

AN OUTLINE OF THE DIFFERENCES BETWEEN PARENTAL RESPONSIBILITY AND CARE RESPONSIBILITY UNDER THE *CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) ACT 1998*

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1. INTRODUCTION

Parental responsibility and care responsibility are two key concepts in the *Children and Young Persons (Care and Protection) Act 1998* (the Act). They outline who can exercise what responsibilities and who can make decisions about children and young persons in out-of-home care. This paper explains parental responsibility and care responsibility and the differences between them.

2. PARENTAL RESPONSIBILITY

What is parental responsibility?

To understand the way that the term 'parental responsibility' is used in the Act we need to think about the usual responsibilities that parents have for their children.

The term 'parent' is defined in the Act as:

'A person who has parental responsibility for the child or young person.'

In turn, 'parental responsibility' is defined in the Act as:

'All the duties, powers, responsibilities and authority which by law, parents have in relation to their children.'

This definition of parental responsibility is derived from the *Family Law Act 1975* and combines the concepts of 'guardianship' and 'custody.' Guardianship is mainly about responsibility for making *long-term* decisions on behalf of a child or young person. Custody involves responsibility for making *day-to-day* decisions for them.

Therefore parental responsibility in the Act includes both the longer term planning for a child or young person, such as what school they will attend and the day-to-day decisions, such as giving them permission to attend a school excursion.

Parental responsibility therefore equates to the broad range of decision making and planning that a parent normally has for a child or young person, where there has been no legal action to restrict those responsibilities.

Who is granted parental responsibility?

While parental responsibility usually rests with parents, the Children's Court can make orders reallocating parental responsibility to:

- one parent to the exclusion of another;
- one or both parents and the Minister for Community Services (the Minister) or another person jointly;
- another suitable person; or
- solely to the Minister

Parental responsibility can be split or shared between several parties (s79 & s81). This means that some aspects of parental responsibility could be granted to a parent, both parents or someone else. The 'suitable person' referred to above may be a carer.

Thus in care proceedings it is up to the Children's Court to determine how the details of parental responsibility will be allocated.

What are the aspects of parental responsibility that can be granted?

Specific aspects of parental responsibility can be allocated to different parties. Some of these are listed in the Act, although there may be other areas of responsibility that the court may allocate. These include:

- the residence of a child or young person;
- contact;
- education and training;
- religious upbringing; and
- medical treatment.

Carers can have in their care a child or young person for whom two or more parties have responsibility for making decisions about specific and different areas of the child or young person's life. For example the Minister may have parental responsibility relating to where the child or young person will live and for issues of contact, while the parents may retain parental responsibility for religious upbringing and/or education.

When the Minister has parental responsibility for a child or young person, section 164 gives the Minister responsibility for the provision of accommodation.

An example of this may be in a case where the Minister is only granted parental responsibility to determine the residence of a child and arranges for the child to live in a long-term foster placement. The parents of the child are Catholic and retain responsibility for making decisions about the child's religious instruction. They may want to ensure that their child's religious heritage is preserved and that they continue to attend a Catholic school. In this situation the designated agency and authorised carer need to follow both the directions of the Minister, as delegated to officers of the Department of Community Services, in relation to the child's placement, and the wishes of the child's parents in relation to religious instruction.

For children and young persons in voluntary placements, the parents retain parental responsibility and continue to make all decisions concerning their child.

What is sole parental responsibility?

Under section 149 of the Act, authorised (foster) carers may apply to the Children's Court to be granted sole parental responsibility for a child or young person in their care.

The conditions of such an application are:

- the child or young person must have been with the carer continuously for two years, and
- the Minister has parental responsibility either alone or with another person of that child or young person, and
- the person who had parental responsibility of the child or young person prior to the Minister must consent to the application. In most cases this will be the parents or it may be another relative, and
- if the child is less than 12 years of age the principal officer of the agency must inform the child about the application, and
- if the child or young person is over 12 years of age and is capable of giving consent, the application cannot be made without their consent.

