

**New South Wales  
Law Reform Commission**

**Report  
90**

**Review of the Community  
Services (Complaints, Appeals  
and Monitoring) Act 1993 (NSW)**

**July 1999**

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# New South Wales Law Reform Commission

To the Honourable Jeff Shaw QC MLC  
Attorney General for New South Wales

Dear Attorney

## **Review of the Community Services (Complaints, Appeals and Monitoring) Act 1993 (NSW)**

We make this final Report pursuant to the reference to this Commission dated 6 June 1998.



The Hon Justice Michael Adams  
Chairperson



Professor Reg Graycar  
Commissioner



Professor Neil Rees  
Commissioner



Professor David Weisbrot  
Commissioner

July 1999

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## Terms of reference

Pursuant to section 10 of the *Law Reform Commission Act 1967* (NSW), the Attorney General, the Honourable Jeff Shaw QC MLC, referred the following matter to the Law Reform Commission:

The Law Reform Commission is to review:

1. The *Community Services (Complaints, Appeals and Monitoring) Act 1993* (“CAMA”) to determine whether the policy objectives of the CAMA remain valid and whether the terms of the CAMA remain appropriate for securing those objectives; and
2. Conduct the review having regard to the obligations arising under s 126 of the CAMA and the provisions of the *Subordinate Legislation Act 1989* (NSW).

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## Participants

Pursuant to s 12A of the *Law Reform Commission Act 1967* (NSW) the Chairman of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

Mr Michael Adams QC  
Professor Reg Graycar  
Professor Neil Rees\*  
Professor David Weisbrot

(\* denotes Commissioner-in-Charge)

## Officers of the Commission

### Executive Director

Mr Peter Hennessy

### Legal Research and Writing

Ms Francesca Di Benedetto  
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### Librarian

Ms Aferdita Kryeziu

### Desktop Publishing

Ms Rebecca Young

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## GLOSSARY

**AAT Act:** *Administrative Appeals Tribunal Act 1975* (Cth)

**AAT:** Administrative Appeals Tribunal

**ADD:** Ageing and Disability Department

**ADJR Act:** *Administrative Decisions (Judicial Review) Act 1977* (Cth)

**ADR:** alternative dispute resolution

**ADT Act:** *Administrative Decisions Tribunal Act 1997* (NSW)

**ADT:** Administrative Decisions Tribunal

**Better Decisions Report:** Australia, Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, 1995)

**CAMA:** *Community Services (Complaints, Appeals and Monitoring Act) 1993* (NSW)

**CAMA Reg:** *Community Services (Complaints, Appeals and Monitoring) Regulation 1996* (NSW)

**CAMA Working Party Report:** New South Wales, DOCS, *Report of the Working Party on Appeals and Complaints Mechanisms for Community Services in NSW, August 1992* (1992)

**CID:** New South Wales Council for Intellectual Disability

**Commission:** Law Reform Commission

**Commissioner:** Community Services Commissioner

**CS Division:** Community Services Division (of the Administrative Decisions Tribunal)

**CSAT:** Community Services Appeals Tribunal

**CSC:** Community Services Commission

**CWAC:** Community Welfare Advisory Committee

**DisQAC:** Disability Services Quality Assurance Council

**DOCS:** Department of Community Services

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**DSA:** *Disability Services Act 1993* (NSW)  
**EAC:** Expert Advisory Committee  
**HACC:** Home and Community Care  
**HCCC:** Health Care Complaints Commission  
**IP 15:** New South Wales Law Reform Commission, *Review of the Community Services (Complaints, Appeals and Monitoring) Act 1993 (NSW)* (Issues Paper 15, 1998)  
**IP 16:** New South Wales Law Reform Commission, *Review of the Disability Services Act 1993 (NSW)* (Issues Paper 16, 1998)  
**NCOSS:** New South Wales Council of Social Service  
**New York Commission:** New York Commission on Quality of Care for the Mentally Disabled  
**PJC:** Parliamentary Joint Committee  
**PWD:** People With Disabilities (NSW) Inc  
**Report 91:** New South Wales Law Reform Commission, *Review of the Disability Services Act 1993 (NSW)* (Report 91, 1999)  
**Review Council:** Community Services Review Council  
**RR 9:** New South Wales Law Reform Commission, *Review of the Disability Services Act 1993 (NSW) and the Community Services (Complaints, Appeals and Monitoring) Act 1993 (NSW): Consultations* (Research Report 9, 1999)  
**SAAP:** Supported Accommodation and Assistance Program  
**SNYPIC:** NSW State Network of Young People in Care  
**Tribunal:** Administrative Decisions Tribunal

