The_House

About Duty of Care

Purpose

This booklet is designed to give you basic training in Duty of Care of long-term residential care for Alcohol and Other Drug (AOD) clients.

The Scenario

The_House is an AOD facility for long-term rehabilitation. It rents several houses near each other and runs its main program in one of them. Clients are called "residents." It depends heavily on volunteer help but its core staff are employees. Suitable senior residents also take responsibility for others, but always work under supervision. It does not get institutional government funding.

Summary

1. Develop a culture of identifying hazards, assessing risks, and doing something about anything dangerous.
2. Duty of care doesn't need to be such a big deal, as long as you do it right.
3. Give some basic on-job training to all new workers, including volunteers and senior residents with oversight.
4. There are different kinds of OHS risks. Don't limit yourself to only physical dangers relating to the property. (E.g. counselor burnout, violence)
5. Cover everybody and all off-site activities.
6. Keep up-to-date policies and procedures and make sure everybody follows them.
7. Keep records.
8. Insurance won't necessarily cover everything.

The long version

Your assignment is to answer the Thirty-One questions in writing using the information on the pages afterwards. You will need to check with your supervisor for some items (e.g. insurance).
Thirty-one Questions

1. What is "duty of care"?
2. Does duty of care mean that your organization is responsible for everything that goes wrong in its duty of care? Explain your answer.
3. What's the same between duty of care under the OSH Act and under the Civil Liability Act?
4. What's different between duty of care under the OSH Act and under the Civil Liability Act?
5. How would you answer someone who says, "We have has full insurance cover, so it doesn't really matter?"
6. What sort of things can't you or your organization be sued for?
7. What sort of incidents must someone sue your organization for?
8. Who of the following does your organization have duty of care for: staff, residents, children of residents, volunteers, visitors?
9. Does your organization have a duty of care for off-site activities run under its auspices?
10. Who has duty of care for residents when playing basketball at a recreation centre?
11. Does your organization have a duty of care for a group of residents who get permission to go out together for a recreational activity? Explain your answer.
12. Does your organization have a duty of care for an adult resident who leaves of her own will? Explain your answer.
13. Does your organization have a duty of care for a fifteen-year-old who has run away? Explain your answer.
14. What duty of care does your organization have for a fifteen-year-old who wants to run away? Explain your answer.
15. Does your organization have a duty of care for someone who falls over their own feet and hurts themselves? Explain your answer.
16. Does your organization have a duty of care for someone who falls over a carpet edge and hurts themselves? Explain your answer.
17. Does your organization have a duty of care for people while traveling? Explain your answer.
18. Does your organization have a duty of care for residents in a rented house? Explain your answer.
19. What duty of care does your organization have for residents as counselees? Explain your answer.
20. What duty of care does your organization have for residents in detox? Explain your answer.
21. What duty of care does your organization have if a senior resident is the designated person to oversee residents at the time of an accident? Explain your answer.
22. What duty of care does your organization not have for residents' children? Explain your answer.
23. What duty of care does your organization have in this case: Kylie, a resident, has a two-year-old son named Ethan. One evening at the home where they live, which as provided for them by The_House, Ethan climbs a veranda handrail, falls off, and breaks an arm. Explain your answer.
24. What kinds of insurance cover does your organization have?
25. What does it protect you for?
26. What does it not protect you for?
27. Make a list of written best practice guides and codes of ethics that you work under that your organization has endorsed? Where do you have access to a copy?
28. Does your current duty of care policy cover all legal requirements? Explain your answer.
29. Is your current duty of care policy consistently put into practice? If so, how do you know? Explain your answer.
30. Are you subject to mandatory reporting?
31. Explain your duty of care for your role.
Reading 1: Introduction

What is Duty of Care?

It is your duty to take reasonable care to avoid acts or omissions that you can reasonably foresee would probably result in injury or other harm to somebody. You should have thought about them when doing what you did.

However, care doesn't have to be perfect. You don't have to cover all possible problems, because that would be unreasonable.

You have a duty of care to those in your care, regardless of their age, but it is increased for the vulnerable (e.g. minors). Some relationships (such as student-teacher) have a more demanding duty, called a 'non-delegable' duty of care. In schools, this is based on the idea that the child is vulnerable and dependent. The school still has a duty of care even if employees and independent contractors do the work.

