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Managing Sexual Abuse Claims: The New Reality for Charities & NFPs


By Sean S. Carter, B.A., LL.B. and Esther S.J. Oh, B.A., LL.B.
scarter@carters.ca and estheroh@carters.ca
1-877-942-0001

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TOLL FREE: 1-877-942-0001 www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca

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OVERVIEW



OVERVIEW OF TOPICS

- Introduction
- If an allegation of sexual abuse arises, what should I do first?
- After the initial reports are done, what do I do next?
- What can I say about the allegations, and to whom?
- What steps may be taken with an alleged perpetrator of abuse?
- What are some policy considerations?

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A. INTRODUCTION

- Every Charity and NFP (which for purposes of this presentation are collectively referred to as “Charity”) hopes that it will never encounter sexual abuse allegations that occurred through one of its programs
- However, a number of high-profile incidents of abuse (including those that have occurred at Charities), now make sexual abuse issues a primary concern for all organizations



- This presentation outlines what Charities can do when an abuse allegation arises
 - While abuse issues are multi-faceted, this presentation outlines general guidelines from a legal perspective only
 - Since every situation is unique and different considerations apply in each case, Charities should obtain legal advice in order to obtain appropriate guidance based on their circumstances
 - Comments from a litigator’s perspective and a solicitor’s perspective are provided throughout this presentation

B. IF AN ALLEGATION OF SEXUAL ABUSE ARISES, WHAT SHOULD I DO FIRST?

Comments from a Litigator's Perspective:

Identify Whether Mandatory Reporting Requirements Might Apply Under Provincial Child Protection Legislation

- What is the age of the alleged victim of abuse?
- Mandatory reporting requirements apply under provincial child protection legislation where an alleged victim meets the age requirement
- In Ontario, the *Child, Youth and Family Services Act* ("CYFSA") defines a "Child" as a person under the age of 18 years (CYFSA s. 2(1))

- CYFSA sets out mandatory reporting requirements to report suspected child abuse
 - However, mandatory reporting requirements do not apply in respect of a Child who is 16 or 17 years of age
 - Instead a person "may" make a report regarding a Child who is 16 or 17 (CYFSA s. 125(4))
- A person who has a duty to report shall make the report directly to the children's aid society and shall not rely on any other person to report on the person's behalf (emphasis added) (CYFSA s.125(3))
 - Cannot delegate reporting to senior leader at Charity, the person must make the report directly
 - A person who has additional reasonable grounds to suspect abuse shall make a further report even if the person has made previous reports with respect to the same child (CYFSA s.125(2))

- The Ministry of Children and Youth Services states that if a person has reasonable grounds to suspect that a child “is or may be in need of protection”, then they must promptly report the suspicion and the information on which it is based
 - “Reasonable grounds” refers to the information that an average person, using normal and honest judgment, would need in order to decide to report http://www.children.gov.on.ca/htdocs/English/childrens_aid/reportingabuse/abuseandneglect.aspx
- Charities need to document the reports that were made as evidence that they have discharged their duty to report

- Persons who perform professional or official duties with respect to children, including health care professionals, teachers, religious officials, “youth and recreation workers” and others, are guilty of an offence if the following applies:
 - the person fails to report suspected abuse and
 - the information regarding suspected abuse was obtained in the course of the person’s professional or official duties (CYFSA ss.125(5),(6))
 - “youth and recreation worker” does not include a volunteer (s. 125(7))

Identify Whether Other Legal Requirements May Apply Where Minors are Not Involved in an Abuse Allegation

- In Ontario, where an alleged victim is 16 years of age or older, mandatory reporting requirements under CYFSA protection legislation would not apply
- Charity should review whether occupational health and safety requirements may apply, if an employee is involved in the incident
 - If an incident of workplace harassment or workplace violence may have occurred, there are statutory obligations under the Ontario *Occupational Health and Safety Act* to investigate the incidents

- Charity should determine whether it has an anti-workplace harassment / workplace violence policy that is to be followed for individuals who are not employees (e.g. volunteers or guests at the Charity's programs)
 - Employees of Charities may report incidents of potential workplace harassment or workplace violence, even if the harassment is alleged to have been committed by non-employees
- Consider non-mandatory reporting to CAS or law enforcement agencies - when might it be appropriate or help to minimize risk? (Discussed below)
- In any situation it would be important to involve legal counsel for the Charity specific to your situation

Comments from a Solicitor's Perspective:

Does the Charity Have Jurisdiction?