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## LIST OF RECOMMENDATIONS

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### RECOMMENDATION 1 (*page 21*)

Section 3(1) should be amended to provide that the objects of CAMA are:

- to foster, in community services and programs, and in related services and programs, an atmosphere in which complaints, independent monitoring, *reviews of persons in care and administrative review* are viewed positively as ways of enhancing service delivery;
  - to provide an independent and accessible process for the resolution of complaints;
  - to encourage, wherever reasonable and practical, the resolution of complaints at a local level or through alternative dispute resolution methods;
  - to provide for independent monitoring of the sector generally and services in particular (including monitoring the progress of recommendations made by the Community Services Commission);
  - to provide an independent process for the review of persons in care;
  - to promote access by residents to independent persons for support and assistance through the Community Visitor Scheme;
  - to encourage compliance with provisions of community welfare legislation; and
  - to facilitate greater community awareness of CAMA and the agencies it establishes.
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**RECOMMENDATION 2 (page 28)**

Section 3(2) should be amended so that the following principles must be observed by all persons when exercising functions under this Act:

- in relation to all administrative or legal processes under the Act, the safety, welfare and interests of a person receiving a service, or eligible to receive a service, should be given paramount consideration;
  - the views of a person receiving a service, or eligible to receive a service, should be taken into consideration in relation to any decision, process or action taken under the Act;
  - a person receiving a service, or eligible to receive a service, is entitled to an adequate explanation of the service and of any decision, process or action taken under the Act, and may question decisions or actions that affect the person in relation to the service;
  - the legal and human rights of a person receiving a service, or eligible to receive a service should be respected (including any need for privacy or confidentiality);
  - the importance of family relationships and the cultural and linguistic backgrounds of persons receiving a service, or eligible to receive a service, should be recognised;
  - the importance of encouraging consultation and cooperation with other relevant agencies and persons should be recognised;
  - a service provider is, to the best of his or her ability, to provide such information about the service as may enable an appropriate decision to be made by the person for whom the service is, or is to be, provided;
  - a service provider is to enable a complaint about the service to be dealt with fairly, informally and quickly at a place convenient to the complainant;
  - a complaint about a service is to be dealt with even if it is made by another person on behalf of the person receiving, or eligible to receive, the service; and
  - the community should be encouraged to apply and promote these principles.
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**RECOMMENDATION 3 (page 35)**

**Section 5 should be repealed.**

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**RECOMMENDATION 4 (page 36)**

**Section 126 of CAMA should be amended to provide that the Act be reviewed as soon as possible after the period of five years from the date that this Report is tabled in Parliament. The purpose of the review would be to determine whether the objectives of the Act remain valid and the terms of the Act remain appropriate for securing those objectives. The Act should require that the Minister table a report of the review in both Houses of Parliament within a further 12 months.**

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**RECOMMENDATION 5 (page 43)**

**The current structure of the Community Services Commission should be retained.**

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**RECOMMENDATION 6 (page 53)**

**A Parliamentary Joint Committee should be established to oversee the operation of the Community Services Commission.**

**The Community Services Commissioner should be appointed by the Governor-in-Council, after approval by the Parliamentary Joint Committee.**

**The selection process for the Community Services Commissioner should include community input (for example, including community representatives on the selection panel).**

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**RECOMMENDATION 7 (page 55)**

**There should be no change to s 78(3). The Community Services Commissioner may be appointed for a term of up to five years and is eligible for re-appointment.**

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**RECOMMENDATION 8 (page 56)**

**The criteria for dismissal of the Community Services Commissioner in s 78(4) should be retained.**

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**RECOMMENDATION 9 (page 58)**

**The functions of the Community Services Commission should include the promotion and encouragement of improved relationships between service providers, consumers, family members, carers, advocates and their representatives.**

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**RECOMMENDATION 10 (page 61)**

**The Community Services Commission should not be given an additional function of administering funding for advocacy programs.**

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**RECOMMENDATION 11 (page 65)**

**The requirement in s 15(1) for written withdrawal of a complaint should be retained.**

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**RECOMMENDATION 12 (page 69)**

Part 4 should be redrafted to ensure that it contains all core provisions conferring substantive rights and duties on the Community Services Commission and on parties involved in complaints.