Variation or rescission of a sole parental responsibility order

While the use of sole responsibility orders is intended to achieve permanency for a child or young person, it is possible once an order has been made, to apply for a variation or rescission of the order. This is particularly important should the placement circumstances change. For example when a young person wishes to move interstate with the person who has sole parental responsibility for them or when a young person and their family feel that continuing case management is unnecessary and intrusive.

Such a step is possible only with the leave of the Children's Court and with the consent of the principal officer of the designated agency that supervised the last placement of the child or young person. The principal officer must provide a report to the court and agree that the agency will provide support for the placement.

3. CARE RESPONSIBILITY

What is care responsibility?

The concept of 'care responsibility' refers to the range of responsibilities and the decision making authority that an authorised carer can exercise, on a day-to-day basis, without referring to the designated agency that authorised them. This should allow for day-to-day decisions to be dealt with more efficiently and effectively because such decisions are made by the person caring for the child or young person.

Under section 136 of the Act only an authorised carer may provide out-of-home care for a child or young person. The regulations make provision for the making and determination of applications for authorisation of a carer by a designated agency. This applies to both foster carers and residential carers.

It should be noted that 'care responsibility' contrasts with 'parental responsibility' in a number of ways. While care responsibility provides for the day-to-day decision making by carers, it does not include the authority to make the long-term decisions that can be made by a person who has parental responsibility.

For example, deciding what school a child may attend is a decision someone with 'parental responsibility' makes, while giving a child permission to go on a sports camp at school is a decision that someone with 'care responsibility' makes.

What does this mean in practice?

Under section 146 of the Act an authorised carer is entitled to participate in making decisions, going beyond those relating to daily care and control, concerning the safety, welfare and well-being of a child or young person in their care.

Standard 2.1 *Recruitment and selection of authorised (foster) carers* in the *NSW Out-of-Home Care Standards* requires designated agencies to provide authorised carers with a detailed written agreement stating the conditions of approval, agency expectations, delegations and carer responsibilities.

The extent to which authorised carers can make decisions relating to an individual child or young person should be determined when the care plan is formulated and reviewed on each occasion the case plan is reviewed.

A designated agency may also *at any time* impose reasonable conditions and vary or revoke conditions on the authorisation of an authorised carer.¹ Conditions can also be used to inform the extent to which, and the circumstances under which, carers may exercise the functions set out in section 157.

Daily care and control

Under section 157 care responsibility allows authorised carers to:

- give consent to medical and dental treatment, including urgent surgical intervention (if specified in writing by the practitioner),
- correct and manage the behaviour of the child or young person (in line with the behaviour management guidelines),
- give permission to participate in activities, such as school excursions, that are organised for the child or young person,
- make other decisions that are required in the day-to-day care and control of the child or young person,
- provide a child or young person with whatever religious instruction (if any) the authorised carer considers to be appropriate, and
- allow the child or young person to participate in religious activities.

¹ Clause 21 *Children and Young Persons (Care and Protection) Regulation 2000*.

The exercise of these powers is subject to any written direction that the Children's Guardian or the designated agency has issued. For example, the principal officer of an agency may instruct a carer not to use unorthodox or 'alternative' medical treatment or choose not to authorise residential carers to consent to medical treatment.

Directions

Under section 157 of the Act the Children's Guardian has issued directions for carers, which are available at www.kidsguardian.nsw.gov.au

1) Directions on religious instruction for children and young people in out-of-home care by authorised carers

Under section 157(4)(a) and (b) of the Act, authorised carers may provide a child or young person with whatever religious instruction (if any) the authorised carer considers to be appropriate, unless the designated agency or the Children's Guardian has given a contrary direction.