- Did the incident occur during the Charity's programs?
- Did the incident occur on the Charity's property or premises (whether rented or owned)?
- Incidents occurring at a private gathering of individuals who happen to participate in the Charity's programs (i.e. but not at a sanctioned program of the Charity) are outside of the Charity's jurisdiction
- Best to clarify whether an event is a sanctioned program of the Charity or not
- Charity sanctioned events should ideally be identified with appropriate signage and clear communications in accordance with applicable policies of the Charity

C. AFTER THE INITIAL REPORTS ARE DONE, WHAT DO I DO NEXT?

Comments from a Litigator's Perspective:

Address Immediate Safety Concerns

- Immediate steps should be taken to protect vulnerable persons and others at the Charity from potential harm
- Depending on the facts and nature of the relationship a Charity and/or employees may have fiduciary relationship, and at the very least will likely have a duty of care central to liability in negligence
 - In some cases it may be necessary to temporarily restrict alleged perpetrator from accessing Charity's premises and programs

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- If an alleged perpetrator is volatile and poses a risk of harm, the Charity can review the option of issuing a trespass notice under the *Trespass to Property Act* of Ontario
 - As an owner of property (whether as registered owner on title or under a lease or rental agreement), the Charity has the right to exclude any individual from attending on their property
 - Trespass notice would prohibit the alleged perpetrator from attending the Charity's premises
 - Includes leased, owned and premises rented for a special event of the Charity
 - The trespass notice does not need to provide any reasons for the notice

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- Trespass notice can either be time limited (e.g. one year) or apply for an indefinite period of time
- Take steps to ensure that the trespass notice is delivered in a way that can be objectively proven
 - Preferred methods may include delivery by a third party, such as a process server, registered mail or courier
- If an alleged perpetrator breaches the trespass notice, the Charity could contact the police regarding the breach or seek civil relief
 - A copy of the trespass notice and proof of its service should always be kept available at the Charity's premise(s) in a secure location, in case police need to be called to enforce the trespass notice

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Take Steps to Preserve Evidence

- Charity has a positive duty to preserve evidence in case there is a criminal investigation or civil proceedings in the future
 - E.g. all relevant text messages, email messages, pictures, written correspondence, video footage from security cameras or other evidence should be preserved and kept in a secure location (producing back-up copies may also assist)
- Consider what steps need to be taken if the Charity's property (such as a cell phone, computer, email accounts etc.) might have relevant information on it (protecting against destruction of evidence)

Options on Offering Assistance to Victim

- Charity might want to offer assistance to the alleged victim; however, Charity needs to consider what liabilities may arise (especially if the police are still investigating)
 - Charity must avoid actual or perceived interference with evidence or testimony to reduce liability criminally and civilly
- Charity may recommend that the victim obtain independent legal advice to reduce exposure to liability

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- Charity may also offer counseling services to an alleged victim
 - Counseling services provided by a third party can be suggested to avoid issues of Charity's interference with evidence or conflicts of interest
 - Before offering counseling or other forms of assistance, Charity should first consider what parameters are to apply
 - Is it even appropriate given the circumstances? Facts and legal advice are central to understanding issues and ramifications to potential victim and what form it may take

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- E.g. consider initial time limits to apply to the duration of third party counseling or other services and issue of selection of which third party professional will assist;
- Proper documentation of each step and consideration is essential
 - One of the worst sources of evidence is a person's memory



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Comments from a Solicitor's Perspective:

Has the Board Of Directors Been Informed?

- The board of directors has the legal duty to manage the Charity as a charitable corporation as the “directing mind” of the organization
 - All directors may be exposed to potential liability for the actions of the Charity
- As such, it is essential that the board of directors be advised of all abuse allegations without delay
- At larger organizations, senior employees may be delegated the duty to co-ordinate matters with legal counsel, police and other parties. However:
 - Board should be kept informed of developments
 - Board approval should be obtained for all decisions

- If a legal claim has been threatened or commenced, Charity should retain a lawyer to protect its interests
 - The directors and officers of the Charity might want to consider obtaining independent legal advice as the lawyer acting for the Charity cannot act on behalf of any of the directors or officers or senior administration in their personal capacity
 - This is not to suggest that any directors, officers have done anything wrong or have been negligent, but rather because the Charity's lawyer acts solely for the Charity and can focus only on what is in the best interests of the Charity

