



## Australian legal definitions: When is a child in need of protection?

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A critical issue faced by researchers working in the area of child maltreatment concerns the definition of child maltreatment. Definitional issues fall into two main areas: (1) those primarily of a conceptual nature; and (2) those primarily related to implementation or measurement. The following resource sheet presents a set of conceptual definitions of abusive and neglectful behaviours. Note that the proposed definitions are of abusive and neglectful *behaviours*, rather than *child abuse* or *child neglect per se*. The aim of these definitions is to describe the types of actions widely considered to constitute the different maltreatment sub-types. These definitions are followed by legislative definitions of “a child in need of protection” in order to examine the point at which, and the circumstances in which, the state is mandated to intervene to protect children.

*Maltreatment* refers to non-accidental behaviour towards another person, which is outside the norms of conduct and entails a substantial risk of causing physical or emotional harm. Behaviours may be intentional or unintentional and include acts of omission and commission. Specifically *abuse* refers to acts of commission and *neglect* acts of omission. Note that in practice the terms *child abuse* and *child neglect* are used more frequently than the term *child maltreatment*.

*Physically abusive behaviour* refers to any non-accidental physically aggressive act towards a child. Physical abuse may be intentional or may be the inadvertent result of physical punishment. Physically abusive behaviours include shoving, hitting, slapping, shaking, throwing, punching, biting, burning and kicking (Higgins, 1998; James, 1994a; US National Research Council, 1993). The definition of physically abusive behaviours extends to and includes the fabrication, exaggeration and inducing of illness symptoms in a child (previously Munchausen Syndrome by Proxy, Lasher & Sheridan, 2004).

*Sexually abusive behaviour* refers to any sexual activity between a child and an adult or older person (five or more years older). Sexual activity includes fondling genitals, masturbation, oral sex, vaginal or anal penetration by a penis, finger or any other object, fondling of breasts, voyeurism, exhibitionism and exposing or involving the child in pornography (Higgins, 1998; James, 1994a; US National Research Council, 1993).

*Neglectful behaviour* refers to a failure (usually by a parent) to provide for a child's basic needs. Here neglect refers to physical neglect, as distinct from psychological or emotional neglect, which are included under the definition of psychologically neglectful behaviours. Physically neglectful behaviours include a failure to provide adequate food, shelter, clothing, supervision, hygiene or medical attention (Higgins, 1998; James, 1994a; US National Research Council, 1993).

*Psychologically abusive or neglectful behaviour* refers to inappropriate verbal or symbolic acts and a failure to provide adequate non-physical nurture or emotional availability. Psychologically abusive or neglectful behaviours include rejecting, ignoring, isolating, terrorising, corrupting, verbal abuse and belittlement (Higgins, 1998; James, 1994a; US National Research Council, 1993).

*Witnessing family violence* is generally considered to be a form of psychologically abusive behaviour. However, there is growing support for the inclusion of family violence as a distinct maltreatment sub-type (James, 1994b). With this in mind, witnessing family violence refers to "a child being present (hearing or seeing) while a parent or sibling is subjected to physical abuse, sexual abuse or psychological maltreatment, or is visually exposed to the damage caused to persons or property by a family member's violent behaviour" (Higgins, 1998, p. 104).

Exerpt from: Bromfield (2005, p. 14)

### When do "abusive and neglectful behaviours" become "abuse" and "neglect"?

Although the above are widely agreed upon as abusive and neglectful behaviours, the point at which these behaviours become "abuse or neglect" such that the state (through statutory child protection services) intervenes to protect a child depends on the legal definition of when a child is "in need of protection". Legal definitions of a child in need of protection set the legal threshold at which sub-optimal parenting or circumstances become abuse or neglect. The definition of "a child in need of care and / or protection" is prescribed in legislation in each jurisdiction. In general, the concept of "a child in need of protection" provides the legislative grounds for intervention, and it is these grounds that form the basis of what is substantiated following a child protection investigation.