All references in the Act to the Investigative Division and the Conciliation Division of the Community Services Commission should be removed. Section 16 should be repealed, and other related sections amended to delete references to these Divisions.

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**RECOMMENDATION 13 (page 73)**

Section 19 should be amended to provide that where the Community Services Commission is unable to deal with a complaint within the specified timeframe and where it proposes to continue its investigation, the Community Services Commission must notify all parties of this fact and the reasons for it.

The Community Services Commission should also be required to report on the number of such cases and reasons for the extension of the timeframe in its Annual Report.

Section 19 should also provide that failure to comply with the specified timeframe does not invalidate any finding or decision of the Community Services Commission.

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**RECOMMENDATION 14 (page 74)**

Section 14(1) should be amended to require the Community Services Commission to give written notice of the making of a complaint to the person against whom the complaint is made within seven days unless the complaint has been resolved.

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**RECOMMENDATION 15 (page 78)**

**Section 117(1) should include retribution against a service user as a ground for the offence, in addition to retribution against a person who makes a complaint or provides information, documents or evidence.**

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**RECOMMENDATION 16 (page 88)**

**The functions of the Community Services Commission should include investigating, reviewing and monitoring deaths of “persons in care” and “children in care” who reside in “visitable services” or are temporarily absent from such services at the time of death.**

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**RECOMMENDATION 17 (page 90)**

**The Community Services Commission should not be given the function of monitoring compliance with service standards.**

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**RECOMMENDATION 18 (page 95)**

**The Community Services Commission and the Children’s Guardian should develop protocols concerning reviews of children in care to ensure there is no unnecessary overlap in the work carried out by them.**

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**RECOMMENDATION 19 (page 96)**

**The time limit restriction on the exercise of the review power should be removed.**

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**RECOMMENDATION 20 (page 99)**

The Community Services Commission should have the power under s 11 to review groups of children and adults in care as well as individuals.

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**RECOMMENDATION 21 (page 101)**

The Community Services Commission should make education of consumers and their families and advocates about CAMA a priority under its education and development function.

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**RECOMMENDATION 22 (page 109)**

The Community Services Commission should develop protocols with other complaints bodies to enable cross-referral of cases where appropriate. There should also be provision in the Act for conferral of appropriate jurisdiction.

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**RECOMMENDATION 23 (page 113)**

Boarding houses licensed under s11 of the *Youth and Community Services Act 1973* (NSW) should be included in the jurisdiction of the Community Services Commission.

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**RECOMMENDATION 24 (page 116)**

The jurisdiction of the Community Services Commission to deal with children and young persons in foster care under its review function should be extended to include the complaints and monitoring functions.

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**RECOMMENDATION 25 (page 116)**

The jurisdiction of the CSC should be extended to include the Children’s Guardian in exercising the parental responsibilities of the Minister in relation to children and young persons.

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**RECOMMENDATION 26 (page 117)**

The definitions of “community service” and “service provider” should be amended to clarify that the jurisdiction of the Community Services Commission includes all child protection matters for the purposes of all its functions.

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**RECOMMENDATION 27 (page 122)**

Section 84 should explicitly provide that the Community Services Commission’s search and entry powers cover all their functions.

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**RECOMMENDATION 28 (page 123)**

Section 84(4) should be amended to explicitly require service providers to answer questions and produce records where requested to do so by the Community Services Commission.

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**RECOMMENDATION 29 (page 124)**

The Community Services Commission should have the power to refer matters to service providers for (a) investigation of a complaint and (b) review of individual circumstances. This should include an investigation or review of the death of a person in care.

The Community Services Commission should direct the nature and scope of the inquiry and retain the right to conduct its own



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investigation or review where it is not satisfied with the progress or the outcome.

Any recommendations endorsed by the Community Services Commission should be regarded as recommendations of the Community Services Commission for other purposes.

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**RECOMMENDATION 30 (page 127)**

Section 38(2)(a) should be amended to require service providers to provide information on the implementation of Community Services Commission recommendations made pursuant to all its functions.