Recording of Board Minutes

When a report on the abuse allegation is provided at a board meeting, board minutes should be carefully recorded

- Where legal advice is discussed, minutes should be carefully recorded to avoid inadvertent waiver of solicitor-client privilege
- *In camera* minutes can be helpful in this regard
 - At the beginning of the board discussion, a brief explanation of the issues can be provided in generic terms (but without going into detail), together with a brief statement that the board will be going into an *in camera* session in light of the sensitivity of the issues involved

- Separate minutes of the *in camera* session should be kept outlining the key points of discussion and issues considered by the board
- After the *in camera* session has ended, the board should adopt resolutions approving any board decisions (i.e. outside of the *in camera* session)
- The resolutions of the board should then be recorded in the regular minutes of the board meeting
- In order to avoid waiving solicitor-client privilege, all communications from Charity's lawyer should be kept strictly confidential and minutes of board discussions should be carefully drafted in a manner appropriate to the circumstances

- If questions on highly sensitive issues arise, it may be best to discuss those in communications with or in consultation directly with the Charity's lawyer to protect those communications with solicitor-client privilege
- After the board meeting, the minutes from *in camera* session will need to be kept:
 - In a secure location that is not accessible by unauthorized parties, and
 - Separate from the other minutes of board meetings
- This is important in order to avoid unauthorized access to the *in camera* minutes,
 - e.g. an administrative personnel who is updating the minute book might inadvertently review highly confidential *in camera* minutes

Comments from a Litigator's Perspective:

Preparation of a Written Chronology

- Shortly after an allegation of abuse arises, the Charity should consider (in consultation with legal counsel) preparing a written explanation of the events
- Written summary should provide a narrative of what, where, when and by whom an incident occurred, including, but not limited to:
 - Chronological summary of events, witnesses, etc.
 - Detailed explanation of steps taken by the Charity to investigate the allegations and protect vulnerable persons
 - Copies of emails or supporting documents can be attached to the written summary

- Hard copies of the documents should be kept securely in a locked cabinet
- Electronic copies should be saved in a password protected folder and computer terminal
- Electronic copies are less secure, and could be subject to possible hacking or accidental review by unauthorized parties
- Consider, with assistance of legal counsel, if the assertion of privilege (and fulfilling the requisite elements) may be of assistance
- Be aware of rights and liability associated with information regarding accused to avoid chances of defamation or privacy related exposure

Comments from a Solicitor's Perspective:

Possible Report to Insurer

- In some cases, there may be a duty to inform the insurer for the Charity
- Different wording is used in different insurance policies
 - Some policies require a report to the insurer in circumstances that might lead to a claim
 - Other policies require a report to the insurer only where there is an actual claim or a threat of legal action

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- Where a Charity is uncertain, assistance from insurance counsel can be sought to clarify reporting obligations under the insurance policy
- Failure to inform insurer according to the terms of policy may result in loss of coverage
- Where it is determined that a report to the insurer is required, Charity can schedule a call with the insurer
 - Verbal report can be done by phone, with two Charity representatives on the call
 - After the call the Charity can follow up in writing to confirm the key points discussed during the call

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- Once the insurer has reviewed the matter, the insurer might choose to appoint legal counsel to protect the Charity's interests, as well as the interests of the insurer
 - In some cases, the Charity can continue to have its own legal counsel to review what is being proposed by the lawyer appointed by the insurer
 - Lawyer for Charity can act on a "watching brief" to make sure insurer appointed lawyer is acting in Charity's best interests
- Where a report has been made to its insurer, the Charity should avoid communications with third parties
 - Best to avoid verbal or written comments which (in the insurer's opinion) may compromise the Charity's defence. Such actions could jeopardize the Charity's insurance coverage

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Comments from a Litigator's Perspective:

Possible Report to Insurer

- Claims are being specifically drafted to assist in denial by insurers (i.e. intentional acts) to exert pressure
- Some insurers are opting for blanket denials of coverage assuming that the insured will not have the resources to defend the action and bring an application for coverage
- Continual oversight and monitoring of litigation is a central duty of the Charity, and personal liability of individual directors for costs of the action may arise (*Alaimo v. Di Maio*, 2009 CanLii 4848 (ONSC))
- Conflicts of interests, divergent or simply different goals may arise throughout litigation – remember the Charity is the party to the litigation (not the insurer)

