

**SUBMISSION TO THE
SPECIAL COMMISSION OF INQUIRY INTO
CHILD PROTECTION SERVICES IN NSW**

11 February 2008

Submission to

Special Commission of Inquiry into Child Protection Services in NSW
PO Box K1026
Haymarket NSW 1240
Email: cps_inquiry@agd.nsw.gov.au

Contact

Lee-May Saw, President
C/- Kathryn McKenzie, Executive Officer
Women Lawyers' Association of New South Wales
Ph: (02) 4392 1185
Email: executive@womenlawyersnsw.org.au

Major Sponsor:



THE WOMEN LAWYERS' ASSOCIATION OF NEW SOUTH WALES¹

The Women Lawyers' Association of New South Wales (WLA NSW) is the peak representative body of women lawyers in New South Wales. Our membership is diverse and includes: members of the judiciary; barristers; solicitors; academics; students; and lawyers working for government bodies, corporations, large and small city and country firms, community legal centres, and law reform agencies.

Since our establishment in 1952, WLA NSW has been active in advocating for and promoting law and policy reform, frequently making submissions on anti-discrimination law, industrial equity, criminal law, women's health, legal aid, child care, and gender bias in the legal profession.

WLA NSW is in a unique position to comment on issues relevant to the child protection system in New South Wales. We are a professional organisation consisting of lawyers who are at the same time members of the community with families. Many of our members have considerable experience in matters of care and protection law and family law.

The weight of our experience informs our submission.

OUR SUPPORT OF OTHER SUBMISSIONS MADE TO THIS INQUIRY

WLA NSW has been given an opportunity to read and consider the submissions to this Inquiry made by the Family Inclusion Network New South Wales (Family Inclusion Network), and Dr Frank Ainsworth and Reg Pollock. We support the observations and recommendations put forward in these submissions in general terms, and add the specific comments and recommendations that we have provided in our submission.

WLA NSW notes that the reasons why cases come before the Children's Court of New South Wales (the Children's Court) are complex and varied. We acknowledge the many cases for which the Department of Community Services New South Wales (DoCS) is to be commended for the level of service and assistance that they provide to often marginalised and disadvantaged families in need of support. In our view, it should not be forgotten that the majority of cases that come to the attention of the media and the courts are the most serious cases.

It is certainly the observation of WLA NSW that the inadequacies of the child support system in New South Wales are highlighted in cases involving victims of domestic violence, people with disabilities particularly people with an intellectual disability, people with a mental illness, and people from culturally and linguistically diverse backgrounds.

¹ For more information about the Women Lawyers' Association of New South Wales, please visit our website – <http://www.womenlawyersnsw.org.au>.

As a professional organisation of lawyers, WLA NSW has chosen to focus our submission on issues relating to the current statutory framework for child protection and the quality of legal service provision within the child protection system. We make the brief additional comments, in the section of this submission immediately below,² in relation to the relevant issues as addressed in the submissions of the Family Inclusion Network, and Dr Frank Ainsworth and Reg Pollock.

Term (i) of the Terms of Reference:

The system for reporting of child abuse and neglect, including mandatory reporting, reporting thresholds and feedback to reporters

Early intervention programs

WLA NSW supports the recommendation of the Family Inclusion Network that:

Early intervention programs should include different types of programs so that where parents have cognitive or intellectual impairment, or other short term or long term disabilities, support services are available to help non-abusive parents to maintain good care and healthy development of their children.

Early intervention programs should not be conducted by the Department of Community Services.

In our submission the adoption of such a recommendation would improve the consistency of services provided through the child protection system. It is our experience that the provision of support services for non-abusive parents generally (including the provision of services to parents without any cognitive or intellectual impairment or disability) is problematic within the current system. We note with considerable concern the inconsistency of service provision across the system that is demonstrated when recent media reports of children known to DoCS dying in the care of their families without any intervention by DoCS, are compared to cases that come before the Children's Court because the family is living an untidy and unhygienic home environment and DoCS have intervened by means of court action.

