
21ST ANNUAL CHURCH & CHARITY LAW SEMINAR

Mississauga – November 13, 2014

Abuse Claims: What to do When Allegations Arise

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**Abuse Claims: What to do When
Allegations Arise**

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OVERVIEW

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2. REPORTING OBLIGATIONS
3. IMPLEMENT INTERNAL CONTROLS
4. DETERMINING AND MANAGING LIABILITY
5. PLAN TO PREVENT FUTURE CLAIMS
6. CONCLUSION

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1. IDENTIFY THE ABUSE

- When an allegation of abuse involving a charity or not-for-profit arises, a series of steps need to be undertaken to identify the abuse and determine what obligations (including reporting) may subsequently arise
- These steps aim to assist in reducing the liability of the organization without unnecessarily prejudicing the potential investigation or prejudicing the interests of involved parties

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- Initial intake of abuse allegation
 - Identify facts, parties, timeline, and what evidence is available (consider signed statements/acknowledgements and legal advice)
- In most abuse allegations, internal discipline is not the appropriate mechanism due to lack of jurisdiction, seriousness of allegations, and outstanding reporting obligations to authorities

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- Is the allegation in fact “abuse”? Abuse can refer to (among other things):
 - Physical abuse
 - Sexual abuse
 - Emotional or psychological abuse
 - Financial abuse
 - Neglect

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- Anyone can be the victim of abuse, though there are particular protections and procedures when dealing with vulnerable persons, like children, the elderly, or handicapped persons
- Any sexual contact with a person without consent is sexual abuse and a crime
- There is also specific legislation to protect vulnerable persons, like children, from sexual abuse and exploitation

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- Sexual abuse of vulnerable persons under the *Criminal Code* includes:
 - Any sexual contact between an adult and a child under 16 years of age (s. 151 – sexual interference)
 - Children under 18 cannot legally give their consent to sexual activity that exploits them (s. 153 – sexual exploitation), e.g. - prostitution, pornography
 - Any person in a position of trust inviting or counseling sexual contact towards a person of mental or physical disability (s. 153.1 – sexual exploitation of a person with a disability)

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- Other legislation protecting against abuse includes:
 - *Child and Family Services Act (CFSA)*
 - Protects any “child in need of protection” (i.e. abuse or neglect)
 - *Long-term Care Homes Act, 2007*
 - Protects the elderly residents of long-term care homes

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- *Home Care and Community Services Act, 1994*
 - Protects individuals receiving various community services in their homes
- *Human Rights Code*
 - Protects against harassment of any type, including sexual harassment
- United Nations documents on Child Protection and other local laws applicable to the international jurisdiction where the charity or not-for-profit might be operating

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2. REPORTING OBLIGATIONS

- Once type of abuse is identified, consider legal advice and internal abuse policy (if any) regarding mandatory reporting obligations
- There is a positive duty to report to the local Children's Aid Society any reasonable suspicion that a child under the age of 16 may be suffering abuse or neglect and is in need of protection

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- There does not need to be definitive evidence that abuse has occurred to trigger reporting obligations
 - For example, under the CFSA, the test for reporting is whether "reasonable suspicion" exists that such abuse or neglect has or will occur
- Reasonable suspicion is interpreted as being what an "average person using normal and honest judgment" might have regarding an instance of abuse
- Organizations need to balance reporting and required disclosure to authorities with the confidentiality interests of all parties

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- Not every instance of sexual activity qualifies as abuse or warrants reporting to authorities
 - e.g. an internal report coupled with some counselling may be sufficient in the instance of a child telling a sexual joke
- Presumption of innocence vs. responsibility to report and protect (especially vulnerable persons)
- Even if reporting obligations to authorities are triggered, careful attention needs to be paid to confidentiality of allegations regarding third-parties

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- Depending on the alleged victim and circumstances, individuals or organizations may have additional duties
 - For example, all cases of elder abuse in a long-term home are reported to the Ontario Ministry of Health and Long-term Care
 - For allegations regarding child victims, certain persons face heightened penalties for failing to report as outlined below

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- Teachers, operators and employees of a day nursery, as well as religious officials, are expressly named in the CFSA as part of a group of professionals for which non-compliance with reporting requirements may lead to heightened sanctions (currently a fine of up to \$1,000 [CFSA s.72 (4), (6.2)], will be \$50,000 and/or imprisonment of up to two years once amendments are proclaimed)
 - The duty to report under CFSA expressly overrides privilege (except solicitor-client) and notes that no action for making a report can be brought against the reporter unless the report was made maliciously or without reasonable grounds (s. 72(7))

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- The requirement to report child abuse takes precedence over any other agreements made between the employee/volunteer and charity or not-for-profit
- If no positive duty to report exists at law and the incident involves adults or even if the incident occurred outside of Canada, the organization should strongly consider voluntarily reporting the allegations to law enforcement (specific legal advice can assist with this decision)
- Not only can voluntary reporting assist in reducing civil liability, it can demonstrate good faith and proactive assistance with authorities

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- Failure to voluntarily report or taking steps to frustrate a potential investigation may result in breaching *Criminal Code*, including:
 - Section 129: Obstructing Police
 - Indictable offence including prison up to 2 years, or summary conviction
 - Section 139: Obstructing Justice
 - Indictable offence including prison up to 2 years, or summary conviction

