



Children's Court of New South Wales

22 July 2010

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

RE: Family Violence Inquiry

The Children's Court of New South Wales has been invited by the NSW Law Reform Commission to comment on the desirability of establishing a "*specialist domestic violence court*" as discussed in the Consultation Paper of the Commission and the Australian Law Reform Commission: *Family Violence: Improving Legal Frameworks*.

At the outset, it is to be noted that the Consultation Paper does not identify whether the proposed court is to be a new separate court or whether it is to operate within an existing court structure under a Practice Note or under new legislation. Further, the Consultation paper does not identify the jurisdictional limits of such a court. For example, is it proposed that the court will have jurisdiction to deal with all summary and indictable criminal cases that arise out of a family violence incident? Is it proposed that the court would have criminal jurisdiction over both adult and juvenile perpetrators of family violence? Is it proposed that the court would have jurisdiction to hear all care and protection matters in which domestic violence is an issue?

The Children's Court is generally supportive of specialist courts. A specialist court has the particular advantage that its judicial officers acquire considerable accumulated specialist knowledge and are able to develop special procedures for the efficient disposal of cases within its jurisdiction. As the Consultation paper correctly states, specialist courts "*are designed to improve experiences and outcomes for victims and the community at large through a range of features including specialist personnel within the courts; the provision of victim and defendant support services; and the collaboration with other agencies and non-government organisations*". The Children's Court therefore supports the establishment of a domestic violence court similar to the Victorian Family Violence Division, with jurisdiction to deal with protection orders (or apprehended violence orders), summary criminal proceedings, committals for indictable offences, civil personal injury claims, compensation claims and family law and child support matters.

The Children's Court does not, however, support the removal of any part of its specialist jurisdictions in care and protection and criminal cases to a separate domestic violence court. Whilst the extent of the jurisdiction of the proposed domestic violence court is unclear, the Court is of the view that if the proposed court were to exercise the care and protection or criminal jurisdiction of the Children's Court in cases relating to domestic violence, then there would be unnecessary and confusing fragmentation of the jurisdictions, whereby some cases would be heard by the Children's Court and others by the proposed domestic violence court. To direct criminal cases involving juveniles and care and protection cases away from a specialist Children's Court on the basis that a particular case involves issues of domestic

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violence, would clearly not be the optimum use of the accumulated knowledge and expertise of a specialist Children's Court. Further, in relation to care and protection cases, it is the Court's experience that domestic violence is rarely a "stand-alone" issue. Instead, in most care and protection cases involving domestic violence, mental health problems and substance abuse are related issues. In these circumstances, singling out a case for hearing by a specialist domestic violence court on the basis of domestic violence alone is wholly artificial.

The Children's Court is of the view that instead of conferring part of the court's criminal and care and protection jurisdictions on a specialist domestic violence court, the jurisdiction of the Children's Court should in certain areas be expanded. For example, the Children's Court often deals with cases in which a child or young person has been removed from his or her family as a result of an outstanding apprehended violence order (AVO) made against another family member. That other family member could be a sibling or a parent. Despite reconciliation within the family, and the court's finding that orders involving restoration should be made, the child or young person cannot be restored to the family because restoration would involve a breach of an existing AVO. The Children's Court of NSW currently does not have the power to vary or revoke an AVO made against a child or young person in the absence of a police application to do so. If the Children's Court was given powers to vary or revoke AVOs, either of its own motion or upon application by the protected person, the Court would be able to finalise both the care and protection proceedings as well as proceedings relating to the AVO at the same time, without the need for the proceedings to be adjourned to the criminal jurisdiction of the court to give the police the opportunity to consider whether they will make an application to rescind or vary the AVO.

Further, in cases involving restoration where there is an existing AVO against an adult family member the Children's Court has no jurisdiction to vary or revoke the AVO. Again, it would be desirable for the Children's Court to have jurisdiction to vary or revoke the AVO on its own motion or upon the application of the protected person. The conferral of such a power on the Children's Court will save the family members the confusion and anxiety associated with being required to go to another court (in NSW, the Local Court) to have the AVO proceedings finalised.

The model proposed by the Children's Court may in some cases require parties to attend at both the Children's Court and the proposed domestic violence court. The parties may need to attend the domestic violence court in relation to civil personal injury claims, compensation claims and family law and child support matters. In such cases the Children's Court supports the provision of community-based support persons to accompany a party to the separate courts and to offer them assistance and support along the whole legal journey. Alternatively, a centralised support service could be established to which referrals could be made by all courts dealing with family violence issues, and the role of which would be to provide assistance, information and support to all the parties.

Further, police domestic violence liaison officers or similar support persons should be provided to juvenile applicants for apprehended violence orders. In the Court's experience, domestic violence liaison officers rarely support juvenile applicants, unlike adult applicants who attend the Local Court. The reason for this may be that the Children's Court covers more than one Police Local Area Command unlike individual Local Courts, as a result of which the attendance of domestic violence liaison officers is not coordinated and organised for juvenile applicants. In order to improve access to courts and make court processes less intimidating it is vital to ensure that applicants are supported at each step of the process, particularly in cases involving children or young persons.