Mandatory reporting

We have addressed the statutory framework for the child protection system, including the statutory framework for mandatory reporting, in detail below.³ In

² Below, at 2-4, under the heading, "Term (i) of the Terms of Reference: The system for reporting of child abuse and neglect, including mandatory reporting, reporting thresholds and feedback to reporters".

³ Below, at 4-16, under the heading, "**TERM (VI) OF THE TERMS OF REFERENCE: THE ADEQUACY OF THE CURRENT STATUTORY FRAMEWORK FOR CHILD PROTECTION**

passing, we raise our experience of the detrimental impact of the current system of mandatory reporting on non-government organisations based in the community who are involved in providing programs and assistance to families from culturally and linguistically diverse backgrounds, particularly in rural, regional and remote areas.

In general, our experience is that the current system of mandatory reporting does not encourage the kind of relationship of trust between DoCS and families from culturally and linguistically diverse backgrounds, that is required for DoCS to provide meaningful assistance to these families. Such families may be families of refugees who, as a result of the immigration policies of the federal government, have been set up in communities in regional, rural and remote areas. Such families are already vulnerable due to the trauma connected to their refugee background, and due to being displaced in a foreign country with a foreign culture, language and legal system. Often domestic violence may also be a significant and ongoing factor within such families and the communities they find themselves living among.

A fall out of the current system is that the responsibility of building trust with these families from culturally and linguistically diverse backgrounds, and providing them with meaningful support, is then diverted by default to non-government organisations based in the community. Such organisations are placed in a difficult position. They may most admirably, without the level of resources available to DoCS, and despite the language and other cross-cultural barriers involved, manage to set up programs to assist such families. However, when counsellors, doctors, nurses, and other members of staff within such non-government organisations are required to comply with their statutory obligation as mandatory reporters, the rapport they have put their effort into establishing with such communities may be lost in the events following a phone call to the DoCS Helpline.

This may occur, for example, where a counsellor who has been supporting a single mother refugee from a culturally and linguistically diverse background has been required to make a report on finding out that the mother has left her five children to go to another regional area and find housing that is large enough to accommodate her family, and that will remove her from a situation where the Department of Housing has moved a perpetrator of domestic violence into a house across the road from her, despite her requests that this not be done.

The current system of mandatory reporting is broad, inflexible, and ethnocentric. It has no room for cross-cultural differences. It may be the case, for example, that the single mother from a culturally and linguistically diverse background comes from a country where the cultural norm is that children are the responsibility of

INCLUDING ROLES AND RESPONSIBILITIES OF MANDATORY REPORTERS, DOCS, THE COURTS AND THE OVERSIGHT AGENCIES”.

the community. It may be the case that according to this cultural norm, it would be acceptable to leave children in a house under the supervision of family members who lived a couple of houses down the street, and who were checking regularly on the children and making sure the children were provided with sufficient meals and adequate care. The counsellor making the mandatory report may know this as a result of her work with families from the relevant refugee community. However, under the current system, her statutory duty is to report the incident to DoCS.

In our submission, any system of mandatory reporting should support the best interests of the children and young people within such families, rather than re-traumatising them unnecessarily. For these reasons we support the following recommendations of the Family Inclusion Network that:

- Training for mandatory reporters should discourage multiple reports and a use of a centralised reporting point in the health system may help to reduce over-reporting.
- Relationships between the Department of Community Services and other government agencies should be realigned so that other agencies are not expected to change their operations to become agents of the child protection investigation system as a first priority. In particular all clients of all agencies should receive information that what they say or do to any government employee or any counsellor may be conveyed to the Department of Community Services and used in the Children's Court.

We note that if relevant changes are not made to the current system of mandatory reporting, that we would support the second recommendation listed immediately above being expanded to cover all relevant non-government organisations based in the community.

TERM (VI) OF THE TERMS OF REFERENCE:

THE ADEQUACY OF THE CURRENT STATUTORY FRAMEWORK FOR CHILD PROTECTION INCLUDING ROLES AND RESPONSIBILITIES OF MANDATORY REPORTERS, DOCS, THE COURTS AND THE OVERSIGHT AGENCIES

It is clear from what we have said so far in our submission that WLA NSW is of the view that the current child protection system in New South Wales is in need of significant reform. We note that in order for such reform to be effective on the practical, policy, cultural and attitudinal levels, it must be supported by adequate and appropriate statutory reform. We accordingly make the following general recommendation:

Recommendation 1: That a comprehensive review of the Children and Young Persons (Care and Protection) Act 1998 (NSW) be conducted.

