

CLAYTON UTZ

Good decision-making for government
Duty of care

Duty of care and the law

The duty of care is a legal obligation to avoid causing harm or injury to others. A breach of the duty of care can give rise to a liability to pay compensation to a person who has thereby suffered damage.

Government agencies and decision-makers are under a duty of care in many situations, some of which are covered in this pamphlet. A duty of care can be owed to the public, as well as to government employees. There is a duty of care, for example, to ensure that government premises and equipment are safe, that employees have safe working conditions, that regulatory inspections are carried out prudently, that formal letters of advice are correct, and that government statutory obligations are fulfilled.

In addition to being a legal obligation, “duty of care” as a concept is sometimes used within government to convey the special (but broader) responsibilities that are owed to the community. Even though, in this extended sense, the duty of care might not be enforceable by legal action or by the payment of damages, the concept is nonetheless important in defining the obligations of government. It is, for example, within the province of the Ombudsman to investigate complaints about defective government administration and to make recommendations for corrective action. Government agencies commonly aspire as well, in service charters and other formal written commitments, to observe standards of decision-making that supplement the legal obligations of government.

Negligent action

People and organisations, government included, have a legal obligation to take reasonable care to avoid causing harm or injury to others. This general obligation – not to be negligent – applies to an infinite variety of situations, including driving cars, constructing buildings, manufacturing products, providing services and issuing orders. The following four issues will commonly arise in applying this principle.

1. The duty

Ordinarily there will be a duty to take reasonable care, when it is reasonably foreseeable that another person could be harmed by negligent conduct. A renowned statement of the principle is that “you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour”. In summary, the law imposes an obligation on people to stand back from any situation, and to appraise the risks and dangers to others, especially to those who are in proximity by reason of contact, dealings or functions.

Legislation sometimes imposes a duty of care – such as workplace and product safety codes, and environmental protection laws. Conversely, legislation at times negates a duty of care, by declaring that a government agency is immune from legal action when exercising its statutory functions. However, immunity clauses are usually interpreted narrowly, and it is prudent always to assume that a duty of care is a legal possibility.

2. Breach of the duty

Reasonable care must be taken to avoid the risks and dangers that are reasonably foreseeable. The standard of care that should be observed will vary with the circumstances. For example, a higher degree of care is expected where the risk of injury is high, the potential damage is serious, a dangerous consequence could easily be avoided, or a professional skill has been asserted. The requirement to observe reasonable care is a requirement to act as a cautious, observant and prudent person would act in the situation. Professional codes and industry standards will often provide useful guidance.

3. Liability for breach

A person who has suffered injury as a result of negligent action is entitled to be compensated, and placed as near as possible in the same position as before. To accomplish that objective a court might award damages for items such as loss of earning capacity, medical expenses, physical pain and suffering, property damage, or loss of profit.

4. Who is liable

The liability to pay damages for loss arising from negligent action is normally owed both by the person who was negligent, and by their employer (this is called vicarious liability). An employee is entitled in law to be indemnified for liability or expenses incurred in properly carrying out an employer’s instructions. However, as this point illustrates, the legal obligation to be careful, and to avoid or minimise the risk of liability, is both a personal and an institutional obligation.



Government regulation

A major function of government is to regulate the conduct of others, so as to safeguard public health, prevent environmental damage, ensure building safety, control public order, and similar objectives. There is a duty to take reasonable care in conducting that regulation. For example, statutory powers that can be used to prevent fire or pollution should be exercised where appropriate; government inspection of premises and equipment should be done with an eye to detecting hidden problems; and measures that ensure the safety of public premises and open spaces should be implemented to remove dangers that are obvious or easily discoverable.

It is not expected that government will take all possible steps to remove every risk and danger. Courts accept that budgetary and policy choices need to be made. However, the duty of care cannot be avoided merely by asserting that financial pressures prevent stronger regulation. A government agency must still discharge its responsibilities and perform its functions. Tasks that are being performed must be performed carefully. If steps are not being taken for budgetary reasons or competing priorities, it should be clear that the failure to take action is a result of a considered and rational choice.

Supplementary legal duties

The doctrine of misfeasance in public office can impose a liability to pay damages where an officer gives an order or direction that is likely to cause harm if obeyed, and knows that the order is not supported by statutory authority.

Giving advice

People rely upon government advice and information in many ways – to ascertain their eligibility for benefits and licences, to learn if planning permission is needed or was granted, to define the pre-conditions for government approval of an activity, or as a forecast of government program intentions. Under the doctrine of negligent misstatement, a liability to pay damages can arise if the following elements are present:

- the agency or officer giving the advice knew, or should reasonably have understood, that the advice would be relied upon
- the agency held itself out as an organisation whose advice was reliable, and it was reasonable for a person to rely upon the advice
- the advice was mistaken, in circumstances where a person exercising reasonable care would have given different advice
- the person to whom the advice was given relied upon it and suffered financial loss as a direct result.

It is therefore important that advice is given carefully. Any caution regarding the thoroughness of the advice, or the need for independent confirmation of advice, should be clearly stated.

Supplementary legal duties

Trade practices legislation will apply to government agencies which carry on a business but generally not to the regulatory, funding or policy activities of government. If trade practices legislation applies, it imposes a liability to pay damages for loss arising from misleading or deceptive conduct, and false or misleading representations in supplying goods and services. This liability is relevant to representations in government tender documents and negotiations.



Staff management

An employer has a duty towards employees to take reasonable care not to expose them to an unnecessary risk of injury. In particular, the employer has a duty to take reasonable care in providing and maintaining safe premises and equipment, a safe system of work, and competent employees. A liability can arise to pay damages to an employee who suffers loss or injury as a result of a breach of that duty.

The employer's duty is a continuing one, which cannot be discharged merely by exercising care in selecting staff, or issuing instructions as to what should happen in the workplace. Continuing oversight, supervision, enforcement and risk assessment by the employer is required.

The standard of reasonable care that is required of an employer will be influenced by the precautions that are customarily followed within an industry or workplace. It is important, however, for an employer to take account of the ability, experience, age and health of employees, and of peculiar dangers arising in the workplace. It is prudent also to keep abreast of developing knowledge about employment risks and precautions.

Supplementary legal duties

Occupational health and safety legislation imposes duties upon employers which, if broken, can give rise to a liability to pay damages to an employee who is injured by the breach. Legislation prohibiting race, sex and disability discrimination in relation to employment also confers a right of action upon an employee who has been the victim of unlawful discrimination.

Clayton Utz acknowledges the contribution of Professor John McMillan to the Good decision-making series.

Re-stating the legal requirements

Good decision-making for government is a series of eight pamphlets on administrative law, prepared by the Government Services Group of Clayton Utz.

A legal perspective – ten major legal themes that permeate administrative law

Natural justice – a plain English guide to handling the legal complexities of natural justice

The role of policy – a legal guide to using government policy in administrative decision-making

Authorised decision-making – the legal principles on who can make a decision in an agency

Reasons for decision – a legal guide to preparing a written statement of reasons for a decision

Duty of care – an outline of the duty of government agencies to take reasonable care

Interpreting legislation – legal principles that control the interpretation of legislation

Fact finding – legal and evidentiary principles to guide fact finding on disputed issues

The Government Services Group of Clayton Utz provides administrative law training seminars, in a half-day or briefer format. Seminars can be tailored to meet the requirements of your agency, and to explain how administrative law applies to your agency. The legal staff of Clayton Utz are also available to provide administrative law advice.

Call the Government Services Group of Clayton Utz on 1800 730 069 to obtain free copies of any of the pamphlets in the series.

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