D. WHAT CAN I SAY ABOUT THE ALLEGATIONS, AND TO WHOM?

Comments from a Litigator's Perspective:

- It is essential that the Charity maintain a high degree of confidentiality regarding the alleged sexual assault within only a small group of leaders directly involved. This is important to:
 - Protect the privacy of the alleged victim
 - Protect the privacy of the alleged perpetrator
 - Avoid potential liability exposure involving claims of defamation of character against the Charity
 - Avoid inadvertently interfering with any police and/or Children's Aid Society ("CAS") investigations (including current or future investigations that may not yet have started)

- In all communications, the Charity and its leaders may want to avoid making public statements, even without specifics and names
- Often when sexual abuse is alleged, the alleged victim or alleged perpetrator may make allegations against the Charity in emails to a large group:
 - It can be tempting for the Charity to provide a group email response to clarify mischaracterizations
 - Often advisable to avoid interference with criminal investigation, privacy breaches and/or legal liability by avoiding “reply all” or group responses – timing and manner of response are fundamental
 - Legal advice is recommended since every situation is unique, and communications may be on a variety of platforms (email, social media, etc.)

Comments from a Solicitor's Perspective:

Possible Communications with Members

- In the context of a religious charity or a closely-knit organization, the Charity's board and leaders might want to provide an update to the members on what has happened:
 - Some members might have already heard about the allegation and want further information
 - Any updates to members provided at a gathering of members should be brief, strictly factual and read from a written script prepared in advance
 - Again, legal advice is recommended as each situation is different

Comments from a Litigator's Perspective:

Communications and Record Keeping

- Documents need to be kept securely in a manner that is accessible only by a small group of authorized persons (e.g. password protected or locked cabinet)
- Precise notes or recordings (if possible) should be kept of any phone calls or in-person meetings with parties, including the alleged victim. If follow up communications between the Charity and alleged victim of abuse are necessary, it may be easiest for the alleged victim to have one primary contact person (consider same gender as victim)
 - During phone calls and/or meetings the alleged victim can be advised a second person is present

- If police/CAS investigations have already commenced, it may be best to stop all communication with alleged victim and/or perpetrator to avoid potentially interfering with the investigations being carried out
 - Each situation is unique and legal advice is recommended
- If rumours begin circulating or if the media becomes involved, legal advice can be sought regarding how to manage the public relations issues
- Ensure the 'narrative' and public statements (where necessary) are coordinated, reflect the truth and are internally consistent

- Any press releases must:
 - Not interfere or comment on any ongoing police and/or CAS investigations;
 - Respect privacy requirements of parties involved; and
 - Reflect balance and consistency, and be aware of variety of possible outcomes and thus statements should be carefully crafted so as not to make unfair comment or allege unsubstantiated facts
- In some cases, a public relations consultant may also be retained to provide assistance, particularly if there is a political aspect or potential long-term damage (e.g. Boy Scouts – potential bankruptcy, reputational damage)

E. WHAT STEPS MAY BE TAKEN WITH AN ALLEGED PERPETRATOR OF ABUSE?

Comments from a Solicitor's Perspective:

Reviewing Employee or Volunteer Status

- It is customary for a Charity to temporarily suspend a person from certain duties while investigation of sexual abuse allegation is underway
- In the earlier stages it would be premature to make a final decision to terminate or alter the terms of a person's employment or volunteer status until all relevant information has been collected
 - In some cases, allegations may constitute false allegations against the employee / volunteer
- After receiving the relevant information, the Charity can consider the findings, the best interests of the Charity and others involved with the Charity, with paramount consideration given to safety concerns

Possible Restorative Steps

- Some religious charities may feel strongly that they wish to take rehabilitative approach to assist alleged or convicted perpetrators to permit them to come to the religious charity's programs. This is a high risk approach
- If a rehabilitative approach is taken, at a minimum the alleged perpetrator must be accompanied at all times by a designated adult while attending at the Charity's premises and programs, in accordance with applicable policies
- Where there is a criminal charge or conviction involving abuse of children, the court will normally order that the perpetrator must not come within a particular distance of children or places where children congregate (such as schools, playgrounds, children's programs and others)
 - As such, in practice, a court order might preclude an alleged or convicted perpetrator from attending the Charity's program and premises for that reason

