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# LK Education Insights

## Are you protecting against foreseeable risks?

*Welcome to LK Law's* ***Education Insights****, a periodic update that identifies legal issues facing education institutions in South Australia and provides practical guidance as to how they might be addressed. A new issue is circulated every six weeks, with topics covering matters relevant to day-to-day operations and risks involving schools and their leaders, such as privacy, AI and cyber issues, as well as disputes, employee relations, managing large capital projects and dealing with charitable bequests.*

*This first issue looks at an institution's obligations to identify and address foreseeable risks to meet their duty of care to students, staff and visitors.*

An educational institution runs a broad and multifaceted operation, which comes with broad and multifaceted risks. When incidents occur, educational institutions and the adequacy of their actions are frequently tested. It is important to implement robust systems and processes to identify and address foreseeable risks.

The majority of the High Court recently overturned *NSW v Lepore*[1], the effect of which is to expand the non-delegable duty of care of an institution such as a school to include protecting against *intentional* acts which cause harm.

Now is a critical time for educational institutions to reassess their policies and procedures around risk management, as articulated by Justice Edelman:

> *The overruling of Lepore will have a significant effect .... Any legal entity ... which assumes responsibility to ensure that reasonable care is taken of another's person or property (goods or land) will be liable if a third party intentionally causes injury to that other person or their property within the scope of the responsibility assumed.*
>
> (Edelman J, [314])

### Scope of duties owed to staff, students and visitors

A school's duty of care does not mean that it must reduce all risk potentially affecting students, staff or anyone visiting its grounds to zero to avoid liability. It must however ensure its actions are adaptive to the circumstances. "Box ticking" exercises will not be sufficient.

The existence and nature of an educational institution's duty of care depends on its legal relationship with others. An educational institution is (generally) a provider of pastoral care to students, an employer to staff and an occupier of premises to visitors. Due to the proximity of these relationships, certain duties owed by an educational institution are "non-delegable".

Non-delegable duties cannot be satisfied merely by engaging apparently competent persons – the duty extends to seeing that care is in fact taken and, unlike vicarious liability for the acts of others, there is no need for the person who causes harm to be an employee. Acts committed by independent contractors, and even third parties, can result in direct liability for the school.

In general terms, a school owes the following duties:

- A non-delegable duty to students to take reasonable care to prevent them from being exposed to reasonably foreseeable risks of not insignificant harm.[2]
- A non-delegable duty to staff as an employer to exercise reasonable care to provide staff with a safe place of work, a safe system of work and safe plant and equipment.[3]
- A duty to provide basic premises safety to visitors,[4] and non-delegable statutory duties to ensure so far as reasonably practicable the health and safety of:
    - workers whose activities in carrying out work are influenced or directed by the institution (for example, workers carrying out repairs on site);[5] and
    - other persons (such as students, staff and other visitors) who may be put at risk from work carried out as part of the school's operations.[6]

In all of these categories, the exact scope and content of the duty of care is fact-specific, taking into account the respective characteristics of the educational institution and relevant student, staff member or visitor, any contractual relationship between them, and any matters that ought to have put the school on notice of a risk of harm.

The High Court of Australia judgment in *AA v The Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle*[7] overturned its previous decision of *NSW v Lepore*, with the effect that Australian law is now that a non-delegable duty of care can also be breached by an *intentional* act by a third party causing harm.[8] This is significant because, prior to the High Court's decision, it was accepted that a school's direct duty of care extended only to *unintentional* acts by third parties (for example, negligent conduct), and a school could be liable for *intentional* acts only in circumstances giving rise to vicarious liability (such as where the third party is an employee of the educational institution).

## *Students*

A duty of care will only exist where the educational institution has some responsibility for the student, although a duty can exist after-hours and off school grounds.[9] The Courts have held that a duty of care may exist where school activities are conducted after-hours and off-campus,[10] students are arriving or leaving school,[11] or where the school's behaviour enabled the harm.[12] For example, if a school is aware a particular bus driver is dangerous, or on a particular bus route older children habitually and violently bully younger children, a school may well be required to take preventative steps or warn parents in order to meet its duty of care.[13]

A greater duty is owed to students than to ordinary visitors.[14] Children require protection from their environment, from others and from themselves in both a physical and psychiatric sense.[15] By way of contrast, although it is assumed for school students, the proximity between a university and its student determines whether it provides pastoral care to its adult students (and therefore assumes a more onerous duty as is owed by a high school). For example, a university residential college will generally be responsible for the welfare of its students.[16]

