DUTY OF CARE & DIGNITY OF RISK

POSITION STATEMENT

Crows Nest Centre will ensure that all staff and volunteers provide a standard of care commensurate with their position that ensures the best outcome for each person with a disability whilst respecting the person’s right to choose to take risks.

Crows Nest Centre’s belief that all people with a disability have the same rights as other members of society to take risks will assist the client to enjoy the broadest range of life opportunities and experiences, in an environment of care, support, information and education.

Introduction

The law of negligence sets minimum standards for Crows Nest Centre in the way services are delivered. Crows Nest Centre staff may know of this concept as ‘duty of care’.

Most of Crows Nest Centre clients are vulnerable in some way because of their age, state of health, disability, social circumstances or other factors. This vulnerability affects the care that Crows Nest Centre must take to avoid being found legally liable for negligence.

The law of negligence does not create ‘no-win’ situations for anyone. Contrary to popular misunderstandings, it does not impose impossible burdens upon staff or require anyone to be perfect. Nor does it expect anyone to be clairvoyant.

The only ‘burden’ imposed on Crows Nest Centre by the law of negligence is the requirement to act reasonably. If it does not act reasonably and people are injured, Crows Nest Centre will be held accountable. It is in the interests of its clients, as well as consistent with its legal obligations, that Crows Nest Centre behaves reasonably in delivery of its services to avoid injury to those clients.

Who this policy applies to

This policy applies to all Crows Nest Centre employees and volunteers who provide services for Crows Nest Centre, whether or not they work in direct contact with clients. Employees and volunteers must comply with the law of negligence in all aspects of their work.

Definitions

Negligence
There are three parts to the definition of negligence and all three elements must be present in any situation for Crows Nest Centre to be considered negligent by a court:

1. **Duty of care.** Crows Nest Centre must owe a duty of care to a particular person.

2. **Breach of duty of care.** Crows Nest Centre must have done something a reasonable person would not have done in a particular situation or omitted to do something which a reasonable person would have done.

3. **Injury.** Some harm must have been caused to the person because of Crows Nest Centre’s unreasonable action.

**Duty of Care**

A duty of care is a duty to take reasonable care to avoid injury to a person whom it can be reasonably foreseen might be injured by an act, or omission.

Crows Nest Centre owes a duty of care to anyone who is reasonably likely to be affected by Crows Nest Centre’s activities. These may be:

- Clients.

- The families and carers of clients (for example, if a family member was injured as a result of the action or inaction of an employee of Crows Nest Centre in their home).

- Certain groups of people in the community (for example, people attending shopping centre who could be affected by the dangerous behaviour of a client on community access).

Crows Nest Centre staff and volunteers must take reasonable care to avoid causing injury to each of these categories of people in the delivery of its services.

Duties of care can be owed by different levels of Crows Nest Centre employees in any particular situation. Managers, program coordinators, direct care employees and volunteers will all owe duties of care to the three groups of people listed.

**Breach of Duty of Care**

- A duty of care is breached if a person behaves unreasonably.

- Failure to act can also be unreasonable in a particular situation.

- A duty of care can be breached either by action or inaction.
The reasonableness of what a person has done, or not done, is assessed by considering how a hypothetical reasonable person would have behaved in the same situation. If the person's job requires special skills or training, the hypothetical person will be assumed to have the same skills or training.

This means that a manager’s actions will be measured against the actions of a reasonable manager, the actions of a direct care worker will be judged according to those of a reasonable direct care worker, the actions of a volunteer will be judged according to those of a reasonable volunteer and so forth.

What is considered reasonable will depend on all the circumstances. What is reasonable in one situation will not necessarily be reasonable in another. There cannot be a complete set of ready-made answers to all the dilemmas and situations that could arise.

An important element in determining reasonable behaviour is the knowledge of the situation. Crows Nest Centre may have information about particular clients or premises. If that knowledge is authorised and available to Crows Nest Centre it must be taken into account in considering what action to take. It is no defence to say the particular employee was unaware of Crows Nest Centre’s information.

**Injury**

The final part of the definition of negligence is that there must have been some harm caused.

The only kinds of harm recognised so far by the courts have been physical injury, nervous or emotional shock and financial loss. Unless a person suffers an injury of one of these kinds, there will not have been any negligence by Crows Nest Centre as far as the law is concerned. The harm must be caused by the unreasonable actions of Crows Nest Centre for Crows Nest Centre to be liable for negligence.

**Dignity of Risk**

Is the belief that each person with a disability is entitled to experience and learn from life situations even if these on occasion may be a threat to their well-being. Each person with a disability experiencing a risk, of which they have been informed, is to receive support in the situation.

**Reasonableness**

**What Is Reasonable**

While there are no predetermined answers to questions about whether or not an action is reasonable, there are a number of factors which must be
considered each time an employee makes a decision. Staff must use their professional skills and experience to decide the weight to be given to each factor and to make a final decision about the most reasonable action in a particular situation.