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**RECOMMENDATION 31 (page 139)**

The Community Visitor Scheme should be retained.

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**RECOMMENDATION 32 (page 144)**

Section 7(1) should be amended to require that the Minister appoint Community Visitors on the recommendation of the Community Services Commissioner. The requirement for the Minister to consult with the Community Services Review Council should be removed.

Section 7(4) should be retained. This exempts Community Visitors from the operation of the *Public Sector Management Act 1988* (NSW).

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**RECOMMENDATION 33 (page 147)**

The Minister should be given the power to terminate a Community Visitor's appointment on the grounds of incapacity, incompetence or misbehaviour.

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**RECOMMENDATION 34 (page 150)**

Section 7(2)(a)-(c) should be retained. This sets out the criteria for appointment of Community Visitors.

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**RECOMMENDATION 35 (page 151)**

Section 7(2)(d) should be amended to provide that a person should not be appointed as a Community Visitor if that person is employed in a capacity which could create an actual or perceived conflict between the interests of residents and those of the Community Visitor or his or her employer.

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**RECOMMENDATION 36 (page 151)**

Part 2 of the Act should be redrafted to clearly identify the functions and powers of Community Visitors.

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**RECOMMENDATION 37 (page 162)**

The jurisdiction of the Community Visitor Scheme as defined in s 8(4) should be retained.

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**RECOMMENDATION 38 (page 168)**

The CSC should ensure that all Community Visitors receive adequate and appropriate training to carry out their functions effectively and efficiently. This includes training on cultural issues and communication with children and young people.

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**RECOMMENDATION 39 (page 174)**

Section 9 should be amended to provide that the Community Services Commissioner is also responsible for the monitoring and supervision of Community Visitors.

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**RECOMMENDATION 40 (page 177)**

The power in s 8(1)(a)-(c) should be retained. This gives Community Visitors the right to enter and inspect visitable services at any reasonable time, confer alone with residents or staff there, and inspect documents on the premises.

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**RECOMMENDATION 41 (page 178)**

Any person resident in a visitable service should have the right to confer alone with a Community Visitor.

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**RECOMMENDATION 42 (page 194)**

Schedule 2 cl 1(3) of the *Administrative Decisions Tribunal Act 1997* (NSW) should be amended to include disability issues and issues relating to the care or welfare of children and young people in the list of subject matters of which applicants should have knowledge and experience.

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**RECOMMENDATION 43 (page 217)**

The following decisions relating to the licensing of child care services, residential services and fostering authorities made under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should be reviewable by the Community Services Division of the Administrative Decisions Tribunal:

- a decision to grant or refuse to grant a licence to operate a children's service;
  - a decision to exclude a person from a children's service; and
  - a decision to impose, revoke or vary a condition on the authorisation of a person as an authorised carer.
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**RECOMMENDATION 44 (page 219)**

A decision to revoke an exemption under s 224(3) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) should be reviewable by the Community Services Division of the Administrative Decisions Tribunal.

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**RECOMMENDATION 45 (page 221)**

Section 14 of the *Adoption of Children Act 1965* (NSW) should be repealed and s 67A should be amended to allow appeals against the following decisions:

- a decision to grant or refuse an application for approval of an adoption agency;
- a decision to impose conditions or remove or vary conditions on an approval;
- a decision to revoke or suspend the approval of an adoption agency; and
- a decision which is within a class of decisions prescribed by the Regulation for the purposes of this section.

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A decision by the Director General or a Principal Officer of a private adoption agency to approve applicants as eligible to adopt under clause 14 of the *Adoption of Children Regulation 1995* (NSW) should be reviewable.

Decisions which are reviewable decisions under the *Adoption of Children Act 1965* (NSW) and the *Adoption of Children Regulation 1995* (NSW) should be assigned to the Community Services Division of the Administrative Decisions Tribunal.

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**RECOMMENDATION 46 (page 223)**

Section 40(1)(b) and (c) of CAMA should be repealed.

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**RECOMMENDATION 47 (page 224)**

Decisions by the Community Services Commission, under CAMA, to decline to entertain a complaint, dismiss a complaint or terminate a complaint should be reviewable by the Community Services Division of the Administrative Decisions Tribunal.

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**RECOMMENDATION 48 (page 226)**

Clause 6(1)(a) and cl 6(2) of the CAMA Regulation should be repealed.