A key practical consequence of the High Court's decision in *AA v Roman Catholic Church* is that an educational institution will *necessarily* be liable for breach of its duty of care where any persons to whom it has delegated responsibility for the care of its students, in connection with the purported exercise of their role, commit an intentional act harming a student.[17]

As a general guide:

- failing to follow pre-existing standards, policies or guidelines may be a breach of duty;[18]
- taking inadequate or ineffective steps to mitigate risk can be a cause of harm;[19]
- it is not necessary to take steps that are unlikely to do much good;[20] and
- it is not necessary to constantly supervise students or specific students.[21]

*Staff*

As a general guide:

- to provide a safe system of work, an educational institution must take into account the possibility of thoughtlessness, inadvertence or carelessness on the part of its employees;[22]
- schools are expected to utilise their powers as employers to prescribe, warn, command and enforce obedience to maintain a safe workplace;[23]
- insisting an employee perform their obligations under their employment contract does not in itself breach a duty of care;[24]
- if there is a real risk of injury in performing a task, a school must develop a different method to eliminate the risk or provide adequate safeguards to the employee.[25]

*Visitors*

As a general guide:

- the duty to keep premises safe may be discharged by delegating to a third party, by reference to whether reasonable care and skill was used in selecting the third party, arranging the terms of engagement and monitoring their conduct to confirm they are taking appropriate steps;[26]
- precautions need to be taken against foreseeable risks of harm, except insignificant risks, where a reasonable person in the same position would take the precautions;[27]
- the information known (or that ought to have been known) by the educational institution is taken into account;[28]
- there is no proactive duty to warn of obvious risks unless the person has asked for advice or information about the risk;[29]
- there is no liability for harm from an inherent risk materialising (something that cannot be avoided by reasonable care or skill).[30]

## Identifying and addressing foreseeable risks

A robust and effective framework to enable foreseeable risks to be identified and addressed at regular intervals is the best protection against liability and will enable staff to better deal with incidents as and when they occur.

In the context of the now-expanded non-delegable duty of care, the High Court stressed that to protect itself from potential liability an educational institution can:

> *[I]nstitute systems that will weed out or give early warning signs of potential offenders, deter misconduct by conducting unannounced inspections, prohibit teachers from seeing a pupil without the presence of another teacher, and encourage teachers and pupils to complain to the school authorities and parents about any signs of aberrant or unusual behaviour on the part of a teacher.*[31]

Educational institutions should also consider whether they are doing the following:

- Periodically reviewing and documenting the school's features and characteristics, its premises and services to identify and track risks.
- Reviewing and, where necessary, updating or supplementing policies and procedures to effectively address identified risks. Effective policies:
  - are tailored to the educational institution;
  - are capable of being adapted to different circumstances;
  - do not treat student, staff or visitors (as relevant) as one uniform group and take into account usual variations within the body (e.g., age, ESL, disabilities, those who are bullied and those who are potentially violent);
  - are coherent with other policies (including importantly privacy policies);

    - clearly delineate responsibility for different tasks and processes, and timing;
    - involve formal measures and intervention for serious matters; and
    - involve defined procedures for complaints and methods to seek assistance.
- Ensuring policies and procedures are documented, made known to staff, and followed.
- Accommodating reasonable requests to vary standard procedures, policies or duties.
- Documenting reasons for deviating from any policy, procedure or not following any recommendations.
- Reviewing whether adequate preparation, training, support services and mentoring opportunities are provided to staff, particularly those with challenging or high workloads.
- Implementing after-hours contact and support.
- Obtaining outside assistance for help in unusual, complex or difficult situations.

