

102. Boards of trustees are legally responsible for the safety of all students involved in EOTC programmes. If there is an accident during an EOTC event a board may be held accountable whether the accident is caused by the actions or omissions of a teacher, outside helper, student or commercial operator contracted by the board. Whether accountability goes so far as being legally liable for the accident will depend on whether the board has complied with its legal obligations when planning and carrying out the EOTC programme.

103. A board's legal obligations include those set out in legislation and those arising out of the general law.

► **Obligations under legislation**

104. The legal requirements of boards under various acts are set out below.

(i) Education Act 1989

105. Boards must prepare charters in accordance with the National Administration Guidelines (NAGs). The following NAGs are relevant to EOTC programmes:

NAG 1 curriculum requirements

- Delivery of programmes that meet student needs.

EOTC might relate to the following:

- Delivery of outdoor education in the health and physical education curriculum.
- EOTC experiences for environmental education.
- EOTC experiences to enhance learning across all curricula.

NAG 2 Documentation and self-review.

- Every school will have an EOTC outdoor safety management system (OSMS) particular to its needs, that includes staff professional development.
- The OSMS requires regular self-review.

- Any death, serious injury or near miss requires documentation, investigation and review.

NAG 3 Employer responsibilities

- Develop personnel policies that promote high levels of staff performance.
- Ensure appropriately skilled and experienced staffing of EOTC activities that meet best practice requirements.

NAG 4 Financial and property management

- Ensure EOTC equipment and facility usage is logged and maintained to industry standards.

NAG 5 Health and safety

- Provide a safe physical and emotional environment for students; and
- comply in full with any legislation in force or planned, to ensure the safety of students and employees.

NAG 6 Administration

- Comply with all general legislation not covered by NAGs 1-5.

(ii) Health and safety in employment legislation

106. Under the Health and Safety in Employment Act 1992 (HSE Act), and the Health and Safety in Employment Regulations 1995, boards have obligations as employers to the health and safety of employees, students, and other visitors to the school.

Boards have a duty to:

- take all practicable steps²¹ to ensure the safety of employees and other people;
- identify hazards and take steps to eliminate, isolate and/or minimise them;
- develop emergency procedures;
- provide employee training;

²¹ See Appendix 1, Glossary.

- keep a register of incidents that have seriously harmed²² or might have harmed staff or students;
- take all practicable steps to ensure no employee's action or inaction at work harms any other person.

(iii) Crimes Act 1961

107. This Act imposes a duty on those with responsibility for others, including boards and teachers, to provide the necessities of life, including food, clothing and medical treatment. A further duty is imposed on those in charge of dangerous things – and this would cover an EOTC activity – to use all reasonable care to avoid danger to human life.

▶ Legal obligations under general law²³

108. This section explains the scope of a New Zealand school's duty of care, and the standard of care required, and explores the relationship with parental responsibility (including the legal efficacy of parental consent forms).

(i) Duty of care

109. School boards of trustees and teachers owe a duty of care to students to safeguard them from harm in situations where a reasonable person would have foreseen the likelihood of harm arising. This responsibility continues even when school activities are located away from the school and involve outside helpers, parents or instructors, and when students participate in course packages offered by commercial operators.

110. Accident compensation legislation has meant that people cannot sue the board for any breach of this duty resulting in personal injury. But boards could still be sued for exemplary damages, for compensation, for property damage, or for damages for mental injury.

(ii) Standard of care

111. Boards are required to meet particular standards in order to fulfil their legal obligations. For example:

- the Health and Safety in Employment Act requires boards to take “all practicable steps”²⁴;
- the Crimes Act refers to a standard of care that would be expected of a reasonable person; and

- there are the reasonable standards of care owed to students in cases where negligence is alleged.

112. The standard of care required on an EOTC activity is the standard that could be reasonably expected of the professional teacher²⁵ or professional outdoor leader.²⁶

113. In order to meet the required standards of care, boards should:

- establish EOTC policies that are based on and reflect best practice; and
- ensure that the EOTC programme operates in accordance with the board's own policies and procedures; and is in the interest of students.

In loco parentis – an out-dated doctrine

114. There is often reference to the rule of “in loco parentis” when determining what standards of care are owed to students in EOTC. It requires that teachers and boards provide the degree of care towards their students that could be expected from a reasonably careful and prudent parent.

115. This is no longer accepted as satisfactory in comparable jurisdictions to New Zealand because students are required to attend schools under the Education Act 1989. They are not there under private arrangements made by parents with the school.

116. To say that schools act in *place* of parents is a useful metaphor for *how* schools should act. But it is wrong to say that schools derive their power *from* parents. Nor is this altered when students are away from schools on overnight school trips or camps. Some supervisory functions will be more parent-like in this setting, but they will still be state-derived.

²² See Appendix I, Glossary.

²³ Key references for this section were:
Hay-MacKenzie, F. (2001). Harm without damages? A school's liability for personal injury in New Zealand. *Australia and New Zealand Journal of Law and Education*. Vol 7, No 1, 2002, pp 39-64.
Rishworth, P. (2001). The lawful powers of schools – territorial and substantive limits. *NZLS Seminar – Recent Developments in School Law*. pp 23-25.

²⁴ See Appendix I, Glossary.

²⁵ See Appendix I, Glossary.

²⁶ See Appendix I, Glossary.

(iii) Breach of standard of care

117. Putting aside the issue of accident compensation, for an injured student to succeed in a claim of negligence against a school, the student must establish that:

- the school owed a duty of care to that student;
- the school was in breach of that duty;
- as a result of the school's breach of its duty, the student suffered damage/harm; and
- the damage or harm suffered was not too remote from the school's breach of its duty.

(iv) Waivers

118. A signed waiver does *not* release the organisation or individual staff or person from their legal responsibilities for the prevention of risk. A high standard of care is still owed, quality equipment is still required, activities need to be supervised by competent staff and emergency procedures need to be planned and followed. The standard rises for those with special needs.

(v) Parental consent and risk disclosure

119. Parental consent/risk disclosure forms *do not* remove a school's legal responsibilities

towards students. They do however have the advantage of bringing to the minds of all parties that risks exist, that measures to prevent those risks are being taken, and a continual surveillance of any risk is everybody's obligation.

120. Boards should get parents' consent before students are involved in an EOTC programme.

- The form should tell parent/s of any risks associated with the programme (risk disclosure).
- There should also be provision for the parent to inform the school of any risks associated with their child's involvement. For example, student's special requirement/s; skills, or lack of them; medical and health conditions; cultural practices etc.

121. Parental consent/risk disclosure forms will be most effective when:

- risks are fully explained so parents and students understand them;
- parents and students are given the opportunity to ask questions; and
- activities are entered into voluntarily (challenge by choice).