CAMA should be amended to provide that a decision of a service provider not to implement, or only partially implement, recommendations of the Community Services Commission arising out of the investigation of a complaint may be reviewed by the Community Services Division of the Administrative Decisions Tribunal.

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**RECOMMENDATION 49 (page 235)**

Section 20 of the DSA and cl 6(1)(b) and (c) and cl 6(2) of the CAMA Regulation should be repealed and replaced by the following.

The DSA should be amended to provide that the following decisions are reviewable by the Administrative Decisions Tribunal:

- a decision by the Disability Services Quality Assurance Council:
  - to certify or refuse to certify a Stage 1 or Stage 2 transition service;
  - to certify or refuse to certify a new service as conforming with the objects, principles and applications of principles under the DSA; and
  - that a service has or has not complied with the requirements of the quality assurance process.
- a decision by the Minister to:
  - vary the terms or conditions of funding;
  - appoint an administrator for a service;
  - stop a service from admitting any more clients; and
  - require a person receiving individual funding to seek help from a service to administer the funds.

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**RECOMMENDATION 50 (page 238)**

The following decisions under the *Youth and Community Services Act 1973* (NSW) should be reviewable by the Community Services Division of the Administrative Decisions Tribunal:

- a decision to refuse to grant a licence to operate a boarding house;
- a decision to impose additional conditions, or revoke or vary existing conditions, on a licence.

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**Applications for a review of a decision under the *Youth and Community Services Act 1973 (NSW)* should be able to be brought by any person whose interests are affected by the decision or any person or body with a genuine concern in the decision.**

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**RECOMMENDATION 51 (page 243)**

**Clause 10 of the CAMA Regulation should be repealed.**

**CAMA should expressly indicate what are the decisions in respect of which reasons should be given, either automatically, or upon request.**

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**RECOMMENDATION 52 (page 254)**

**Section 41 relating to standing should remain unchanged.**

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**RECOMMENDATION 53 (page 255)**

**All provisions in CAMA relating to the powers and procedures of the Community Services Division of the Administrative Decisions Tribunal should be transferred to a Schedule to the *Administrative Decisions Tribunal Act 1997 (NSW)*.**

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**RECOMMENDATION 54 (page 262)**

**The ADT Act should be amended to allow a legally qualified member sitting alone to determine procedural matters prior to the actual hearing.**

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**RECOMMENDATION 55 (page 267)**

Section 42 of CAMA should be repealed and incorporated in a Schedule to the *Administrative Decisions Tribunal Act 1997* (NSW) which deals with the powers and procedures of the Community Services Division.

Consideration should be given to the recommendations of the Commission in its forthcoming Report on the *Review of the Anti-Discrimination Act 1977 (NSW)* for the adoption of the representative procedure as contained in Part IV of the *Federal Court Act 1976* (Cth).

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**RECOMMENDATION 56 (page 269)**

Section 43 of CAMA should be repealed and incorporated in a Schedule to the *Administrative Decisions Tribunal Act 1997* (NSW) which deals with the powers and procedures of the Community Services Division.

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**RECOMMENDATION 57 (page 270)**

Section 44(1) of CAMA should be repealed.

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**RECOMMENDATION 58 (page 271)**

Section 44(2) of CAMA should be repealed and incorporated in a Schedule to the *Administrative Decisions Tribunal Act 1997* (NSW) which deals with the powers and procedures of the Community Services Division.

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**RECOMMENDATION 59 (page 273)**

Section 45 of CAMA should be repealed and incorporated in a Schedule to the *Administrative Decisions Tribunal Act 1997* (NSW) which deals with the powers and procedures of the Community Services Division.

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**RECOMMENDATION 60 (page 275)**

Section 45(3) of CAMA and cl 7 of the CAMA Regulation should be repealed and be effectively replaced by s 71 of the *Administrative Decisions Tribunal Act 1997* (NSW).

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**RECOMMENDATION 61 (page 276)**

Section 126 of the ADT Act should be confined in its application to community service matters.

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**RECOMMENDATION 62 (page 278)**

Section 46 of CAMA should be repealed.