We additionally make the following specific recommendations for reform to the CYPCPA.

The role and responsibilities of mandatory reporters

Section 27 of the CYPCPA sets out who mandatory reporting obligations apply to, and what the requirements of the mandatory reporting obligation are. If mandatory reporting obligations are retained under the CYPCPA, and continue to apply to the broad class of service providers currently covered by section 27(1), it is our view that amendments to section 27 are required to increase the threshold required for mandatory reporting, and reduce the number of notifications made.

For these reasons we make the following recommendation:

Recommendation 2: That section 27 of the Children and Young Persons (Care and Protection) Act 1998 (NSW) be amended as follows:

27 Mandatory reporting

- (1) This section applies to:
 - (a) a person who, in the course of his or her professional work or other paid employment delivers health care, welfare, education, children's services, residential services, or law enforcement, wholly or partly, to children, and
 - (b) a person who holds a management position in an organisation the duties of which include direct responsibility for, or direct supervision of, the provision of health care, welfare, education, children's services, residential services, or law enforcement, wholly or partly, to children.
- (2) If:
 - (a) a person to whom this section applies has reasonable grounds to suspect that a child **has suffered harm, is suffering at risk of harm, or is likely to suffer harm,** and
 - (b) those grounds arise during the course of or from the person's work, the person must, as soon as practicable, report to the Director-General the name, or a description, of the child and the grounds for suspecting that the child **has suffered harm, is suffering at risk of harm, or is likely to suffer harm.**

Maximum penalty: 200 penalty units.

- (3) A person to whom this section applies satisfies his or her obligations under subsection (2) in relation to two or more children that constitute a particular class of children if the person reports that class of children to the Director-General together with:
- (a) a description that is sufficient to identify all the children who constitute the class, and
 - (b) the grounds for suspecting that the children of that class **have suffered** ~~are at risk of harm,~~ **are suffering harm, or are likely to suffer harm.**

The roles and responsibilities of the Department of Community Services New South Wales

Investigations and assessments conducted by the Department of Community Services New South Wales

WLA NSW supports the recommendation of Dr Frank Ainsworth and Reg Pollock to:

Redefine the role of caseworkers so that they move away from a solely forensic and investigative approach to child protection. Retrain caseworkers so that they know how to build empathic working relationships with parents that show respect. Caseworkers must have the skills to undertake careful unhurried evidence based child and family assessment prior to the seeking of any Care Order.

Section 30 of the CYPCPA provides as follows:

30 Director-Generals investigations and assessment

On receipt of a report that a child or young person is suspected of being at risk of harm:

- (a) the Director-General is to make such investigations and assessment as the Director-General considers necessary to determine whether the child or young person is at risk of harm, or
- (b) the Director-General may decide to take no further action if, on the basis of the information provided, the Director-General considers that there is insufficient reason to believe that the child or young person is at risk of harm.

It is the experience of WLA NSW that it is current practice for the caseworkers of DoCS, as delegates of the Director-General, to conduct the types of investigations and assessments referred to in section 30. WLA NSW notes the level of responsibility placed on the caseworkers of DoCS, due to the nature of the investigations and assessments being conducted. We further note the level of discretion provided under section 30(a) to the Director-General and their

delegates, when it comes to how such investigations and assessments are to be conducted.

WLA NSW observes with some emphasis that the investigations and assessments conducted by the Director-General and their delegates concern the best interests of children and young people who are in need of care and protection. More often than not such investigations and assessments involve allegations of domestic violence and sexual abuse. In our submission it is highly inappropriate for any body charged with an investigative role to be provided with such broad powers when it comes to deciding the procedure and manner in which it is to conduct its own investigations and assessments. The investigations and assessments of DoCS should be accountable and open to scrutiny. To allow any room for such investigations and assessments to be otherwise, is to lessen the regard the child protection system has for the best interests of children and young people in need of care and protection.