The Children's Court notes the enormous costs involved in the establishment of a separate stand alone court and consequently supports the establishment of a specialist domestic

violence court as a division of, or programme within, an existing court. However, as the court's submission makes clear, it strongly opposes any part of its jurisdiction being conferred on a proposed domestic violence court.

The Court has also been asked to consider proposals 13-6, 13-7 and 13-8, namely:

"Proposal 13-6 State and territory child protection legislation should be amended to allow a court, in the exercise of its criminal jurisdiction where a child or young person who is a defendant before it, to refer a matter to the child protection agency for investigation where it considers that there are legislative grounds for a protection application, or an application for a therapeutic treatment order, to be made.

Proposal 13-7 State and territory child protection legislation should require the child protection agency to provide, within 21 days of the referral, a report to the court setting out the outcomes of its investigation into the matter, and specifying whether a care and protection order or a therapeutic treatment order is being sought, or if the investigation reveals that such an order is not warranted.

Proposal 13-8 A court exercising care jurisdiction under state and territory child protection legislation should have a power to refer its concerns for the safety of other children or siblings of the child or young person the subject of care proceedings before it to the child protection agency for investigation, and to require the child protection agency to furnish it with a report of its investigation within a certain time period specified in the legislation."

The Court strongly supports proposals 13-6, 13-7 and 13-8. In the exercise of its criminal jurisdiction the Court often sees young persons who have no stable accommodation or appropriate or adequate adult supervision and who as a consequence are easily led into criminal offending. The Court regularly refers children or young persons in these circumstances to Community Services. However, there is no obligation on Community Services to report back to the Court following any investigation. As a result, the Court will not be aware of whether or not any action has been taken and may only be informed that Community Services has not intervened or taken any action when the young person again appears before the Court. In these circumstances, the Children's Court should be given statutory power when exercising its criminal jurisdiction to refer a case to the child protection agency for investigation where the court considers that there are legislative grounds for a care application to be made. There should also be a legislative requirement for a child protection agency to report back to the court as to the results of its investigation and to advise the court what action (if any) it has taken. The Court adopts the same position in respect of a young person's siblings.

The Children's Court also recommends such a statutory power of referral to the child protection agency being conferred on the court when, in exercising its care and protection jurisdiction, it considers that there are legislative grounds for a protection application to be made with respect to a child or young person who is not the subject of the proceedings before the court. This may arise where the court becomes aware that a sibling or indeed another child (who is not related to the subject child) is in need of care and protection and that sibling or other child is not the subject of the proceedings.

¹ Australian Law Reform Commission, *Family Violence: Improving Legal Frameworks*, Consultation Paper, 2010

Other questions raised in the Consultation Paper upon which the Court wishes to comment

Question 13–6 In what circumstances is it appropriate for police to make child protection notifications when responding to incidents of family violence?

In New South Wales the police must make a child protection notification whenever the police form the view that the child may be at risk of abuse or neglect, or is at a significant risk of harm. Naturally this may occur when the police are responding to an incident of domestic violence, but may occur in a variety of other situations.

According to NSW *Keep Them Safe* initiatives, police are required to identify, report and investigate child abuse and neglect and initiate legal proceedings for child abuse and neglect offences. NSW Police make child protection notifications in two ways: by referring the case to its Child Wellbeing Unit or to Community Services. If the child appears to be at risk of abuse or neglect but is not deemed to be at a significant risk of harm the police refer the matter to its Child Wellbeing unit which undertakes preliminary and cumulative risk assessments on children who do not meet the risk of significant harm threshold, and analyses information and provides either a referral to an early intervention service or escalates the matter to the Child Protection Helpline if it meets the statutory threshold. If on the other hand, the child does appear to be at a significant risk of harm the police report the case to Community Services via the Child Protection Helpline.

Question 13–11 In care proceedings under child protection legislation, where final orders are pending, should children's courts in all states and territories be given power to make protection orders in favour of the child who is the subject of proceedings before it, where the court considers a protection order necessary to protect the child from serious harm arising from the child's exposure to family violence?

The Court is of the view that the Children's Court should have the power to make protection orders in favour of a child who is the subject of care and protection proceedings before the Court and that these orders should have the same effect as AVOs issued under general law. The Children's Court does not presently have the power to enforce prohibition orders it may make against a person under section 90A of the *Children and Young Persons (Care and Protection) Act 1998*. Section 90A gives the court the power to prohibit a person from doing anything that could be done by the parent in carrying out his or her parental responsibility. However, the court should also have the power to make enforceable prohibition or protection orders against other persons who may not be exercising any parental responsibility.

Thank you for considering our submission.

Yours sincerely

His Honour Judge Mark Marien SC
President