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**RECOMMENDATION 63 (page 279)**

In determining whether the circumstances of the case justify the making of a costs order under s 88 of the ADT Act, the CS Division should consider:

- whether any important public policy considerations were raised;
- the behaviour of the parties during the inquiry process;

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- whether the complaint was pursued in a genuine belief that it had merit; and
  - whether the matter was dismissed on the basis that it was frivolous or vexatious.
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**RECOMMENDATION 64 (page 285)**

**Section 5 of CAMA should be repealed. (see Rec 3)**

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**RECOMMENDATION 65 (page 298)**

**The Community Services Review Council should be abolished. In its place, the Community Services Commissioner should develop appropriate consultation mechanisms with persons representing the interests of consumers, families, carers, advocates and service providers. It should also establish an inter-agency forum comprising the heads of all relevant agencies to discuss ways of ensuring more efficient and effective co-ordination of services.**

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# 1. Introduction

- Terms of reference
- Background to the review
- Issues Paper 15
- Reference group
- Public consultations
- Acknowledgement
- Structure of this report

## TERMS OF REFERENCE

1.1 On 9 June 1998, the Attorney General, the Hon J W Shaw QC MLC, asked the Commission to:

1. Review the *Community Services (Complaints, Appeals and Monitoring Act) 1993 (NSW)* (“CAMA”) to determine whether the policy objectives of the CAMA remain valid and whether the terms of the CAMA remain appropriate for securing those objectives; and
2. Conduct the review having regard to the obligations arising under s 126 of the CAMA and the provisions of the *Subordinate Legislation Act 1989 (NSW)*.

The name of the Act was recently changed to the *Community Services (Complaints, Reviews and Monitoring) Act 1993 (NSW)*. However, to avoid confusion, this Report refers to the legislation by its former name, the *Community Services (Complaints, Appeals and Monitoring Act) 1993 (NSW)* (“CAMA”).

## BACKGROUND TO THE REVIEW

1.2 Section 126 of CAMA states that the Act must be reviewed to determine whether its policy objectives remain valid and whether its terms remain appropriate for securing those objectives. The review was required to be conducted as soon as possible after five years from the date of assent of the Act (8 April 1993), and tabled in Parliament by 8 April 1999. The Commission has also reviewed the *Disability Services Act 1993 (NSW)* (“DSA”) as part of the same reference.<sup>1</sup>

1.3 The *Subordinate Legislation Act 1989 (NSW)* states that statutory rules are repealed on 1 September following the fifth anniversary of the date of publication of the rule.<sup>2</sup> This means that the *Community Services (Complaints, Appeals and Monitoring) Regulation 1996 (NSW)* (“CAMA Reg”) will be repealed on 1 September 2001.

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1. New South Wales Law Reform Commission, *Review of the Disability Services Act 1993 (NSW)* (Report 91, 1999).  
2. *Subordinate Legislation Act 1989 (NSW)* s 10(2)(b).

## ISSUES PAPER 15

1.4 In September 1998, the Commission published Issues Paper 15, *Review of the Community Services (Complaints, Appeals and Monitoring Act 1993 (NSW)* (IP 15) and Issues Paper 16, *Review of the Disability Services Act 1993 (NSW)* (IP 16). The papers were designed to stimulate community debate and submissions to the Commission about the Acts.

1.5 IP 15 asked questions about the provisions of CAMA and how they operate in practice. It discussed the objects of CAMA, and considered the provisions of the Act in relation to the following bodies established under CAMA:

- the Community Services Commission (“CSC”);
- the Community Visitors Scheme;
- the Community Services Appeals Tribunal (“CSAT”), which has now become the Community Services Division (“CS Division”) of the Administrative Decisions Tribunal (“ADT” or “Tribunal”); and
- the Community Services Review Council (“Review Council”).

1.6 Approximately 1200 copies of IP 15 and IP 16 were distributed widely. The Issues Papers were made available in a number of alternative formats: large-print and spiral-bound; diskette; large-print summary; and a summary on audio tape. The Issues Papers were also available on the Commission’s website.

1.7 The reviews of CAMA and the DSA were also publicised in six newspapers for a variety of non-English speaking populations, on SBS radio, community radio stations and 2DAY-FM radio.