It is our observation that while Joint Investigative Response Teams (JIRTs) comprising of officers of NSW Police and DoCS are often utilised to investigate cases involving serious domestic violence and sexual abuse, it is also often the case that children are interviewed by the caseworkers of DoCS without the involvement of JIRTs, and more pertinently, without attracting the requirements of section 13 of the *Children (Criminal Proceedings) Act 1987 (NSW) (CCPA)*.

Section 13 of the CCPA requires police officers interviewing children in relation to criminal matters to ensure that there is an appropriate support person present during such interviews, unless there are proper and sufficient reasons for the absence of such a support person. Without an appropriate support person being present, any statement, confession or information obtained from a child or young person during an interview may not be admitted as evidence in court.

While WLA NSW acknowledges that the rules of evidence do not apply to cases before the Children's Court, in our submission, there is no good reason why obligations similar to those that apply to police officers under Section 13 of the CCPA, should not also apply to the caseworkers of DoCS when they investigate and assess cases proceeding through the child protection system, particularly in cases where children or young people are being interviewed about cases involving domestic violence and sexual abuse.

In our view, due to the gravity of the responsibility placed on the caseworkers of DoCS, and the undeniable connection of this responsibility with protecting the best interests of children and young people in need of care and protection, there are rather compelling reasons why obligations similar to those provided for under Section 13 of the CCPA should apply. In our submission, it is more likely than not that interviews of children and young people by the caseworkers of DoCS will have a similarly traumatising impact on children and young people to interviews conducted by NSW Police. We note the likelihood that interviews and

assessments of children and young people conducted by the caseworkers of DoCS, like interviews conducted by NSW Police, will involve allegations of domestic violence and sexual abuse.

The fact that the child protection system in New South Wales is premised on the principle of the best interests of children and young people, and is primarily concerned with children and young people in need of care and protection, makes it most appropriate that children and young people being subject to investigations and assessments within the child protection system should be entitled to a right to have a support person during such processes.

WLA NSW further notes that section 102 of the CYPCPA allows participants in proceedings before the Children's Court to, with the leave of the Children's Court, be accompanied by a support person. Section 102(2) provides that the Children's Court must grant leave for a participant to be accompanied by a support person unless:

- the support person is a witness in the proceedings;
- the Children's Court, having regard to the wishes of the child or young person with respect to whom the proceedings are brought, is of the opinion that leave should not be granted; or
- there is some other substantial reason to deny the application.

Given that the CYPCPA already allows participants in proceedings before the Children's Court to be accompanied by an appropriate support person unless there is a good reason why this should not happen, it would be consistent with the existing terms of the CYPCPA to amend the CYPCPA to allow children and young people to have an appropriate support person accompany them during interviews and assessments conducted by the caseworkers of DoCS.

For these reasons, WLA NSW makes the following recommendations:

Recommendation 3: That section 30 of the Children and Young Persons (Care and Protection) Act 1998 (NSW) be amended so that the procedure and manner in which the Director-General conducts their investigations and assessments is not open to the discretion of the Director-General.

Recommendation 4: That the Children and Young Persons (Care and Protection) Act 1998 (NSW) be amended so that the Director-General ensures that any child or young person being interviewed or assessed is accompanied by an appropriate support person, unless there are proper and sufficient reasons for the absence of such a support person.

Intervention by the Department of Community Services NSW in family law proceedings

Section 67Z of the *Family Law Act* 1985 (Cth) (FLA) requires a party to family law proceedings before the Federal Magistrates Court of Australia (Federal Magistrates Court) or the Family Court of Australia (Family Court), to file a prescribed Notice of Child Abuse or Family Violence form, where the party is alleging that a child has been abused or is at risk of being abused. Under section 67Z(3) of the FLA, the Registry Manager of the court must notify a prescribed child welfare authority as soon as practicable, once the Notice of Child Abuse or Family Violence has been filed.

Section 4 of the FLA defines a “prescribed child welfare authority” as an officer of the state in which the child is located or believed to be located, who is responsible for the administration of the child welfare laws of the state.