Consider the following:
1. Is the person particularly vulnerable, such as a young child?
2. How serious would the harm/injuries probably be?
3. How likely would it be? (If you can't reasonably be expected to foresee it, then you don't have to do anything about it.)
4. How difficult is it to take preventative measures? (Extreme measures would be unreasonably demanding.)

Note: points 2-4 are covered as part of normal risk management.

Negligence Claim

Most legal claims are based on negligence. The employer is responsible for what is done by its employees as part of their employment, so people sue the employer. They can only sue the employee personally for something done by employees outside their employment.

To sue successfully, the plaintiff has to show in court that:
1. the defendant had a duty of care;
2. the defendant gave a lower standard of care than would be reasonable,
3. that the lack of adequate care resulted in harm (usually injury), even if it wasn't the sole cause of harm.
4. the plaintiff suffered some kind of damage or loss.

Reading 2: Occupational Safety and Health Act (WA)

This Act covers things that you can be prosecuted for if you don't comply.

OHS Duty of care

- **Employers** have a duty of care as far as practicable to provide and maintain a working environment where employees are not exposed to hazards.
- **Employees** must take reasonable care to ensure their own health and safety and avoid adversely affecting the health or safety of others through any act or omission.
- **All staff** have a duty of care responsibility to clients.

What to do

1. First, make sure your Occupational Health and Safety system is up to speed. You should have identified hazards, assessed them, and put controls in place. Your access and exit ways should be safe. Your instruction and induction training should promote a safety culture in the workplace.
2. Next, differentiate between places that are open to the public and those that are not. You may also need to specify particular locations that have particular hazards or risks.

3. Allow only authorized people to enter places that are closed to the public. You may allow visitors admission, but should have a duty of care system in place. Train staff who are responsible for accompanying visitors. This especially applies to all high hazard areas.

4. You would normally restrict visitors from all high hazard areas. Visitors needing access to closed areas should go through a procedure for reporting in, and particular staff should be given the responsibility for monitoring entry.

**Paraphrased quote**

19. **Duties of employers**
   
   (1) Provide and maintain a working environment in which employees are not exposed to hazards.
   
   a. give employees information, instruction, and training
   
   b. supervise employees so that they aren’t exposed to hazards
   
   c. consult and cooperate with any safety and health representatives
   
   d. where it isn’t practicable to avoid hazards, ensure that employees have adequate personal protective clothing and equipment
   
   e. make arrangements for ensuring that dealing with plant and substances is done without exposing employees to hazards, as far as practicable.

   (2) Consider the particular functions and responsibilities of employees when determining the training required.

   (3) Notify the Commissioner immediately if an employee is injured or affected by a disease at a workplace that results in death or is prescribed in the regulations.

   (4) If a person engages a contractor, he/she is deemed to be the employer for matters over which he has control, even if he has made a contract to the contrary. The contractor and his employees are considered the employees.

20. **Duties of employees**

   (1) Employees must take reasonable care to ensure their own safety and health at work, and to avoid adversely affecting anybody else's safety or health (including by omission)

   (2) An employee contravenes if he:
   
   a. fails to comply with instructions given by his employer the safety or health of himself or others
   
   b. fails to use protective clothing and equipment properly
   
   c. misuses or damages any equipment
   
   d. fails to report immediately to his employer hazards that he cannot correct or any injury or harm to health that he knows about

   (3) An employee shall co-operate with his employer in the carrying out OHS laws

22. **Duties of persons who have control of workplaces**

   (1, 2) If you have any extent of control of a workplace or its entries and exits, you must ensure that people are not exposed to hazards. You are considered in control if a contract or lease obliges you to provide maintenance or repair.

   (3) This applies to carrying on a trade, business or undertaking, whether for profit or not.

**Reading 3. Civil Liability Act 2002 (WA)**

This Act is covers things that you can be sued for if you don't comply.

Even if you are at fault and somebody comes to harm, they can't successfully sue you if they could (or should) have seen the risk and taken precautions, especially considering:

- Would they probably be harmed if they were careful?
- Would the harm probably be serious?
- Is it reasonable to expect them to take precautions?
- "Social utility" defined in various ways: Is it primarily a social or recreational activity?
What was practical and possible in the situation?