### The components of “a child in need of protection”

The legislative provisions in each jurisdiction that relate to the definition of a child in need of care or protection, and the threshold at which statutory child protection intervention is triggered, are outlined below. These excerpts illustrate the range of different ways in which states and territories define “a child in need of protection” (or in some jurisdictions, a child “at risk”). While definitions vary, the thresholds for statutory intervention are broadly consistent. That said, there is some variation as to the threshold at which statutory services can intervene (for example, whether intervention is triggered as a result of “harm” or “serious / significant harm”). There is also variation across jurisdictions regarding whether it is abusive or neglectful actions or consequences (or a combination of the two) that are substantiated (for further detail, see Bromfield & Higgins, 2005).

Several other aspects of the definition of “a child in need of protection” are common to most, if not all, Australian jurisdictions. For example, the range of potential perpetrators who could lead a child to be in need of protection is typically restricted to parents or people acting in the place of parents (*in loco parentis*). Some jurisdictions expand the definition of a child in need of protection to include children for whom no parents can be found (whether the parents are deceased or have abandoned the child and cannot be located). Further, it is common for a child to be defined as being “in need of protection” only if they do not have a parent “able or willing” to protect them (the Northern Territory was the exception to this, however the Northern Territory does have policy to this effect). For a comprehensive discussion of the definition of a child in need of protection, see Bromfield and Higgins (2004).

### Legislative definitions of “a child in need of protection”

#### **Australian Capital Territory**

According to section 156 of the *Children and Young People Act 1999* (ACT), “a child or young person is in need of care and protection” if:

- (1) a) the child or young person—
  - i) has been abused or neglected; or
  - ii) is being abused or neglected; or
  - iii) is at risk of abuse or neglect; and
- b) no-one with parental responsibility for the child or young person is willing and able to protect the child or young person from suffering the abuse or neglect.

(2) Without limiting subsection (1), a child or young person is in need of care and protection in the following circumstances:

- a) if a person with whom the child or young person lives or is likely to live—
  - i) has threatened to kill or injure the child or young person and there is a real possibility of the threat being carried out; or
  - ii) has killed, abused or neglected a child or young person and there is a real possibility of the person killing, abusing or neglecting the relevant child or young person; and no-one with parental responsibility for the child or young person is willing and able to protect the child or young person;
- b) no-one with parental responsibility for the child or young person (other than the chief executive) is willing and able to provide him or her with adequate care and protection;
- c) if there is a serious or persistent conflict between the child or young person and the people with parental responsibility for him or her (other than the chief executive) to such an extent that the care and protection of the child or young person is, or is likely to be, seriously disrupted;
- d) the people with parental responsibility for the child or young person (other than the chief executive) are—
  - i) dead, have abandoned him or her or cannot be found after reasonable inquiry; or
  - ii) unwilling or unable to keep him or her from engaging in self-damaging behaviour; or
  - iii) sexually or financially exploiting the child or young person or unwilling or unable to keep him or her from being sexually or financially exploited;
  - iv) the child or young person is the subject of a child protection order in a state that is not being complied with.

#### *Threshold employed*

In the ACT, a child is in need of care and protection, if he or she *has been, is being, or is at risk of being* abused or neglected (that is, the act or actions of abuse and / or neglect, or in other words, experiencing abusive and / or neglectful behaviour).

Abuse, according to section 151 of the Act, is defined as:

- (a) physical abuse; or
- (b) sexual abuse; or
- (c) emotional abuse (including psychological abuse) if the child or young person has suffered or is suffering in a way that has caused or is causing significant harm to his or her wellbeing or development; or
- (d) emotional abuse (including psychological abuse) if—
  - i. the child or young person has been or is being exposed to conduct that is domestic violence under the *Domestic Violence and Protection Orders Act 2001* (ACT); and
  - ii. the exposure has caused or is causing significant harm to the wellbeing or development of the child or young person.

