exactly what the nature of the support is that you are providing, that the person is relying on you for; and
- (b) ensure that this understanding is shared by both you and the people (and their carers and families) that you are supporting.

Where a duty of care is owed, then a corresponding **standard of care** must be met. In law, the required standard of care is that which a 'reasonable person' could be expected to meet. What is 'reasonable' depends on:

- The nature of the relationship between the person owing the duty and the person/s to which the duty is owed.
- The practicalities of the situation.
- Prevailing community and professional standards.

A **breach of duty** of care is a failure to meet the relevant standard of care.

Harm or loss: the person to whom a duty of care was owed has to be able to show that the breach of that duty resulted in some sort of harm or loss.

Ian Parsons emphasises several other points that are probably worth quoting in full.

All are from *Duty of Care - Who's Responsible?*

On page 18, he advises that:

You are responsible for not only ensuring that you do not inadvertently deny people their legitimate rights, but also that you do whatever you can, within your role as a carer, to further advance and protect those rights.

Concerning accountability in relation to legislation, Parsons Notes on page 33, that:

With the passage of the Disability Discrimination Act, it is just as possible that we might damage a person by being over-protective - by denying opportunities for self-determination or equal treatment. Despite the fact that these harms to people might not be able to be actionable under the law of negligence, they are nevertheless injuries that we have a legal obligation to avoid. Our notion of what constitutes injury, therefore, has to be considerably broader than just that which is covered by the law of negligence.

In operational terms, this means that:

It is important to understand that your responsibilities to safeguard the rights of clients are every bit as important, from a legal perspective, as your responsibilities towards people's physical safety. (Page 35)

INFORMED DECISION MAKING

Informed decision making capacity is a critical component of duty of care, and Parsons has outlined some issues here with particular clarity.

Some of the key elements include:

- General awareness of the consequences of the decision;
- Decision made voluntarily and without coercion; and
- Person has a right to an assumption of competence.

Some ways of being involved in another person's decision making are:

- Supporting the person to make their own decisions;
- Informal involvement of others in making a decision;
- Formal involvement of others in making a decision (substitute decision-makers)
- Case planning (case management and program planning) - Powers of Attorney, etc.
- Guardianship and administration; and
- Advocacy.

In many cases it will be appropriate for a whole range of these strategies to be adopted - the need for one does not necessarily do away with the need for the others.

The aim of all these strategies should be to uphold the human rights of the person.

In relation to informed decision making, Parsons also makes the following key points:

You also need to keep in mind that there is an important difference between having the capacity to make informed decisions and actually always making informed decisions.

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Approved: 

...the key responsibility is not so much to make sure that people are always making fully informed decisions, but that they have the capacity, the opportunity and the support to become informed, and that they are aware of the availability of information, should they choose to use it. This means that you have a responsibility to ensure that information about the decisions to be made is available and accessible and that the people you are helping are actively supported to be aware of that information and to use it. (Page 57)

**SOME SUGGESTED STEPS IN A RISK MANAGEMENT
PROCESS RELATED TO DUTY OF CARE**

Step 1: Clarify the boundaries of the care that we are undertaking to provide

Many of the issues around "duty of care" depend upon people's understanding of what our role and responsibilities are. If there are no clear and negotiated limits or boundaries to the service we are undertaking to provide, then our duty of care may also be unclear.

It may be dangerous to the person receiving our care if they or others misunderstand what we do.

We should have a written statement of the nature of our service and its boundaries, and see that it is clearly communicated to everyone it matters to.

Sometimes we can see that a person faces a risk which is not directly related to the service that we provide. We would still be expected to do what any reasonable person would do under the circumstances. This may include such things as informing a responsible person of the risk that we see, or advocating.

When we are dealing with people who may have impaired decision making capacity because of their youth or an intellectual or psychiatric disability, we must clarify what our responsibilities are. If we were to take it upon ourselves to not allow them to take any responsibility that might involve risk, we would be denying their human rights and effectively "institutionalising" them.

If we were to completely disregard the risk that impaired decision making capacity may have on the person, we would not be exercising sufficient care.

Generally speaking, people with impaired decision making capacity should be given, as far as we can manage:

- Information in ways that make sense to them;
- Options to choose from;
- Experience and understanding of the options available; and
- Experience and understanding of the effects of their decision or choice.

Step 2: Identify, analyse and evaluate the risks to the person that may be associated with our care.

Risks may occur from things that we do, and from things that we fail to do. Example, risks may arise from:

- lack of expected knowledge or skill;
- lack of adequate maintenance of equipment;
- lack of adequate supervision;
- lack of reasonable care; or
- Confusion.

We cannot eliminate all possible risks, but we can deliberately plan to address the most likely and the most serious.

**Step 3: Plan to minimise the risk of harmful events occurring
Plan to minimise the harm that might be done if a risk cannot be eliminated.**

This planning stage can include many strategies, e.g.:

- Clear, well thought-out procedures;
- Staff training;
- Physical design; and
- Good communications.

Step 4: Monitor and review the risk management plans related to our care.

Every time a harmful incident occurs, or is only luckily avoided, we need to ask:

- (a) whether we had accurately identified the risk that we faced;
- (b) what more we can do to reduce the chance of the event happening again; and
- (c) what more we can do to minimise the harm, should the situation arise again.

Approved (Executive Officers) David Beal Date 19.11.09

Approved (Chairperson) Paul E Devine Date 19.11.09