
THE OTTAWA REGION CHARITY & NOT-FOR-PROFIT LAW SEMINAR

Ottawa – February 12, 2015

Abuse Claims: What to do When Allegations Arise

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OVERVIEW

- IDENTIFY THE ABUSE
- REPORTING OBLIGATIONS
- IMPLEMENT INTERNAL CONTROLS
- DETERMINE AND MANAGE LIABILITY
- PLAN TO PREVENT FUTURE CLAIMS
- CONCLUSIONS

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A. 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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1. 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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2. 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, persons with disabilities or the elderly, from sexual abuse and other 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
- *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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B. 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)
- The duty to report made under CFSA overrides most privilege, and there is a specific statutory exclusion that no party can have an action brought against it for reporting unless done so maliciously or without reasonable grounds (s. 72(7))

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- Depending on the alleged victim and circumstances, individuals or organizations may have heightened duties:
 - 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
 - Non-compliance with amendments to legislation means that teachers, religious officials, and nursery staff/operators now face increased monetary penalties
 - Currently \$1,000.00, but will be up to \$50,000.00 and/or imprisonment of up to two years once amendments are proclaimed

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- 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)
- 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

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C. 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



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1. Follow-up Internal Protocols

- 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, protect and preserve any relevant employment documents (screening, work history) or evidence (cell phone or computer owned by the organization) 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 and potential defamation claims
 - A consistent and comprehensive message needs to be balanced against *sub judice* rule

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- Review the organization's relevant insurance policies and contact its insurer about the potential claim as required, review notice requirements, coverage years and policy coverage
- Proactively review your policy for scope and coverage, most general liability and D&O insurance policies exclude abuse and molestation claims
- Consider motions to protect privacy and legal tests to meet
 - Publication Ban – public can access court file, but contents can't be published
 - Sealing Order – public cannot access court file
 - Pseudo Names – any party (plaintiff or defendant)

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D. DETERMINE AND MANAGE 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:
 - Vicariously liable for the actions of its employees or volunteers,
 - Liable for failing to take appropriate steps to prevent abuse and/or adequately respond to an allegation of abuse
 - Negligence
 - Breaching Fiduciary duty

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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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General principles of negligence in abuse cases: Was there a breach of duty of care?

- Courts will Consider:
 - What would a reasonable institution/person in similar situation do?
 - Industry Standards are instructive but not binding or determinative
 - Institutions actions will be assessed according to "standards of day" therefore date of alleged negligence is important
 - Was there statutory duties?
 - When did society generally become aware of prevalence of childhood sexual assault?
 - Anything since mid 1980's considered prevalent and should be investigated (*D.W. v. Canada*)

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responsibility

- 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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E. 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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A comprehensive abuse policy ensures an organization of the following:

- 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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Applicable Case Law

- Has established that institutions can be negligent in several ways, including failing to respond appropriately after abuse disclosure (*J.R.S. v. Glendenning*)



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F. CONCLUSIONS

- 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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