



Human Services
Community Services

Legal services

Topic 44: Abuse in Care

30 May 2011

Abuse in Care

Introduction

A child or young person in out-of-home care (OOHC) is entitled to special protection from the State, due to the vulnerability of the child or young person and the circumstances leading to their removal from their natural family.

When a child or young person suffers harm at the hands of a carer or member of the carer's family whilst in OOHC, the State may owe a duty of care to the child or young person, including a fiduciary duty. Where it is found that a duty of care was breached, the State may be civilly liable for the harm suffered by the child or young person. This aspect is addressed in Legal Services Branch Paper Topic 45, Civil Liability and Child Welfare and is not expanded upon in this Paper.

If the Minister holds parental responsibility for the child or young person who has suffered abuse in care, Community Services also owes a duty to the child or young person to ensure that they pursue any legal remedies in the specified time limit.¹

Special protection of the state

Children and Young Persons (Care and Protection) Act 1998

Section 9 of the *Children and Young Persons (Care and Protection) Act 1998* sets out the principles of the Act including:

- (d) *If a child or young person is temporarily or permanently deprived of his or her family environment, or cannot be allowed to remain in that environment in his or her own best interests, the child or young person is entitled to **special protection and assistance from the State**, and his or her name, identity, language, cultural and religious ties should, as far as possible, be preserved.*
- (e) *If a child or young person is placed in out-of-home care, arrangements should be made, in a timely manner, to ensure the provision of a **safe, nurturing, stable and secure environment**, recognising the child's or young person's circumstances and that, the younger the age of the child, the greater the need for early decisions to be made in relation to a permanent placement.*

The wording of s9 of the Act derives from Article 20 of The United Nations Convention of the Rights of the Child which states:

"A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. ..."

¹ *Bennett v Minister of Community Welfare* (1993) 176 CLR 408

Charter of Rights

Section 162 of the *Children and Young Persons (Care and Protection) Act 1998* refers to the Charter of Rights for children and young persons in OOHC.

The charter includes a right to feel safe and not be abused.

Abuse in Care

'Abuse in Care' is a term that refers to any physical, emotional or sexual harm suffered by a child or young person at the hands of a foster carer or residential carer whilst in OOHC.

Allegations of Abuse in Care

An allegation of Abuse in Care would normally be made to the Child Protection Helpline and allocated in accordance with priority.

The allegation is investigated by Community Services and an assessment report completed recommending appropriate action. This may include removal of the child or young person from the placement.

Removal of the child from care

If the child or young person is removed from the care of a foster carer, this is a reviewable decision by the Administrative Decisions Tribunal, NSW under s 245 *Children and Young Persons (Care and Protection) Act 1998*.

A letter advising of the decision and the right to review in the Administrative Decisions Tribunal must be provided to the carer under s 48 of the *Administrative Decisions Tribunal Act 1997*. Reasons for the decision must also be provided upon request under s 49 of the *Administrative Decisions Tribunal Act 1997*.

Reportable allegations

Community Services must notify the Ombudsman within 30 days of becoming aware of an allegation against an employee (including foster carer) that involves reportable conduct or misconduct that may involve reportable conduct, (s 25C *Ombudsmans Act 1974*).

Reportable conduct is defined in s 25A of the *Ombudsmans Act* to mean:

- (a) *any sexual offence, or sexual misconduct, committed against, with or in the presence of a child (including a child pornography offence or an offence involving child abuse material (within the meaning of Division 15A of Part 3 of the Crimes Act 1900)), or*
- (b) *any assault, ill-treatment or neglect of a child, or*
- (c) *any behaviour that causes psychological harm to a child, whether or not, in any case, with the consent of the child.*

...

The definition of reportable conduct excludes trivial or negligible physical force and conduct for the purposes of discipline.

The Ombudsman monitors the allegations, the investigations and the action to be taken in response to the investigation. The Ombudsman may also conduct its own investigation into the allegations or response to the allegations under s 25G of the *Ombudsman Act 1974*.

Legal rights of the child or young person – victim’s compensation

A child or young person who has suffered abuse in care may be entitled to compensation under the *Victims Support and Rehabilitation Act 1996*. It is the responsibility of Community Services to assess eligibility for a child or young person in OHC and pursue the claim if necessary.

A child or young person will be eligible for compensation if they have suffered an injury (physical or psychological) due to an act of violence against them (s 5, *Victims Support and Rehabilitation Act 1996*).

If eligible, the child or young person may be compensated for a compensable injury in accordance with Schedule 1 to the *Victims Support and Rehabilitation Act 1996*.

Advice in relation to civil claim

If the child or young person is under the parental responsibility of the Minister or under the care responsibility of the Director General, Community Services has a responsibility to ensure that the child or young person has the opportunity to pursue any relevant civil claim, including against Community Services.

In *Bennett v Minister of Community Welfare* (1993) 176 CLR 408, a boy was injured whilst in the care of the Department of Community Welfare, WA. The High Court held that the Director of Community Welfare, upon the boy’s injury, “became subject to a duty of care... to avoid his suffering loss and damage arising from the possibility that he might not exercise an entitlement to bring an action for damages in respect of his injury and that the action might become statute barred... The Director breached that common law duty by failing to obtain independent legal advice.”²

A possible claim against the State is a form of property interest; a chose in action, and Courts may consider that the protection of the property interest gives rise to relevant fiduciary obligations of the State in relation to a child or young person in care.

There are limitation periods for the commencement of civil actions for personal injuries. Generally, the limitation period is 3 years from when the injury is “discoverable” (known) by the person, and not later than 12 years after the injury occurred. However, s 50E of the *Limitation Act 1969* provides for a longer limitation period in circumstances where a child (under 18) is injured by a parent or guardian of the child. In this instance, the period is 3 years from when the child turns 25 or when the cause of action is actually discoverable by the person, whichever is the later. An action cannot be commenced after 12 years from when the child turns 25 (however, this can be extended by a Court).

To avoid a real or perceived conflict of interest, the procedure for attaining legal advice for a child or young person who has a potential claim against the State is in accordance with the Memorandum of Understanding between Legal Aid NSW and Department of Justice and Attorney General and Department of Human Services, Community Services 2010.

² *Bennett v Minister of Community Welfare*, Mason CJ, Deane and Toohey JJ at para 5.

Community Services writes to DJAG and requests a guardian be assigned to the child or young person to seek legal advice and provide instructions on a legal claim.

Community Services provides to DJAG, (and consequently the Guardian), evidence to establish the parental responsibility of the Minister or Director General, a statement setting out why it is thought the child or young person may have a claim against the State, contact details and all information held by Community Services that will assist in assessing the claim.

Advice is sought by the guardian from Legal Aid and the guardian continues to instruct on any possible claim if necessary.

Conclusion

Vulnerable children and young persons in OOHC are entitled to special protection to ensure their safety upon removal from their family of origin. If allegations are made regarding suspected harm to a child or young person in OOHC, Community Services and the Ombudsman's Office have procedures to investigate and take or oversee action in response to the investigation. Community Services may then have liability, and responsibilities to the child or young person to obtain independent legal advice or pursue a claim for victim's compensation on behalf of the child.