F. WHAT ARE SOME POLICY CONSIDERATIONS?

Comments from a Solicitor's Perspective:

Importance of Adopting Appropriate Policies

- Charities need to adopt policies as may be appropriate for their programs
 - E.g. child protection policy, anti-harassment policy and/or vulnerable persons' policies
- While policies cannot guarantee abuse will not occur, they can however, help to protect the Charity from potential liability by reducing the likelihood that incidents of abuse would occur, through the implementation of checks and balances within the operations of the Charity

- In the context of children's programs, a child protection policy would also serve as evidence of due diligence steps taken by the Charity to protect its children and would thereby assist in defending against any legal claims, should they arise
- Police checks are one important step in a more comprehensive screening procedure that should be set out in the Charity's policy, for volunteers and employees who wish to work with vulnerable persons
 - Not all perpetrators of abuse have a past criminal record and a number of incidents have involved first-time abusers
- Many insurance companies now require organizations to have an abuse prevention plan as a prerequisite to providing relevant insurance coverage

Policies Need to Comply with Legal Requirements and Organizational Needs

- Charities should ensure that their child protection policy, anti-harassment policy and/or vulnerable persons' policies reflect up-to-date legal requirements, operational needs and best practices that may apply
 - Child abuse reporting requirements are governed by provincial legislation
 - As such, charities carrying out children's programs in multiple provinces should have a policy that reflects applicable requirements in each province
 - Procedures to obtain vulnerable sector checks are also different in each jurisdiction and often require some form of supporting documentation to be provided by the Charity

- Policies should be reviewed on a regular basis
 - For possible legal updates:
 - E.g. in Ontario, the new *Child, Youth and Family Services Act* came into force April 2018 and the new *Police Records Reform Act* came into force on November 2018
 - For possible operational updates:
 - E.g. expansion or other changes to children’s programs, that can occur from time to time

Comments from a Litigator’s Perspective:

Importance of Procedural Fairness in Policies

- In investigating and addressing abuse allegations, it is important to comply with any written policies and procedures of the Charity
- Substance and enforcement of policies should reflect level of procedural fairness and fundamental justice
 - Some Christian Charities might have governing documents and policies containing Bible references, prohibiting “acts of the sinful nature, impurity, debauchery, discord and selfish ambition...”
 - Such provisions would most likely be found unenforceable due to vagueness, if legally challenged

- Enforcement of a Charity's policies in relation to alleged perpetrators should be done in a consistent and objective manner
 - Failure to do so would be detrimental in the context of a civil claim or publicity regarding the alleged incident
 - Enforcing policies inconsistently (e.g. enforcing certain rules, but not others) can result in the Charity being subject to possible criticism and possible legal action or allegations of human rights violations

Comments from a Solicitor's Perspective:

Consistent Implementation of Policies in Programs

- Charities must ensure that policies are not only adopted but are being followed in their operations
- Training should be provided on an on-going basis to all new and existing employees and volunteers regarding steps to implement the various policies
 - In one case, a church had a child protection policy in place (which included a requirement for police checks for employees and volunteers working with children), but the individual in charge of doing the police checks did not get them completed
 - The church advised the insurer that it had an abuse prevention policy and obtained insurance coverage for abuse claims

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- Three years later a youth leader was charged and later pleaded no contest to sexually abusing three teenagers in the youth group
- Youth leader had a previous sexual offence conviction that would have been disclosed if a police check had been done
- Insurance coverage was denied on the basis of a material misrepresentation
- Abuse prevention and anti-harassment policies should be implemented at all Charity's programs, including programs held in homes
 - One possible exception: Child protection policies might not apply at family programs where parents are responsible for their own children. This should be set out in the policy

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- Many churches and religious charities carry out meetings at a member's home on a weekly or bi-weekly basis (e.g. referred to as cell groups, house churches, and other meetings)
- Risk of abuse can arise from sources not directly within the Charity, including the following:
 - Abuse by teenaged babysitter of children while adults had their group meeting
 - Criminal conviction of partner of person hosting the meeting in their home (even though the host's partner has no direct involvement in the Charity)
 - Abuse or harassment committed by a guest attending the Charity's program at someone's home

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