The Shopfront

YOUTH LEGAL CENTRE

Children and young people at risk – reporting and exchange of information

1 Introduction

The *Children and Young Persons (Care and Protection) Act* 1998 (referred to in this document as "the Act") deals with matters relating to the welfare of children and young people in New South Wales.

This includes the reporting and investigation of child abuse, licensing of child care services, employment of children, care proceedings in the Children's Court, and those cases in which the State has parental responsibility for children and young people.

The NSW Department of Communities and Justice (DCJ), formerly the Department of Family and Community Services (FACS), can intervene in matters where the welfare of the child is in issue. Intervention may range from the provision of family support and respite child care to the very extreme action of removing a child from his or her family.

The parts of the Act likely to be of most relevance to youth workers are the sections dealing with situations where a child or young person is at risk of harm.

2 Definitions of "child" and "young person"

Most laws define a "child" as a person under 18 years of age.

The *Children and Young Persons (Care and Protection) Act* is a bit different. It defines a "child" as a person under 16 years of age, and a "young person" as a person 16 or 17 years of age.

3 Child or young person at risk of significant harm

According to section 23 of the Act, a child or young person is "at risk of significant harm" if current concerns exist for the safety, welfare or well-being of the child or young person because of the presence, to a significant extent, of any one or more of the following circumstances:

(a) the child or young person's basic physical or psychological needs are not being met or are at risk of not being met,

(b) the parents or other caregivers have not arranged and are unable or unwilling to arrange for the child or the young person to receive necessary medical care,

(b1) in the case of a child or young person who is required to attend school, the parents or caregivers have not arranged and are unable or unwilling to arrange for the child or young person to receive education;

(c) the child or young person has been, or is at risk of being, physically or sexually abused or ill-treated,

(d) the child or young person lives in a household where there have been incidents of domestic violence, and as a consequence, the child or young person is at risk of serious physical or psychological harm,

(e) a parent or other caregiver has behaved in such a way towards the child or young person that the child or young person has suffered or is at risk of suffering serious psychological harm,

(f) the child was the subject of a pre-natal report and the birth mother did not engage successfully with support services to eliminate, or minimise to the lowest level reasonably practical, the risk factors that gave rise to the report.

4 Voluntary reporting of children or young people at risk of significant harm

Anyone who has reasonable grounds to suspect that a child (*under 16*) or young person (*aged 16 or 17*) is (or that a class of children or young persons are) at risk of significant harm *may* make a report to DCJ (section 24).

A report may also be made about an unborn child who may be at risk of significant harm after birth (section 25).

A report may be made anonymously (section 26).

Reports are usually made to the Child Protection Helpline on 132 111.

For general information about the reporting process, see https://www.facs.nsw.gov.au/families/Protecting-kids/reporting-child-at-risk.

5 Mandatory reporting of children at risk of significant harm

5.1 When must a report be made?

Mandatory reporting requirements apply to certain persons if, in the course of their work, they suspect on reasonable grounds that a *child* (*under 16*) is (or a class of children are) *at risk of significant* harm.

The threshold was raised from “harm” to “significant harm” by amendments to the law which commenced on 24 January 2010.

There is no definition of “significant” in the Act, but some guidance may be found at https://www.facs.nsw.gov.au/families/Protecting-kids/mandatory-reporters.

5.2 Who is a mandatory reporter?

The mandatory reporting requirement extends to all paid workers who deliver (or are responsible for the delivery of) any of the following services, wholly or partly to children health care, welfare, education, children’s services, residential services or law enforcement (section 27).

Managers (including unpaid members of management committees) who supervise people working with children are also mandatory reporters.

Volunteers are not mandatory reporters, unless they are on a management committee or otherwise responsible for supervising paid staff. However, in many cases an agency’s policy or funding agreement will require everyone (including volunteers) to make a report if they suspect a child is at risk of significant harm.

5.3 Does under-age sex need to be reported?

Not necessarily. A child under 16 who engages in consensual sex is *not* necessarily “at risk of significant harm” within the meaning of the Act. Under-age sex does not automatically equate to abuse, particularly if the partners are relatively close in age.

The *Mandatory Reporter Guide* at https://reporter.childstory.nsw.gov.au/s/mrg contains a decision tree to help mandatory reporters respond to concerns about sexual abuse.

According to the *Mandatory Reporter Guide*: "Sexual abuse is sexual activity or behaviour that is imposed, or is likely to be imposed, on a child by another person". The guide contains examples of conduct that may amount to abuse, and a table to provide guidance on age-appropriate sexual behaviours.

For more information on the age of consent, under-age sex, and the similar age defence, see our fact sheet on ***Age of Consent – issues for youth workers***.

5.4 How is a report made?

Mandatory reporters working in certain government agencies (e.g. NSW Health, Education, Police, Juvenile Justice, Housing) may make a report to the Child Wellbeing Unit in their department, instead of to DCJ.

Other mandatory reporters, including those in non-government organisations, still make reports to DCJ via the Child Protection Helpline on 132 111 or via the website.

5.5 Consequences of not reporting

Until 2010, a mandatory reporter who did not make a report to Family and Community Services when required could be charged with a criminal offence.

As of 24 January 2010 there is no longer any criminal penalty for failing to report. However, reporting is still a legal duty and failure to report could result in disciplinary action from an employer or professional body.