Paraphrased quote

Duty of care: General principles
(1) A person is not liable for harm caused by their own failure to take precautions against a risk of harm unless —
   1. the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known);
   2. the risk was not insignificant; and
   3. in the circumstances, a reasonable person in their position would have taken those precautions.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things) —
   1. the probability that the harm would occur if care were not taken;
   2. the likely seriousness of the harm;
   3. the burden of taking precautions to avoid the risk of harm;
   4. the social utility of the activity that creates the risk of harm.

This causation section covers recreational activities, contributory negligence, assumption of risk (e.g. Injured persons are presumed to be aware of obvious risks, and there is no duty to warn of obvious risk, and no liability for harm from inherent risk.

Health care professionals
For the purposes of this Act, an AOD worker fits the category of health professional: "In this Division — "health professional" includes any of the following ... any other discipline or profession practising in the health area which applies a body of learning." (Division 7, 5PA)

As an AOD worker, you can't be successfully sued if you do something (or omit doing something) as long as you follow competent professional practice at the time. This applies even if there are different ideas around on what is "competent professional practice."
(However, there are exceptions for pregnant clients.)

But you can be successfully sued if you don't follow competent professional practice at the time.

Part 1B — Mental harm
The mental harm section of the Act basically says you have a duty of care not to put people into a position that would result in a psychiatric illness if you could foresee what would happen. People can't sue you for mental harm without just because something made them feel bad.

Paraphrased quote

1. "Mental harm" means impairment of a person’s mental condition. If it isn't caused by a personal injury of some kind, it’s called pure mental harm.
2. You only have a duty of care not to cause mental harm if:
   • you should be able to foresee that a normal person would suffer a recognized psychiatric illness
   • you don’t take reasonable care
   • considering the circumstances.
3. About circumstances:
   • It's not normally an injury if it's the result of a sudden shock or traumatic experience (e.g. witnessing a person being killed, injured or put in peril, considering also the kind of relationship with that person)
   • It also considers whether there had already been a relationship of some kind between the plaintiff and the defendant.
4. The court may consider what the defendant knew (or should have known) about the fortitude of the plaintiff.
5. A court can only award damages for mental harm that is a recognized psychiatric illness.
**Reading 4. Volunteers (Protection from Liability) Act 2002**

People doing voluntary community work can't be successfully sued for their work unless they:
- knew (or should have known) that they were acting outside the scope of the work,
- act contrary to the organization's instructions, or
- are significantly impaired by alcohol or drugs.

The community organization that organizes it incurs the liability, and it can't make an agreement with the volunteer that will get them out of it.

**Reading 5. Insurance**

Insurance doesn't cover everything if it's your fault (e.g. you are doing something illegal). Insurance companies will spend lots of money investigating a major claim if they think they shouldn't pay it.

Employers are legally required to have workers' compensation insurance for employees. Third party person damage for motor vehicles is obligatory in Western Australia, although it doesn't cover unlicensed drivers or unlicensed vehicles. Vehicle property damage is not obligatory. Public liability and volunteer insurance are not normally mandatory. All organizations should have some public liability insurance, and all organizations that use volunteer help should have volunteer insurance cover.

Insurance contracts vary widely, and some give much better cover than others. Besides, insurance companies vary in how willing they are to pay claims.

A small number of reasonable claims doesn’t usually have much effect on your insurance cover, and it is in your organization's best interests to make them.

However, making major claims or lots of claims has ongoing consequences for your organization:
- The insurer might consider you to be higher risk and put your insurance premiums up.
- If the insurer pays out for a series of major claims, it might become unwilling to insure you at all.
- Other insurance companies will also charge much higher premiums, or even become unwilling to insure you at all.

Even worse, you might find it difficult to get insurance from another insurance company. The new insurer will ask you to declare any claims you have made at other insurers. Your new policy will be void if you hide a bad history of insurance claims, even if you pay all the premiums. As a result, if you apply to another insurer without disclosing your past claims, you could pay all the premiums but you will lose your cover.

In some cases, an injured person must sue. Here's a case study:

A volunteer was helping at his local church doing some general maintenance. He fell off the roof while cleaning gutters, becoming a paraplegic and incurring huge long-term costs. He was reluctant to sue, but the church encouraged him to do so because it was the only way he could pay his bills and live afterwards as a paraplegic. The insurance company paid the claim in full.