Section 67ZA of the FLA requires certain people within the family law system to notify a prescribed child welfare authority where they have reasonable grounds for suspecting that: a child has been abused; is at risk of being abused; has been ill treated; is at risk of being ill treated; has been exposed or subjected to psychologically harming behaviour; or is at risk of being exposed or subjected to psychologically harming behaviour. These people include:

- the Registrar or a Deputy Registrar of a Registry of the Family Court of Australia;
- the Registrar or a Deputy Registrar of the Family Court of Western Australia;
- a Registrar of the Federal Magistrates Court;
- a family consultant;
- a family counsellor;
- a family dispute resolution practitioner;
- an arbitrator;
- a lawyer independently representing a child's interests.

Section 67ZC provides the Federal Magistrates Court and Family Court with the jurisdiction to make orders relating to the welfare of children in family law proceedings.

Section 92A(2)(d) allows a prescribed child welfare authority to intervene in family law proceedings where it has been alleged that a child has been abused or is at risk of being abused.

It is under the mechanisms of sections 67Z, 67ZA, 67ZC and 92A(2)(d) that DoCS is able to intervene in family law proceedings before the Federal Magistrates Court and Family Court, involving children located or believed to be located in New South Wales.

It is the experience of WLA NSW that DoCS rarely intervenes in family law proceedings, and that the courts are reluctant to make an order requiring DoCS to intervene for this reason. In our view, this is a notable inconsistency within the child protection system in New South Wales. Cases before the Federal Magistrates Court and Family Court may involve domestic or family violence and child abuse that place children and young people at as great a risk of harm as cases before the Children's Court. The involvement of DoCS in upholding the best interests of children and young people in need of care and protection should be independent of which court a case is brought before.

WLA NSW therefore makes the following recommendation:

Recommendation 5: That a comprehensive review be conducted on the involvement of the Department of Community Services New South Wales in intervening in family law cases before the Federal Magistrates Court of Australia and the Family Court of Australia.

The roles and responsibilities of the courts

Maintaining the Children's Court of New South Wales

WLA NSW is strongly of the view that the Children's Court of New South Wales should be maintained instead of being replaced by the more informal structure of a tribunal. We note that sporting and other tribunals have often been referred to as "kangaroo courts" due to problems with a lack of accountability and lack of procedural fairness that can arise when a tribunal system is introduced.

It is our observation that significant motivations behind the introduction of tribunal systems are to increase efficiency in the system, and to ensure that the system is an informal one which is accessible to self-represented parties.

In our submission the replacement of the Children's Court with a tribunal system that does not ensure that parties have a right to legal representation, is only likely to lead to increased delays within the system. We note that the majority of parties involved with the child protection system are from a disadvantaged background, and that a significant proportion of these parties are people with only basic levels of education and literacy, people with a disability, or people from culturally and linguistically diverse backgrounds. In our view, the legal arm of the child protection system is only likely to become more inaccessible to the majority of parties in the child protection system if a tribunal system is introduced and the right to legal representation abandoned.

As a professional legal organisation, we acknowledge with some regret that there

may be a minority of legal practitioners who engage in behaviours and practices that cause delays in the Children's Court system as currently constituted. However, it is our submission that the decisions currently made by the Children's Court are decisions of some gravity, due to the fundamental involvement of the best interests of children and young people in need of care and protection in such cases, and that on balance the right of parties in child protection cases to legal representation should be retained. We note the existence of current avenues for resolving problems with the practices and behaviours of individual legal practitioners. Such avenues are to be preferred over abolishing the right of parties to legal representation through the introduction of a tribunal system.

It is the experience of WLA NSW that tribunals such as the Mental Health Review Tribunal, Guardianship Tribunal, Administrative Appeals Tribunal, Consumer, Trader and Tenancy Tribunal, and Social Security Appeals Tribunal, are constituted of lawyers and expert members. Expert members of such tribunals may not have any formal legal qualifications, but may give significant input to decisions of the tribunal when it comes to matters involving their area of expertise. WLA NSW is of the view that the engagement of experts in child protection cases is best left to provision of expert evidence, and that the most constructive and effective role for experts in child protection proceedings is as expert witnesses.