Neglect, according to section 151A, is defined as: a failure to provide the child or young person with a necessity of life that has caused or is causing significant harm to the wellbeing or development of the child or young person. Examples of necessities of life:

- (1) food
- (2) shelter
- (3) clothing
- (4) medical care

#### New South Wales

According to section 71 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), a child is in need of care and protection for any of the following reasons:

- (1)
  - a) there is no parent available to care for the child or young person as a result of death or incapacity or for any other reason,
  - b) the parents acknowledge that they have serious difficulties in caring for the child or young person and, as a consequence, the child or young person is in need of care and protection,
  - c) the child or young person has been, or is likely to be, physically or sexually abused or ill-treated,
  - d) subject to subsection (2), the child's or young person's basic physical, psychological or educational needs are not being met, or are likely not to be met, by his or her parents or primary care-givers,
  - e) the child or young person is suffering or is likely to suffer serious developmental impairment or serious psychological harm as a consequence of the domestic environment in which he or she is living,
  - f) in the case of a child who is under the age of 14 years, the child has exhibited sexually abusive behaviours and an order of the Children's Court is necessary to ensure his or her access to, or attendance at, an appropriate therapeutic service,
  - g) the child or young person is subject to a care and protection order of another state or territory that is not being complied with,
  - h) section 171 (1) applies in respect of the child or young person,
  - i) in the case where the application for the order is made by filing a contract breach notice—any presumption arising from the operation of section 38E (4) that the child or young person is in need of care and protection has not been rebutted.

#### *Threshold employed*

In NSW, a child is in need of care and protection, if he or she *has been or is at risk of being* physically or sexually abused or ill-treated, *is suffering or is likely to suffer serious* developmental impairment or *serious* psychological harm as a consequence of the environment in which he or she lives, and/or his or her basic physical, psychological or educational needs *are not being* met, or *are likely not to be* met. In other words, statutory intervention is triggered on the basis of the acts or behaviours in and of themselves where the acts or behaviours constitute physical or sexual abuse. The consequences of serious developmental impairment or serious psychological harm are required where maltreatment is occurring, or is likely to occur, as a result of omissions or non-physical commissions (e.g., verbal abuse).

#### Northern Territory

According to section 4(2) of the *Community Welfare Act 1983* (NT), a child is in need of care where:

- (a) the parents, guardians or the person having the custody of the child have abandoned him or her and

cannot, after reasonable inquiry, be found;

- (b) the parents, guardians or the person having the custody of the child are or is unwilling or unable to maintain the child;
- (c) he or she has suffered maltreatment;
- (d) he or she is not subject to effective control and is engaging in conduct which constitutes a serious danger to his or her health or safety; or
- (e) being excused from criminal responsibility under section 38 of the Criminal Code he or she has persistently engaged in conduct which is so harmful or potentially harmful to the general welfare of the community measured by commonly accepted community standards as to warrant appropriate action under this Act for the maintenance of those standards.

#### *Threshold employed*

In the NT, a child is in need of care and protection, if he or she *has* suffered maltreatment. Maltreatment, according to section 4(3) of the Act, is suffered by a child where:

- (a) he or she has suffered a physical injury causing temporary or permanent disfigurement or serious pain or has suffered impairment of a bodily function or the normal reserve or flexibility of a bodily function, inflicted or allowed to be inflicted by a parent, guardian or person having the custody of him or her or where there is substantial risk of his suffering such an injury or impairment;
- (b) he or she has suffered serious emotional or intellectual impairment evidenced by severe psychological or social malfunctioning measured by the commonly accepted standards of the community to which he or she belongs, because of his or her physical surroundings, nutritional or other deprivation, or the emotional or social environment in which he or she is living or where there is a substantial risk that such surroundings, deprivation or environment will cause such emotional or intellectual impairment;
- (c) he or she has suffered serious physical impairment evidenced by severe bodily malfunctioning, because of his or her physical surroundings, nutritional or other deprivation, or the emotional or social environment in which he or she is living or where there is substantial risk that such surroundings, deprivation or environment will cause such impairment;
- (d) he or she has been sexually abused or exploited, or where there is substantial risk of such abuse or exploitation occurring, and his or her parents, guardians or persons having the custody of him or her are unable or unwilling to protect him or her from such abuse or exploitation; or
- (e) being a female, she –
  - i. has been subjected, or there is substantial risk that she will be subjected, to female genital mutilation, as defined in section 186A of the Criminal Code; or
  - ii. has been taken, or there is a substantial risk that she will be taken, from the Territory with the intention of having female genital mutilation performed on her.