The factors to consider are:
- The risks of harm and the likelihood of the risks occurring.
- The sorts of injuries that may occur, and how serious they are.
- Precautions which could be taken.
- The powers which Crows Nest Centre employees have.
- The usefulness of the particular activity which involves risks.
- Any statutory requirements or specific directions from Crows Nest Centre.
- Current professional standards about the issue.
- Any other factors relevant to a particular situation must also be considered.

This list of factors must be used by Crows Nest Centre staff to ensure reasonable decisions are made by Crows Nest Centre. No single factor can be relied upon by itself to justify acting in one way rather than another. All factors will need to be considered together to determine what is reasonable.

The fact that a client gives their consent or expresses a wish to do a particular thing does not justify Crows Nest Centre acting unreasonably to help the client perform that activity. Crows Nest Centre must act reasonably in the way it uses its powers and the consent of a client does not alter this.

Professional Standards

The prevailing standards of the relevant profession will also be taken into account in deciding whether a person has behaved in a reasonable manner, as long as those standards are themselves reasonable.

However, compliance with reasonable professional standards will not necessarily be all that is required in an individual case. The facts should be examined to determine whether, in that particular situation, it would have been reasonable for a person to do more than, or other than, comply with the standards.

Staff must comply with current professional standards and practices, where those standards and practices are themselves reasonable.

Staff must also consider whether, in a particular situation, it would be reasonable to do more than the standards or practices require.

This decision must be made by the employee and supervisor on the basis of their professional skills and experience.
It is Crows Nest Centre policy that professional standards or practices will not be considered to be reasonable if they expose a client to a real risk of serious harm and there are no effective precautions which can be taken to reduce the risk of injury. This means that if there is a real risk that a client will suffer serious harm, and there are no reasonable and effective precautions possible, then the activity must not be undertaken.

**Risk of Harm**

Staff are expected to take steps to avoid reasonably foreseeable risks of injury. No one will be found negligent for failing to prevent a completely far-fetched or improbable risk of harm to a client, but employees will need to assess the risks of particular activities sensibly. Before undertaking any activity with clients, staff must consider the risks of harm to clients and the likelihood of harm occurring. Staff will have to use their professional judgement in deciding these matters.

**Seriousness of Harm**

The less serious the harm that could result from a particular activity, the more reasonable it may be to take the risk. Conversely, the more serious the harm (for example, serious injury or death), the less reasonable it may be to undertake the activity. For example, there is a risk of physical injury in playing netball. A player may be bumped, bruised or fall over during the game. These injuries are usually not serious and, after considering the other factors, it may be reasonable to allow clients to play. However, if the sport being considered was sky diving, the kinds of injury possible are much more serious and all the other factors would have to be considered to assess whether it was reasonable to take that risk.

The consequences of harm may also vary from person to person. For example, a client with asthma risks more serious harm than a non-asthmatic client by doing strenuous activities. A decision-maker will be taken to have constructive knowledge of any particular vulnerabilities known to Crows Nest Centre.

Staff must consider the seriousness of any potential harm to clients. The more serious the harm which could result, the less likely it will be that the risk should be taken, depending on the other listed factors. Staff must use their professional judgement in assessing the seriousness of injuries which could occur.

**Precautions**

The availability of precautions must be considered. If the risks of harm from an activity can be reduced or eliminated by taking relatively simple precautions, then it will not be reasonable to proceed without taking those precautions.
If there are no feasible precautions that can be taken, then this must be considered, along with all the other factors, in deciding whether it is reasonable to go ahead. Employees must use their professional judgement to assess whether there are precautions which could be taken in any particular situation.

If a client who cannot swim wants to go to a swimming, there are a number of precautions that could be taken to ensure they do not drown. These include allowing the client to go in the water only if closely supervised at all times by at least one staff member, or requiring the client to wear a life jacket and also be supervised at all times. The ultimate precaution, of course, is not to allow the client to go in the swimming pool. Rather than deny the client this opportunity, it would be preferable to have staff closely supervise the client in the pool, or have the client wear a life jacket and be supervised by staff. However if neither of these less restrictive precautions is possible, the staff must take the next available precaution, that is, not allow the client to go in the water.

Staff must take all reasonable precautions which could avoid or reduce the risk of harm to clients. Where there are a number of effective precautions which would reduce the risk of harm, staff must choose the option which is least restrictive to the client. Again, staff will need to use their professional judgement to assess what precautions are available and which are the least restrictive.

**Emergencies**

All employees also have 'emergency or 'rescue' powers enabling them to save a person from a dangerous situation. These powers allow an employee to prevent harm to someone by touching or even briefly physically restraining them without their consent. These 'rescue' powers are limited to emergencies.

Emergencies are sudden, unexpected and dangerous situations which do not happen often. If a particular, dangerous situation arises often, Crows Nest Centre employees will be expected to take reasonable action to reduce the likelihood of the 'emergency' happening in future, as well as using their 'rescue' powers if it should happen again.