The Children's Guardian has provided directions about religious instruction of children and young people in out-of-home care. These directions state that authorised carers (including the principal officer of each designated agency):

- must have regard to the views of the child or young person regarding their willingness to receive religious instruction.
- are not to coerce or compel a child or young person to attend or participate in any religious instruction, activity or teaching.
- are not to provide a level of religious instruction that will interfere with a restoration plan, even if they are the same religion as the child or young person.
- if of a different religion, are not to provide religious instruction in the carer's religion, if restoration of the child or young person is the goal.
- may provide religious instruction to a child or young person in long-term care, even if in a different religion to that in which the child or young person has been raised, providing it is part of an approved case plan.
- are not at liberty to give religious instruction contrary to these directions.

2) Directions on the exercise of care responsibility by authorised carers

Subsections 157(1) and (4) of the Act provide that an authorised carer may make decisions that are required in the day-to-day care and control of the child or young person.

The exercise of these powers by an authorised carer is subject to any written direction that the Children's Guardian or the designated agency has issued. For example, a child may be placed with an excellent and appropriate carer who believes in a certain kind of unorthodox or 'alternative' medical treatment. If a designated agency is concerned about risks to a child from such treatment, it could direct the carer not to take the child to alternative medicine practitioners without the approval of the agency.

The Children's Guardian has provided directions regarding the exercise of care responsibility. These directions instruct that authorised carers (including the principal officer of each designated agency):

- are not to exercise any of the functions under s157(1) contrary to any order of the Children's Court.
- are not to exercise any of the functions under s157(1) contrary to the agreed care plan for a child or young person.
- can only correct and manage the behaviour of the child or young person using behaviour management practices approved by their designated agency. If the approved behaviour management practices are regarded as being inadequate to correct or manage the behaviour of a child or young person, the authorised carer is to advise their designated agency as soon as is practicable.
- authorised carers are unable to consent to the administration of a psychotropic drug to a child or young person in out-of-home care unless the principal officer of the designated agency, who authorised the carer, has approved of the proposed consent.
- are not to exercise any of the functions under s157(1) without first having ascertained the views of the child or young person, having regard to the child's or young person's age and developmental capacity.
- are not at liberty to provide religious instruction contrary to the provisions within the direction issued by the Children's Guardian.

Behaviour management of children and young people in out-of-home care

The Act and regulations permit persons having parental responsibility and authorised carers to manage the behaviour of a child or young person as a component of their care responsibilities. The methods used must be within the bounds of the Act and regulations and as such should be part of the care plan. This may include the use of physical restraint when it is to be used to prevent self-harm or injury to others. All behaviour management practices should reflect the agency's behaviour management policy which in turn must meet the requirements of the Office of the Children's Guardian.

Under section 157(1)(c) of the Act, authorised carers can correct and manage the behaviour of a child or young person in their care subject to clause 30 of the *Children and Young Persons (Care and Protection) Regulation 2000* which states:

- (1) An authorised carer, in correcting and managing the behaviour of a child or young person in out-of-home care:
- (a) must not use physical coercion or physical punishment, and
 - (b) must, in any event, use only behaviour management practices approved by the designated agency.

(2) An authorised carer who finds that the approved behaviour management practices are not sufficiently effective to correct or manage the behaviour of a child or young person is to notify that fact as soon as practicable to the designated agency.

- (3) On receiving a notification under subclause (2), the designated agency, after assessing the situation, is to determine if the problem should be addressed:
- (a) by providing appropriate advice, support and training to the authorised carer and appropriate support to the child or young person, or
 - (b) by changing the placement arrangements.

The Office of the Children's Guardian has published guidelines for developing a behaviour management policy in order to guide the development of a designated agency's behaviour management policy. These are available at www.kidsguardian.nsw.gov.au.