**Reading 6. Categories: Who's at The_House?**

The **House Foundation Inc.** The incorporated body has specific duties to:
- provide a safe workplace for all employees
- provide workers' compensation insurance cover for all employees
- provide adequate supervision
It is liable for anything workers do on its behalf (called vicarious liability).

**Employees** (staff). Their responsibilities are clearly laid out in the OSH Act.

**Volunteers.** They have the same responsibilities as employees, but aren't covered by workers' compensation. The_House has volunteer insurance cover for them.

**Senior residents with oversight.** Their responsibilities are the same as employees, even though they always work under supervision. The_House has volunteer insurance cover for them.

**Guests.** The OSH Act makes The_House responsible for people other than workers while they are in the workplace.

**Residents.** The OSH Act gives The_House responsibility for people other than workers (e.g. residents) while they are in the workplace. The Civil Liabilities Act also requires it to provide a reasonable level of safety on its property, including residences and during its off-site activities. This includes living with anybody who has an identified tendency to become violent.

**Adult residents** are able to follow instructions and foresee any reasonable risks. They are legally free to leave if they wish.

**Residents who are 16-17 years of age** are able to follow instructions and foresee any reasonable risks. They are legally free to leave if they wish, but must be able to show that they can support themselves.

**Residents under 16 years of age** are classified as children, so are seen to be vulnerable and deserving of extra care. They are not usually free to leave except to the care of a parent or guardian, or the police.

**Residents in detox or sick** are seen to be vulnerable and deserving of extra care. This also includes those who are emotionally unstable, have ideation of suicide, are psychotic, etc.

**Residents' children** are seen to be vulnerable and deserving of extra care.

**Reading 7. Other factors**

**Out of work.** If you provide free care to other people outside your work, they are entitled to the same standard of care and confidentiality as if they paid you for it. (Doing something for free doesn’t mean you can be sloppy or a gossip.)

**Mandatory reporting.** In WA, some professions have mandatory reporting. This means that someone is legally obliged to report abuse to the relevant authority. They’d be committing a legal offence if they learnt of sexual abuse and did not report it. Mandatory reporters are:

- Doctors
- Nurses and midwives
- Teachers (i.e. anybody registered under WACOT), teachers in community kindergartens, teachers in detention centres
- police officers.

If you aren’t one of these, WA law does not require you to report abuse.

If you are a mandatory reporter, you must report your suspicions of child sexual abuse to the Department for Child Protection if you form this belief, based on reasonable grounds, in the course of your paid or unpaid work.

You should report other forms of abuse (physical, emotional and neglect), but there’s no penalty if you don’t.
A child is someone under 18 years of age. If you have no positive evidence of age, a child is a person who appears to be under 18 years of age.

Child sexual abuse includes sexual behaviour in circumstances where:
(a) the child is the subject of bribery, coercion, a threat, exploitation or violence; or
(b) the child has less power than another person involved in the behaviour; or
(c) there is a significant disparity in the developmental function or maturity of the child and another person involved in the behaviour.

Residences are both workplaces and private residences. This makes it more difficult to interpret some of the laws.

Other forms of required reporting. You may also be required to report any kind of abuse for:
• residents who are referred to your care by the courts
• wards of the state in your care
• any other residents if there is a contract in place regarding reporting.

These other kinds of reporting are not limited to sexual abuse.

Main house vs. residences. The main house is clearly a workplace during all program hours. During this time, The_House has full duty of care for everyone on the property according to the OSH Act. Outside program hours, it could be seen as simply a residence.

Under the Civil Liabilities Act, The_House has the same basic duty of care for residences as anybody does for a private home, with the exceptions that:
• It might be occasionally used as a workplace (e.g. meetings, counseling)
• The_House should still consider risks relating to children and other vulnerable people.

Is an off-site activity part of the program? The_House has duty of care for all workers and residents during an off-site activity that is part of its program. However, the duty of care may be shared by another party (e.g. a building owner). It seems that The_House has no particular duty of care at all for residents' children during off-site its activities; they are fully in the care of their parents.

Otherwise, The_House has no particular duty of care for people during off-site activities that are not part of its program.

End