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- Subject to the individual's right to counsel and not to incriminate oneself, all other steps should be taken to provide full disclosure to law enforcement or reporting authority to avoid criminal and civil liability
- Discuss specifics with legal counsel, but given the relatively small additional exposure to liability that voluntary reporting might result in (assuming proper procedures are followed), it may often be in the organization's best interests to voluntarily report allegations to law enforcement

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3. IMPLEMENT INTERNAL CONTROLS

- After identification of the abuse and consideration of reporting obligations, an organization should consider how to protect others from similar incidents (both in immediate situation and long term) and reduce liability for the organization moving forward.
- In line with any relevant internal abuse policy, the organization should consider the following:

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- Suspend/limit the alleged abuser's access via organization's programs or resources to vulnerable person(s), complainant and their family, potential witnesses, etc.
- Internally inform employees and volunteers to refrain from discussing evidence relating to allegations and to keep information strictly confidential

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- Organize and preserve any relevant employment or other documents (screening, work history) relating to alleged abuser and/or victim to prepare for potential investigation by law enforcement or relevant authority
- If deemed appropriate, the organization may release a public statement, but should remain conscious of privacy concerns of the various parties involved
 - Be cautious of publically identifying the accused in order to protect against possible defamation claims

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- Preserve potential evidence: seize and/or deactivate any organizational property the alleged abuser has access to, e.g. cell phones, laptops, and email accounts
- Review the organization's relevant insurance policies and contact its insurer about the potential claim as required

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- Make a careful review of any/all applicable insurance policies (including historical), with particular note of policy coverage years, terms, and notice requirements
- Review (with legal counsel) the insurer's response and position on coverage issues and consider whether additional steps (including litigation) will be necessary to resolve any dispute on insurance policy coverage interpretation or other issues
- Most general liability and D&O insurance policies exclude abuse and molestation claims

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4. DETERMINING AND MANAGING LIABILITY

- The accused
 - The accused may be liable criminally and/or civilly for his/her abusive behaviour
- An employee or volunteer
 - An employee or volunteer is generally only liable for his/her own actions
- The organization
 - The organization can be:
 - Vicariously liable for the actions of its employees or volunteers, and/or
 - Liable for failing to take appropriate steps to prevent abuse and/or adequately respond to an allegation of abuse

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- The board of directors
 - The tortious liability of board members of charities and not-for-profits is almost identical to the liability of directors and officers of business corporations
 - May be held liable for an employee's or volunteer's actions by virtue of failing to take adequate steps to prevent abuse.
 - *Jane Doe v. Board of Commissioners of Police for Municipality of Toronto* (1990) 72 DLR (4th) 480
 - Board members may also be liable for being negligent in not ensuring the abuse policy is followed

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- This liability does not extend to isolated incidents of abuse that could not have been expected to have occurred
 - *AIB et. al v. YWCA 4 ACWS (3rd) 445*
- Management
 - Employees in management have the duty to implement the rules as well as act appropriately in response to an allegation, they may thus be held liable for improperly applying the abuse policy of the organization, or not fulfilling their duties in response to an allegation

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- Historical abuse
 - If an allegation is made of historical abuse (i.e., the victim was a child at the time of the abuse, but is now an adult)
 - The organization has a duty to report if the accused still has access via the organization's programs to children
 - If the individual is no longer a risk to children or other vulnerable individuals, the organization may choose to initiate its own internal discipline or reconciliation process

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- In *Blackwater v. Plint*, 2005 SCC 58, the Supreme Court rejected the existence of the doctrine of charitable immunity
- Charitable or non-profit status will not exempt organizations from being held liable for the conduct of its employees
- Organizations should look to insurance policies for potential coverage and board members may be able to rely on corporate indemnification, if applicable

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- False allegations
 - An accused may also civilly claim against a victim or an organization for the torts of negligence and defamation, among others
 - For example, an action where an accused claims an organization improperly handled the information regarding the allegation, leading to harm of the accused's reputation

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5. PLAN TO PREVENT FUTURE CLAIMS

- In light of the ruling in *Blackwater v. Plint*, charities and not-for-profits that supervise, care for, host and/or sanction activities for and involving children and other vulnerable persons should be proactive in implementing safeguards to prevent and detect abuse
- Such safeguards should enhance the possibility of preventing and detecting abuse, as well as minimizing the likelihood that an organization will be held vicariously liable for the conduct of an offending employee or volunteer

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- A comprehensive abuse policy ensures an organization of the following:
 - Due diligence
 - As a response to an allegation of negligence, proactive due diligence procedures can be raised as a good faith defence
 - Creates an environment of heightened awareness, which may in turn lead to quicker more efficient and effective organizational response and effective deterrence
 - Increased awareness/education
 - Serves to identify problems before they occur
 - Promotes reporting and pro-active conduct

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- Structured procedure
 - Provides for a standardized procedure to respond to complaints and ensure that appropriate measures are taken to reduce or eliminate risks
 - Ensures a uniform response to complaints and allows for mechanisms to deal with the complaints, including the right to terminate employees

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- Can be used as a good faith defence in response to claims brought by alleged victims, employees, and volunteers
- Policies help to promote public confidence in the organization's effective and efficient use of assets and management of liabilities and risks

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6. CONCLUSION

- Each potential abuse allegation will present its own particular challenges, but if the organization has an existing abuse policy, it can help to both prevent and react to abuse in an organization
- Given the nature of charitable and not-for-profit work and the vulnerable communities serviced, abuse allegations must be expected
- However, abuse allegations can be managed successfully with proactive advice and treating all those involved with dignity and respect

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