In the case of strangers, nobody has ever been sued for being a ‘good samaritan’. While staff do not have a legal obligation to step in to assist a stranger, they should not be in legal trouble if they choose do so. Crows Nest Centre does not expect staff to render emergency aid to people to whom they do not owe a duty. The decision to do so or not is a matter for the individual.
Balancing the Benefits of an Activity

If there is little benefit for a client from a particular activity and it involves real risks of serious harm to the client, then it would not be reasonable to proceed with the activity.

However, if there is a real benefit to be gained from doing something and the risks of serious harm are relatively small, then it may be reasonable to take those risks with proper precautions. Staff must consider the purpose of any activity which may cause harm to a client. The fact that an activity is useful will not by itself justify putting a client at risk of harm. If an activity carries a high risk of serious harm and there are no effective precautions available, then the activity must not be undertaken.

However, where the risks of an activity are not high, the types of possible injury not serious, or there are effective precautions which could be taken, the purpose of the activity may be relevant in deciding that the activity is reasonable. Staff must use their professional judgement to assess the purpose or usefulness of an activity.

Statutory Requirements

Statutory requirements and directions from Crows Nest Centre must be followed by staff. If additional action in a particular situation would be reasonable, such action must also be taken. It is up to Crows Nest Centre’s employees to decide whether it is reasonable to do more than is required in guidelines or by statute. This decision must be made on the basis of employees' professional training and skills.
OPERATIONAL PROCEDURES

Certain things have to be done to be sure that Crows Nest Centre is meeting its duty of care to its clients. The following is a list of the minimum operational requirements:

- Duty of Care issues are to be recorded on client files.
- The client file must be available to staff so that all instances of care can be undertaken in the light of Crows Nest Centre’s duty of care.
- Staff are to assist clients to make informed choices by providing clients with relevant information, in appropriate formats where required, about the benefits and risks involved in activities.
- Where duty of care is an issue, the decision-making processes and implementation of each stage of the process is to be documented.
- If, at the end of the decision making process, the consumer does not have the necessary skills to carry out the activities then the duty of care is paramount and outweighs the dignity of risk.
- Where a client over 18 years of age chooses to undertake an activity that could harm him or her but understands the risks involved, staff must note this decision on the client’s file.
- Where a client chooses to undertake an activity that could harm him or her and does not understand the risks involved, staff must ensure their duty of care to the client is implemented and that any action is documented.
- If the needs of a child or young person and the family become incompatible and separate needs do arise, the safety, welfare and wellbeing of the child are paramount.
- Staff must be aware of their mandatory reporting responsibilities.
- Staff will receive appropriate training to enable them to identify children and young people with a disability who are at risk of poor health or any form of abuse or neglect.
- Where necessary, ensure that appropriate medical, therapy or nutritional attention and information and advice is obtained. Any such information is to be recorded in the CIARR.
- Crows Nest Centre must have a procedure to deal with a person with challenging behaviour who is a danger to himself or herself or others. See the Challenging Behaviour Policy.
- Crows Nest Centre must have a process for recording and reviewing accidents and injury to clients.

Adopted
Reviewed
To Be Reviewed
CROWS NEST CENTRE
POLICY & PROCEDURE MANUAL
HUMAN RIGHTS

APPENDIX 1
LEGISLATION AND STANDARDS

Crows Nest Centre is bound by a number of statutory regimes and regulatory arrangements. Under all of this law, Crows Nest Centre must do what is reasonable within its legal powers.

NSW Disability Services Act 1993 Objects - 3 (e)
To achieve positive outcomes, such as increased independence and integration in the community for persons with disabilities;

NSW Disability Services Act 1993 Schedule 1 – Application of Principles 2 (b)
To contribute to ensuring that the conditions of the everyday life of persons with disabilities are the same as, or as close to possible to, norms and patterns which are valued in the community;

NSW Disability Services Standard 2 – Individual Needs 2.8
Each person with a disability is provided with support in a manner which maximises his or her potential to reach person goals.

Ombudsman Act 1974
Commission for Children & Young People Act 1998
Children and Young Persons (Care and Protection) Act
NSW Disability Services Standards – Children’s Standards in Action

In addition to child and disability specific legislation, Crows Nest Centre has a responsibility to comply with the terms of the Civil Liability Act 2002 (NSW). This Act sets out the circumstances in which a person or organisation can be considered to be negligent.

5B General principles
(1) A person is not negligent in failing to take precautions against a risk of harm unless:
(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
(b) the risk was not insignificant, and
(c) in the circumstances, a reasonable person in the person’s 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):
(a) the probability that the harm would occur if care were not taken,
(b) the likely seriousness of the harm,
(c) the burden of taking precautions to avoid the risk of harm,
(d) the social utility of the activity that creates the risk of harm.