[1] *(2003) 195 ALR 412*.
[2] *State of NSW v T2 (by his tutor T1)* [2025] NSWCA 165, [65]. See also *Civil Liability Act 1936* (SA), s 32(1).
[3] *Koehler v Cerebos (Aust) Ltd* [2005] HCA 15, [19]; *Bersee v Victoria* [2022] VSCA 231, [100]; *Czatyrko v Edith Cowan University* [2005] HCA 14, [12]; *DAC Finance (NSW/QLD) Pty Ltd v Cox* [2024] NSWCA 170, [54]; *Work Health and Safety Act* 2012 (SA), s 19.
[4] *Bellevista Pty Ltd v Liberty International Insurance Co* [2009] NSWCA 16, [53]; *Stringer v Westfield Shopping Centre Co Pty Ltd* [2017] SASCFC 138.
[5] *Work Health and Safety Act 2012* (SA), s 19(1); *WorkCover Authority (NSW) (Inspector Egan) v Atco Controls Pty Ltd* (1998) 82 IR 80, [85].
[6] *Work Health and Safety Act 2012* (SA), s 19(2); *WorkCover Authority (NSW) (Inspector Egan) v Atco Controls Pty Ltd* (1998) 82 IR 80, [85].
[7] [2026] HCA 2.
[8] *AA v The Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* [2026] HCA 2.
[9] *State of NSW v T2 (by his tutor T1)* [2025] NSWCA 165, [67].
[10] *Gugiatti v Servite College Council Inc* [2004] WASCA 5; (2004) Aust Torts Reports 81-724 at [19].
[11] *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* (1996) Aust Torts Reports 81-399; *Geyer v Downs* [1977] HCA 64; (1977) 138 CLR 91.
[12] *PCB v Geelong College* [2021] VSC 633.
[13] *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman* (1996) Aust Torts Reports 81-399, at 63,957.
[14] *John XXIII College v SMA* (2022) 369 FLR 465, [86].
[15] *The Trustees of the Roman Catholic Church, Archdiocese of Sydney v Kondrajian* [2001] NSWCA 308 at [55]; *Kapland v Victoria (No 8)* [2023] FCA 1092, [1264] – [1266] citing *Bradford-Smart v West Sussex County Council* [2002] EWCA Civ 07.
[16] *John XXIII College v SMA* (2022) 369 FLR 465.
[17] Ibid, [30], [47], [80].
[18] *State of NSW v T2 (by his tutor T1)* [2025] NSWCA 165, [61] – [62]; *Kaplan v Victoria (No 8)* [2023] FCA 1092; *State of New South Wales v Mikhael* [2012] NSWCA 338
[19] *PCB v Geelong College* [2021] VSC 633 at [384].
[20] *Kaplan v Victoria (No 8)* [2023] FCA 1092, [146].
[21] *Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn v Habda* (2005) 221 CLR 161; *State of NSW v T2 (by his tutor T1)* [2025] NSWCA 165, [83].
[22] *Czatyrko v Edith Cowan University* [2005] HCA 14, [12].
[23] *McLean v Tedman* [1984] HCA 60; (1984) 155 CLR 306, 313.
[24] *Koehler v Cerebos (Aust) Ltd* [2005] HCA 15, [27] – [29].
[25] *Czatyrko v Edith Cowan University* [2005] HCA 14, [12].
[26] *Bellevista Pty Ltd v Liberty International Insurance Co* [2009] NSWCA 16; *Stringer v Westfield Shopping Centre Co Pty Ltd* [2017] SASCFC 138.
[27] *Civil Liability Act 1936* (SA), s 32.
[28] *Civil Liability Act 1936* (SA), s 31.
[29] *Civil Liability Act 1936* (SA), s 38.
[30] *Civil Liability Act 1936* (SA), s 39.
[31] *AA v The Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle* [2026] HCA 2, [41].

## Sidebar: How long should out-of-hours support be provided?

Educational institutions commonly have staff on site in some capacity 30 minutes before and after school hours. Schools should consider critically whether this is sufficient, based on their knowledge of student, staff and visitor movements and events.

Courts have imposed liability within the 30-minute window when a responsible adult was not available for assistance. However, whilst reasonable care does not require indefinite availability, a school's duty of care is not measured by reference to any specific period of time. If your institution is aware of access or use of premises by any groups, whether recurring or for a specific reason, it should seriously consider the practicality of ensuring at least one responsible adult is on site who can be accessed in person or by telephone.

Where out-of-hours support is offered, it is important to make clear how that support can be accessed (for example, through notifications, signage, etc). In one recent case, a student sought urgent assistance within 30 minutes of the close of school but was unable to find an adult, the front office having closed. No signage was put up directing the student to the nearby building where a staff meeting was occurring. Calls by the parent to the school were unanswered and unmonitored. The student suffered serious injury and the school was found liable.




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