In our submission, given the gravity of decisions currently made by the Children's Court and the complexities that can arise in relation to matters of law and evidence, the Children's Court should be retained, and the decisions of the Children's Court should continue to be made by specialist members of the judiciary, as opposed to judicial members without any specialist training and experience in child protection matters.

WLA NSW notes the role of the Federal Magistrates Court and the Family Court as specialist family law courts. We note the common view among the legal profession that the Children's Court is some kind of inferior arm of the family law courts system. It is generally accepted among members of the legal profession that there are significantly greater numbers of parties from backgrounds of disadvantage appearing in child protection proceedings before the Children's Court, than there are numbers of parties from similar backgrounds appearing before the family law courts. In our view, to replace the Children's Court system with a tribunal would only increase the gap between the Children's Court system and the family law courts system.

We accordingly make the following recommendations:

Recommendation 6: That the Children's Court of New South Wales be retained and not be replaced by a tribunal.

Recommendation 7: That the members of the judiciary who preside over child protection cases before the Children’s Court of New South Wales should be specialists in child protection matters, as is the case in the present system.

The interaction between the jurisdiction of the Children’s Court of New South Wales and the jurisdiction of the family law courts

WLA NSW has observed that the interaction between the jurisdiction of the Children’s Court and the jurisdiction of the Federal Magistrate’s Court and the Family Court is often an awkward and inflexible one.

Section 31 of the FLA that deals with the original jurisdiction of the Family Court, does not provide the family law courts with the power to supersede the jurisdiction of the Children’s Court. Section 4 of the CYPCPA specifically provides the Children’s Court with jurisdiction over matters involving children and young persons:

- who ordinarily live in New South Wales;
- who do not ordinarily live in New South Wales, but who are present in New South Wales;
- who are subject to an event or circumstances occurring in New South Wales that gives or give rise to a report.

Section 31 of the FLA does not similarly provide the family law courts with specific jurisdiction over cases involving issues that may encompass the jurisdictions of both the Children’s Court and the family law courts.

As a result, if a case commences as a parenting case in the family law courts system, and is then brought before the Children’s Court in relation to issues of child protection, the family law courts do not have any power to retain the case within the family law courts system, and any proceedings before the family law courts must be withdrawn and the proceedings before the Children’s Court allowed to continue.

In some cases, it may be more appropriate for proceedings to continue before the family law courts, particularly if: there are complex matters of evidence that arise in the case that require considerable court time; there have been previous proceedings before the family law courts; or if there are related property issues, which the Children’s Court has no power to deal with. Due to the inflexibility in the intersection between the two court systems, this issue can become problematic and cause delays in cases where, for example, proceedings before

the Children's Court are ultimately withdrawn in favour of allowing proceedings to progress through the family law courts.

For these reasons, WLA NSW makes the following recommendation:

Recommendation 8: That the intersection between the jurisdictions of the Children's Court and the family law courts as supported by the statutory frameworks for both jurisdictions be reviewed.

The quality of legal service provision within the courts

WLA NSW submits that the need to appropriately and competently deal with the complex and significant issues faced by parties in child protection proceedings makes it especially important that sufficient education and training is provided to the caseworkers, legal practitioners, members of the judiciary and other agencies involved in the child protection system, particularly in cases coming before the courts.

WLA NSW accordingly makes the following recommendations:

Recommendation 9: That funding be provided to an appropriate body to engage in the specialist education and training of caseworkers working in the child protection system in New South Wales.

Recommendation 10: That funding be provided to appropriate bodies such as the Law Society of New South Wales, the Bar Association of New South Wales, the Legal Aid Commission of New South Wales, or local community legal centres, to engage in the specialist education and training of legal practitioners working in the child protection system in New South Wales.

Recommendation 11: That funding be provided to an appropriate body such as the Judicial Commission of New South Wales, to engage in the specialist education and training of members of the judiciary working in the child protection system in New South Wales.

It is the experience of WLA NSW that one of the most effective ways of ensuring quality legal service provision to parents involved with the child protection system is to ensure that they engage in services that allow them to deal with the complex issues that have led them to come before the courts. Legal practitioners, particularly those in private practice, often have limited available resources and education when it comes to identifying relevant local services, such as counselling, mental health, drug and alcohol, anger management, and family support services.