Note that section 4(3) of the Act broadens the threshold to encompass children who are at risk of maltreatment, in addition to children who have experienced maltreatment. The definition of maltreatment also expands the trigger for statutory involvement to the consequences of abusive or neglectful behaviours, in addition to the behaviours themselves (for example, maltreatment is deemed to have occurred when a child suffers physical injury or impairment, or serious emotional or intellectual impairment (consequences), or where a child has been sexually exploited (act / behaviour)).

### Queensland

According to section 10 of the *Child Protection Act 1999* (QLD), a child in need of protection is a child who:

- (a) has suffered harm, is suffering harm, or is at unacceptable risk of suffering harm; and
- (b) does not have a parent able and willing to protect the child from the harm.

#### *Threshold employed*

In QLD, a child is in need of protection if he or she *has* suffered harm, *is* suffering harm, or *is at risk of* suffering harm; that is, statutory intervention is triggered due to the consequences of abusive or neglectful behaviours.

Harm, according to section 9 of the Act, is defined as:

- (1) any detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing.
- (2) It is immaterial how the harm is caused.
- (3) Harm can be caused by—
  - a) physical, psychological or emotional abuse or neglect; or
  - b) sexual abuse or exploitation.

### South Australia

The *Children's Protection Act 1993* (SA) refers to children "at risk". According to section 6(2) of the Act, a child is at risk if:

(aa) there is a significant risk that the child will suffer serious harm to his or her physical, psychological or emotional wellbeing against which he or she should have, but does not have, proper protection; or

- (a) the child has been, or is being, abused or neglected; or
- (b) a person with whom the child resides (whether a guardian of the child or not)—
  - i. has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out; or
  - ii. has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person; or
- (c) the guardians of the child—
  - i. are unable to care for and protect the child, or are unable to exercise adequate supervision and control over the child; or
  - ii. are unwilling to care for and protect the child, or are unwilling to exercise adequate supervision and control over the child; or
  - iii. are dead, have abandoned the child, or cannot, after reasonable inquiry, be found; or
- (d) the child is of compulsory school age but has been persistently absent from school without satisfactory explanation of the absence; or
- (e) the child is under 15 years of age and is of no fixed address.

### *Threshold employed*

In SA, a child is at risk when there is significant risk that he or she will suffer serious harm whether physical, psychological or emotional, or where he or she has been or is being abused or neglected; statutory intervention is triggered if there is a reasonable belief that a child is at risk and the matters causing the child to be at risk are not being adequately addressed (Section 19(1)). Intervention takes place in relation to both abusive and neglectful acts and their consequences where the consequences are serious harm to a child's physical, psychological or emotional wellbeing.

### Tasmania

The *Children, Young Persons and Their Families Act 1997* (TAS) does not make reference to a child in need of care and protection; instead the Act refers to children "at risk". According to section 4, a child is at risk if:

- (a)
  - i. the child has been, is being, or is likely to be, abused or neglected; or
- (b) any person with whom the child resides or who has frequent contact with the child (whether the person is or is not a guardian of the child) –
  - i. has threatened to kill or abuse or neglect the child and there is a reasonable likelihood of the threat being carried out; or
  - ii. has killed or abused or neglected some other child or an adult and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person; or
- (ba) the child is an affected child within the meaning of the Family Violence Act 2004 (Tas); or
- (c) the guardians of the child are –
  - i. unable to maintain the child; or
  - ii. unable to exercise adequate supervision and control over the child; or
  - iii. unwilling to maintain the child; or
  - iv. unwilling to exercise adequate supervision and control over the child; or
  - v. dead, have abandoned the child or cannot be found after reasonable inquiry; or
  - vi. are unwilling or unable to prevent the child from suffering abuse or neglect; or
- (d) the child is under 16 years of age and does not, without lawful excuse, attend school regularly.

### *Threshold employed*

In Tasmania, a child is deemed to be at risk if he or she has been, is being, or is likely to be abused or neglected.

According to section 3, abuse and neglect means:

- (a) sexual abuse; or
- (b) physical or emotional injury or other abuse, or neglect, to the extent that –
  - i. the injured, abused or neglected person has suffered, or is likely to suffer, physical or psychological harm detrimental to the person's wellbeing; or



ii. the injured, abused or neglected person's physical or psychological development is in jeopardy.