5.6 Resources for mandatory reporters

Mandatory Reporter Guide:

https://reporter.childstory.nsw.gov.au/s/mrg

NSW Inter-Agency Guidelines for Child Protection Intervention (current edition):

https://www.facs.nsw.gov.au/providers/children-families/interagency-guidelines

6 Mandatory reporting of homelessness

Anyone (other than an "excluded person" – see below) who provides residential accommodation for a person whom they have reasonable grounds to suspect is:

(a) a child (under 16); and

(b) living away from home without parental permission

must report the child's whereabouts to DCJ (section 122).

An "excluded person" means a friend or relative of the child who maintains both a close personal relationship with the child through frequent personal contact and a personal interest in the child's welfare, and who does not provide support to the child wholly or substantially on a commercial basis.

7 Confidentiality and legal protection for reporters

Reports made to DCJ (whether voluntary or mandatory) are treated confidentially.

However, the identity of the reporter may be disclosed in some very limited situations, e.g. to police involved in investigating a serious offence against a child or young person (section 29(4A)).

If the report is made in good faith, the reporter is protected from legal actions such as defamation and breach of professional ethics (section 29).

8 Investigation of reports

Where DCJ has received a report that a child or a young person is at risk of significant harm, it must make whatever further investigations it considers necessary (section 30).

If DCJ is satisfied that a child or a young person is in need of care and protection it may take a range of actions including (section 34):

- arranging for support services to be provided to the family;
- offering alternative dispute resolution services to the family;
- developing a care plan or parent responsibility contract; exercising emergency protection powers (e.g. removing the child form their current environment);
- making a care application to the Children's Court.

9 Emergency removal of children or young persons at risk

Generally a Children's Court order must be obtained for the long-term removal of a child or young person from their usual home.

In the short-term, the Children's Court may make an emergency care and protection order (section 46) or interim care order (section 69). Alternatively, DCJ may make a temporary care arrangement (s151) (for a child under 16, this requires the consent of the child's parents if they can be located).

In an emergency, a child or young person may be removed by a police officer or a DCJ child protection worker in the following situations:

- from any premises, if DCJ or the police are satisfied on reasonable grounds that the child or young person is at immediate risk of serious harm and that an apprehended violence order would not be sufficient to protect them (section 43(1));
- from a public place, if DCJ or the police suspect on reasonable grounds that a child (under 16 only) is in need of care and protection, is not subject to the supervision or control of a responsible adult, and is living in or habitually frequenting a public place (section 43(2));
- from situations where children are being exposed to or participating in "prostitution" or children are being used for the production of "child abuse material" (section 43(3));
- with an order of the Children's Court, on the making of a care application (section 48); or
- with a search warrant which allows for the entry of premises and the removal of the child or young person (section 233).

DCJ may assume the care of a child or young person who is at risk of serious harm but is currently safe (such as in hospital) without physically removing the child (section 44).

10 Placing children or young persons in care

A child or young person removed in any of the above circumstances may be placed in the care of the Secretary of DCJ (or in some cases returned home). The child or young person may not be kept in a police cell or a juvenile detention centre.

If the child or young person remains in the Secretary's care, the Department must immediately make an application to the Children's Court for care orders, within 3 working days (section 45).

The Children's Court may make a range of interim and final orders, which are set out in Chapter 5 Part 2 of the Act.

If the Children's Court finds that the child is "in need of care", it may make a final care order (section 79) which could include:

- Restoring the child to the parent(s), often with the parent(s) making undertakings (promises) about their behaviour; or
- Placing the child in the care of an extended family member; or
- Allocating parental responsibility to the Minister for Family and Community Services.

11 Information sharing between agencies

Chapter 16A of the Act provides for government agencies and non-government agencies to exchange information relating to the safety, welfare and well-being of children (under 16) and young people (16 or 17). It also requires these agencies to take reasonable steps to co-ordinate decision-making and service delivery regarding children and young people.

Chapter 16A applies to "*prescribed bodies*" under the Act. This includes some courts and government departments, fostering and adoption agencies, and any organisation providing health care, welfare, education, child care, residential or law enforcement services to children.

A prescribed body:

- *must* pass on information if requested by another prescribed body
- *may* provide information to another prescribed body, even if not requested to

if the agency passing on the information reasonably believes it would assist the other agency:

- to make a decision or provide a service relating to the young person's safety, well-being or welfare; or
- to manage any potential risk to the young person that might arise in the agency's capacity as an employer or designated agency.

This information can be provided even though the agency would normally owe the client a duty of confidentiality.

However, a prescribed body *may refuse to provide information in certain circumstances*, for example: if it would prejudice the conduct of an investigation or inquiry, endanger a person's life or physical safety, or would not be in the public interest.

For further information, see https://www.facs.nsw.gov.au/providers/children-families/interagency-guidelines.

12 Power of DCJ to direct the provision of information

Under section 248 of the Act, DCJ may direct a "prescribed body" to furnish information about the safety, welfare and well-being of a particular child or young person (or a class of children or young persons).

Unlike Chapter 16A, section 248 does not allow a prescribed body to refuse to provide this information.

Section 248 overrides any confidentiality obligations that would otherwise exist. A person or body who provides information under section 248 is protected from legal actions for professional misconduct, defamation, malicious prosecution and the like.

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The Shopfront Youth Legal Centre is a service provided by Herbert Smith Freehills, in association with Mission Australia and The Salvation Army.

This document was last updated in November 2019 and to the best of our knowledge is an accurate summary of the law in New South Wales at that time.

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