

## Frequently Asked Questions

### The question of liability for boards and principals

**Disclaimer:** The following information is necessarily brief and general in nature. You should seek professional advice before taking any action in relation to the matters raised.

**Q1 Has liability for school boards of trustees (boards) changed under the Health and Safety in Employment Act 1992 (HASE)?**

**A1** Although Crown organisations have always had to comply with the HASE, they could not previously be prosecuted under the HASE. That immunity has now been removed. This change came about as an amendment to the HASE Act under the Crown Organisations (Criminal Liability) Act 2002.

Boards have always been subject to the general laws of New Zealand, for example, a board could be prosecuted for negligence or criminal nuisance under the Crimes Act 1961, if, where a duty is owed, it failed to take all reasonable care, and its actions or omissions caused injury.

Despite boards' prior immunity, boards were still responsible for, and required to maintain certain health and safety standards under the Education Act 1989 (for both employees and students). The focus on student safety has not changed.

**Q2 Has liability for individual trustees and school principals changed under the HASE?**

**A2** As in the answer above, trustees or principals could not previously be prosecuted under the HASE Act as an agent of a Crown organisation. This position has changed in respect of Crown organisations, and therefore also in respect of agents of the Crown. *Any agent, officer or employee concerned in the management of the organisation* may now be personally liable for **personal** breaches of the HASE Act.

Where the board is prosecuted, the trustees are still protected from the board's liability, provided they have acted in good faith (Sixth Schedule, Education Act 1989). This only applies to protect trustees from the board's liability.

Where an individual is prosecuted, protection does not apply as no person can claim immunity from prosecution for an offence due to being an employee or agent of the Crown (Section 11, Crown Organisations (Criminal Liability) Act 2002).

**Q3 When is OSH likely to prosecute individuals?**

**A3** The Occupational Safety and Health Service of the Department of Labour (OSH) apply an enforcement policy, which states (in summary): that

prosecution of an individual takes place if the prosecution is in the public interest; and if the individual had clear knowledge the situation was unsafe or was otherwise contrary to the Act, and decided not to take practicable steps. Therefore it is unlikely a prosecution will be brought where the individual has been careful in planning and following proper guidelines.

[Note: OSH enforcement policy is subject to change, and a private prosecution may also be brought under the HASE Act, provided that OSH decide not to prosecute, and leave is granted by the Court.]

Principals and senior teachers are more likely to be involved in the *management* of the school than an individual trustee. As with boards, principals and teachers involved in school management have always been open to prosecution for negligence or other like offences under the Crimes Act 1961. Liability in general has not changed.

**Q4 Does the conviction of the organiser of Le Race 2001 mean that school principals and those teachers involved in *managing* the school are more susceptible to prosecution under the amended health and safety legislation?**

**A4** No. There is an incorrect perception that the event organiser in the “Le Race” case was prosecuted by OSH under the Health and Safety in Employment Act, 1992 (HASE). The defendant was actually prosecuted by the police, for criminal nuisance under the Crimes Act, 1961. This Act has not changed.

The presiding judge for the Le Race case commented on the community reaction since the guilty verdict:

"...there is no reason whatever to suggest that people who are involved in organising sporting or other events have any justified cause for alarm as a result of the verdict in this case."

The judge stated that on the evidence, the tragedy resulted from a series of flawed decisions by the defendant, who had a duty as a person in charge of a dangerous thing, to take reasonable precautions and take reasonable care.

Further information on Le Race is available on the web, for example [www.lawlink.co.nz/resources/lerace.pdf](http://www.lawlink.co.nz/resources/lerace.pdf)

**Q5 What does the Le Race Case conviction mean for principals?**

**A5** Principals should continue to take *reasonable* precautions and care in order to protect themselves from liability. Note that it is not a requirement to take every possible precaution and "absolute" care.

**Q6 Can the Ministry of Education cover fines issued to principals, boards and board members following the changes to the HASE Act?**

**A6** No. The Ministry is prohibited by section 561 (2) (b) of the HASE Act to offer or provide an indemnity to anyone for fines or infringement fees. The Ministry's Health and Safety Code of Practice has been up-dated to reflect this change in policy.

**Q7 Does a serious incident automatically invoke personal liability under the HASE Act or Crimes Act?**

**A7** The mere fact that there is an injury or death does not necessarily invoke liability under the Crimes Act 1961 or the HASE Act 1992. As above, OSH enforcement policy states that, there must have been a clear breach of duty, that practicable steps known to the person were not taken. Negligence requires that a duty of care is owed, and that the person failed to take all reasonable steps.

**Q8 What help is available to assist schools with EOTC and their outdoor safety management systems?**

**A8** A range of avenues are open:

- The resource: *Safety and EOTC – A good practice guide for New Zealand Schools*, is available online at [www.tki.org.nz/r/eotc/resources/safety\\_e.php](http://www.tki.org.nz/r/eotc/resources/safety_e.php) and in hard copy in every school
- [EOTC Professional Bodies and National Organisations](#).
- Local experts in the school community with knowledge or expertise in the particular activity you intend running (eg, horse riding – the local pony club; tramping – the local tramping club or local branch of the New Zealand Mountain Safety Council)
- Attend the Professional Development workshops being offered to support schools to implement the *Safety and EOTC* guidelines. Workshop schedules for your region are available at [www.tki.org.nz/e/community/eotc](http://www.tki.org.nz/e/community/eotc)
- School Support Services in your region will have advisers responsible for EOTC
- Your professional peers Form a cluster of schools in your region (or use an existing cluster) that run EOTC activities similar to yours.

**Q9 What liability insurance can / should my school take out?**

**A9** Generally, boards should cover:

- a) damage to property of a third person caused by teachers' or students' actions
- b) personal injury to a student or teacher not covered by ACC

Note

- Schools that have joined the Ministry's insurance scheme will have liability insurance cover in place for a) and b) above.

- The scheme covers civil liability, which includes legal liability arising from any legal proceedings for compensation arising out of schools' day-to-day operations.
  - It also covers liability to pay for compensation in respect of personal injury or property damage caused by an occurrence in connection with the school's operation.
- c) While section 561 of the HASE Amendment Act 2003 prohibits insuring against fines and infringement fees, it is still possible to insure against the legal costs of defending a prosecution and against any reparation order.

**Q10 What new legislation, affecting the liability of principals and boards in the case of a serious injury or death during a school event, has come into effect?**

**A10** Two new pieces of legislation came into force in 2002-2003:

- [Health and Safety in Employment Amendment Act 2002](#)
- Crown Organisations (Criminal Liability) Act 2002

**Q11 What is the Crown Organisations (Criminal Liability) Act 2002 and why did it come into effect?**

**A11** The Crown Organisations (Criminal Liability) Act changed the law to enable Crown Organisations to be prosecuted for offences under the HASE Act and the Building Act 1991.

The Criminal Liability Act came about in response to Judge Noble's report on the Cave Creek tragedy. The government was lobbied to bring more accountability to Crown organisations and their officers.

**Q12 How can principals and boards avoid prosecution under the HASE and Crimes Acts?**

**A12** Boards and principals can be confident that if they take all reasonable practicable steps, and follow relevant health and safety guidelines (such as [Safety and EOTC – A good practice guide for New Zealand schools](#)) to manage risk during school events, they will significantly reduce the chances of an incident occurring (and, therefore, being prosecuted).