While Tasmania's definition of "at risk" extends to acts / behaviours only (that is, abusive or neglectful behaviours), the definition of abuse and neglect encompass the consequences of such acts / behaviours (that is, a child being injured or suffering physical or psychological harm).

#### Victoria

According to section 162 of the *Children, Youth and Families Act 2005* (VIC), a child is in need of protection if any of the following grounds exist:

(1)

- a) the child has been abandoned by his or her parents and after reasonable inquiries—
  - i) (i) the parents cannot be found; and
  - ii) (ii) no other suitable person can be found who is willing and able to care for the child;
- b) the child's parents are dead or incapacitated and there is no other suitable person willing and able to care for the child;
- c) the child has suffered, or is likely to suffer, significant harm as a result of physical injury and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;
- d) the child has suffered, or is likely to suffer, significant harm as a result of sexual abuse and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;
- e) the child has suffered, or is likely to suffer, emotional or psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;
- f) the child's physical development or health has been, or is likely to be, significantly harmed and the child's parents have not provided, arranged or allowed the provision of, or are unlikely to provide, arrange or allow the provision of, basic care or effective medical, surgical or other remedial care.

(2) For the purposes of subsections (1)(c) to (1)(f), the harm may be constituted by a single act, omission or circumstance or accumulate through a series of acts, omissions or circumstances.

#### *Threshold employed*

In Victoria, a child is in need of protection if he or she *has suffered or is likely to suffer significant harm* due to physical injury or sexual abuse, or emotional or psychological harm (to the extent that he or she suffers or is likely to suffer significant emotional or intellectual damage). A child is also in need of protection if he or she *has been or is likely to be significantly harmed* as a result of not being provided basic care or effective medical, surgical or other remedial care. Thus in Victoria, statutory intervention is triggered due to the consequences of abusive and neglectful behaviours.

#### Western Australia

According to section 28(2) of the *Children and Community Services Act 2004* (WA), a child is in need of protection when:

- (a) the child has been abandoned by his or her parents and, after reasonable inquiries —
  - i. the parents cannot be found; and
  - ii. no suitable adult relative or other suitable adult can be found who is willing and able to care for the

child;

- (b) the child's parents are dead or incapacitated and, after reasonable inquiries, no suitable adult relative or other suitable adult can be found who is willing and able to care for the child;
- (c) the child has suffered, or is likely to suffer, harm as a result of any one or more of the following:
  - i. physical abuse;
  - ii. sexual abuse;
  - iii. emotional abuse;
  - iv. psychological abuse;
  - v. neglect,

and the child's parents have not protected, or are unlikely or unable to protect, the child from harm, or further harm, of that kind; or

- (d) the child has suffered, or is likely to suffer, harm as a result of —

- (i) the child's parents being unable to provide, or arrange the provision of, adequate care for the child; or

- (Gills-Arnold *et al.*) the child's parents being unable to provide, or arrange the provision of, effective medical, therapeutic or other remedial treatment for the child.

#### ***Threshold employed***

In WA, a child is in need of protection where he or she *has* suffered, or *is likely to* suffer, *harm* as a result of physical, sexual, emotional, or psychological abuse, or neglect; that is, statutory intervention is triggered as a result of the consequences of abusive or neglectful behaviours.

According to section 28(1):

“harm” means any detrimental effect of a significant nature on the child's wellbeing;

“neglect” includes failure by a child's parents to provide, arrange, or allow the provision of —

- (a) adequate care for the child; or
- (b) effective medical, therapeutic or remedial treatment for the child.

#### **Conclusion**

In conclusion, this resource sheet has considered one of the crucial debates in the field of child maltreatment research: the definition of child maltreatment. At the outset, conceptual definitions of abusive and neglectful behaviours were presented. Following these definitions, legislative excerpts concerning “a child in need of care and protection”, and the thresholds that trigger statutory involvement, were presented. Despite some differences in whether behaviours or consequences (or both) were substantiated, for the most part thresholds triggering statutory involvement were

fairly consistent across jurisdictions.

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