The principles in the guidelines reflect the legislative framework of the Act and regulations. They are provided here in brief:

- The safety, welfare and well-being of children and young persons must be the paramount consideration.²
- The human rights of children and young persons should be fully respected in any behaviour management policy and practice.
- Behaviour management should always emphasise positive approaches and prohibit cruel, harsh or degrading actions.
- All proposed behaviour management plans must be evidence-based and informed by a comprehensive assessment of the child or young person and their environment. Behaviour management plans must be reviewed regularly.
- All behaviour management practices should be appropriate to the age and developmental level of the child or young person.
- The least intrusive behaviour intervention strategies should be used to address the particular behaviour to be corrected or reduced.
- Children and young persons should participate in decisions about behaviour intervention in relation to their own behaviour management plan.
- Children and young people, who have sufficient capacity to understand the implications of what is proposed, are to be involved in decision-making about the use of various intervention strategies, including restraint, in relation to their own behaviour.
- Any behaviour intervention strategy must be appropriate to the cultural, linguistic and religious background of the child or young person.
- Anyone designing behaviour management plans must have demonstrated skills, competencies and expertise in this area.
- Authorised carers are accountable for the behaviour management practices that they utilise. They require training and supervision in order to develop positive behaviour management skills.

² Section 8(a) and 9(a) *Children and Young Persons (Care and Protection) Act 1998*.

Agency protocol on approving behaviour management practices

Designated agencies are required to have a protocol setting out how consent to implement behaviour management strategies will be sought.

Note that:

- While parents are allowed to reasonably chastise their children, they cannot consent to another person doing this or agree to the use of any behaviour management technique that constitutes an assault or wrongful imprisonment.
- While the Guardianship Tribunal can consent to the use of some behaviour management techniques for persons aged 16 years or older, the Tribunal cannot give consent for use of such techniques with persons under 16 years of age. Information from the Guardianship Tribunal is available from www.gt.nsw.gov.au
- In the absence of consent, such procedures would constitute an assault or wrongful imprisonment or assault.

Defences against civil or criminal proceedings

If a person can show that they acted in accordance with the requirements of section 158 and procedures (if any) specified by the Director-General of the Department of Community Services and their actions were reasonable, on the balance of probabilities, in all circumstances of the case, section 158(5) says the person is exempt from any criminal or civil liability. However, this does not prevent a carer being taken to court where they would be required to prove that they acted within all requirements.

If more than 'reasonable' force or restraint was used, such actions may be considered unlawful and not covered by the defences of self-defence or necessity according to section 158(5). Criminal or civil liability may arise as a consequence.

If a person uses inappropriate behaviour management techniques which harm a child or young person or place them at risk of harm, an obligation arises in section 27 of the *Children and Young Persons (Care and Protection) Act 1998* for the designated agency to report the child or young person at risk of harm to the DoCS Helpline. The agency should also advise the NSW Ombudsman under section 25C of the *Ombudsman Act 1974*.

Under section 39(1) of the *Commission for Children and Young People Act 1998* it is the duty of a designated agency to notify the NSW Commission for Children and Young People of the name and other identifying particulars of any employee against whom relevant employment proceedings have been completed. Section 33(3) of this Act clearly specifies that the performance of duties by a foster carer constitutes employment.

If, for example, an agency found a carer was using a behaviour intervention strategy that was an infringement of the agency's behaviour management policy the agency would have to notify the Commission for Children and Young People. They would need to provide details about the carer, their conduct and the outcome of the agency's investigation into the matter.

4. CONCLUSION

The main differences between parental responsibility and care responsibility are in regard to the kind of decisions made in the best interests of children and young persons and their ramifications. Parental responsibility relates mainly to long-term decisions while care responsibility relates to day-to-day decision making.

Parental responsibility can be allocated to the Minister or other person by the Children's Court. Whereas a person authorised by a designated agency, who is directly caring for the child or young person, is allocated care responsibility.

5. DEFINITIONS

Authorised carer

A person authorised as a carer by a designated agency.³

Designated agency

In relation to an authorised carer, means the designated agency that authorised the carer.

Principal officer

In relation to an authorised carer, means the most senior person in the designated agency.

³ Clause 19 Definitions, the *Children and Young Persons (Care and Protection) Regulation 2000*.