WLA NSW therefore makes the following recommendation:

Recommendation 12: That funding be provided to appropriate bodies such as the Legal Aid Commission of New South Wales, local community legal centres, the Law Society of New South Wales, or the Bar Association of New South Wales, to develop service directories and resources that allow legal practitioners to identify relevant local services for parents involved in the child protection system in New South Wales.

Additional issues

Section 75 of the *Children and Young Persons (Care and Protection) Act 1998 (NSW)*

The problematic drafting of Section 75 of the CYPCPA, has come to the attention of WLA NSW. This section states:

75 Order to attend therapeutic or treatment program

- (1) The Children's Court may, subject to this section, make an order:
 - (a) requiring a child of less than 14 years of age to attend a therapeutic program relating to sexually abusive behaviours, and
 - (b) requiring the parents of a child to take whatever steps are necessary to enable a child to participate in a treatment program, in accordance with such terms as are specified in the order.
- (1A) An order under this section may be made only in respect of a child who has exhibited sexually abusive behaviour.
- (1B) The Children's Court may, subject to this section, make an order requiring a parent of a child or young person:
 - (a) to attend a therapeutic program relating to sexually abusive behaviours, or
 - (b) to attend any other kind of therapeutic or treatment program, in accordance with such terms as are specified in the order.
- (2) An order cannot be made under this section if:
 - (a) in the case of an order under subsection (1)-the child is or has been convicted in criminal proceedings arising from the same

- sexually abusive behaviours, or
- (b) in the case of an order under subsection (1B) (a)-the parent is or has been convicted in criminal proceedings arising from the same sexually abusive behaviours.
- (2A) A reference in this section to a therapeutic or treatment program includes a reference to a therapeutic or treatment program that requires a participant to reside at a particular location during the whole or part of the time when the program is being conducted.
- (3) An order cannot be made under this section unless the Children’s Court has been presented with and has considered the provisions of a treatment plan that outlines the therapeutic program or treatment program proposed for the child or parent (as the case may be).

As currently drafted, section 75(1A) would appear to limit the operation of this section to cases that only involve children who have exhibited sexually abusive behaviour.

In our submission there is no good reason to limit the effect of section 75 of the CYPCPA to cases that only involve children who have exhibited sexually abusive behaviour. Rather it is in the best interests of children and young people with parents with specific conditions such as mental illness to be allowed the opportunity to benefit from a broadening and clarification of this section. In our view, section 75 of the CYPCPA should be amended so that it clearly allows courts to make an order requiring a parent of a child or young person to attend any kind of therapeutic or treatment program. Such an amendment would be consistent with, and allow a more meaningful application of, the principle in section 9 (d) of the CYPCPA that states:

In deciding what action it is necessary to take (whether by legal or administrative process) in order to protect a child or young person from harm, the course to be followed must be the least intrusive intervention in the life of the child or young person and his or her family that is consistent with the paramount concern to protect the child or young person from harm and promote the child’s or young person’s development.

WLA NSW accordingly makes the following recommendation:

Recommendation 13: That section 75(1A) of the Children and Young Persons (Care and Protection) Act 1998 (NSW) be repealed.

Inconsistencies arising in the transfer of matters between states

Chapter 14A of the CYPCPA allows Orders of the Children’s Court and proceedings before the Children’s Court to be transferred from New South Wales to other states and territories subject to certain conditions.

It is the observation of WLA NSW that the transfer of Orders of the Children's Court to other states and territories is often problematic, and demonstrates the inconsistencies between the child protection systems of the various states and territories. Under the current child protection system in New South Wales and the child protection systems of the various states and territories, certain types of final orders of the Children's Court may be transferable to one state or territory but not another. In our submission, the final order that is in best interests of a child or young person should be a uniform one within Australia, and one that is independent of which state or territory the Order is to be transferred to.

WLA NSW notes the recent commitment of the state and federal governments to nationalising statutory and legal frameworks.

For these reasons, WLA NSW makes the following recommendation:

Recommendation 14: That a review of the interaction between the various state and territory child protections systems, particularly in relation to the statutory frameworks that support these systems, be conducted, with the intention to increase consistency between the various state and territory child protection systems.