## REFERENCE GROUP

1.8 With the assistance of the Disability Council of NSW, the Commission convened a ten-member Reference Group, which was representative of consumers, service providers, advocates, families and carers, to provide advice on the conduct of the reviews of CAMA and the DSA. Members were also appointed to represent the views and interests of Aboriginal and Torres Strait Islander people and those from a non-English speaking background. A

list of members of the Reference Group is provided at Appendix A. The Group met on four occasions and provided comments on drafts of the Issues Papers and final Reports. The Commission is very grateful for the time members of the Reference Group gave to attend meetings and for their generosity in contributing their expertise.

## **PUBLIC CONSULTATIONS**

### **Submissions**

1.9 The Commission asked for submissions from the public by 14 December 1998. However, the Commission continued to accept submissions in January and February 1999. A number of people and organisations provided submissions on both CAMA and the DSA.<sup>3</sup> A full list of the 96 submissions received is provided at Appendix B.

1.10 Many of the submissions were very detailed. They covered a very broad range of stakeholders with an interest in CAMA, including people with disabilities, their families, advocacy groups, peak consumer groups, people with an interest in community services, and non-government providers of services to people with disabilities or to children and young people. The peak groups who made submissions had often themselves conducted extensive consultations with their members for the purposes of drafting their submissions to the Commission. Staff of the Commission attended several of these consultations.

1.11 Submissions were also received from some government agencies, including the Local Government and Shires Association of NSW, the Ombudsman, the CSC and the former CSAT. A submission was received from the Minister for Community Services, the Hon Faye Lo Po MLC, representing a “whole of government” response on behalf of government agencies.

1.12 As well as calling for and receiving submissions, the Commission conducted two alternative methods of consultation: public seminars and small

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3. For the purpose of this Report, the Commission has identified these separately as *CAMA Submission* and *DSA Submission*. Where the Commission received several submissions from the same person or organisation, these have been numbered chronologically, for example, *CAMA Submission 3*.

focus groups with consumers of community services. This was to ensure that the Commission heard from as wide a range of people as possible in the relatively short time-frame available.

## **Public seminars**

1.13 The Commission conducted seven public seminars on CAMA and the DSA in Sydney and selected country areas over a three week period between 18 November and 2 December 1998. The issues raised in IP 15 and IP 16 formed the basis of the discussions. Participants were given an opportunity to raise topics that were not covered in the Issues Papers. These seminars were well-attended and provided dynamic forums in which issues could be discussed openly. Importantly, they also allowed the Commission to see how CAMA and the DSA were working in practice.

### ***Sydney seminars***

1.14 Four seminars were held in Sydney. Three of these were with particular groups of stakeholders in the disability area:

- service providers (18 November 1998);
- consumers of disability services (20 November 1998); and
- advocacy groups, and families and carers of people with disabilities (30 November 1998).

The Commission wishes to thank Ms Julia Haraksin, Co-ordinator of the Disability Unit within the NSW Attorney General's Department, for facilitating the latter two seminars.

1.15 Since the above meetings focused largely on the DSA, another seminar primarily on CAMA was arranged with children's advocacy groups and providers of services to children and young people (2 December 1998).

### ***Regional seminars***

1.16 Three public seminars were also held in regional areas of NSW for anyone with an interest in CAMA or the DSA. These were held at:

- Wagga Wagga (23 November 1998);
- Maitland (24 November 1998); and

- Ballina (26 November 1998).

## Focus groups

1.17 In conducting a review of legislation that can have an important impact on the lives of consumers of community services, it is vital that the views of those consumers be heard. This sometimes does not happen. For example, a report by the Disability Council of NSW found that people with disabilities often feel that there is inadequate consultation with them on important policy issues.<sup>4</sup>

1.18 The Commission was aware that consumers of community services, such as people with a disability and children and young people in care, might be less likely than other people to make written submissions and attend the Commission's public seminars. The Commission was also aware that there could be additional cultural and language barriers for these people. It therefore commissioned three organisations to conduct small focus groups with consumers of community services, including Aboriginal and Torres Strait Islander people and people from non-English speaking backgrounds. Two of the organisations focused on consumers of disability services, and one on children and young people in care and formerly in care. The findings of these consultations have been published separately in a Research Report.<sup>5</sup>

### ***Juliet London Research and Consultancy***

1.19 Nine focus groups were conducted with people with intellectual, physical, sensory and psychiatric disabilities, autism and acquired brain injury. Twenty individual interviews were also conducted with people with intellectual, physical and sensory disabilities, acquired brain injury, and carers of people with intellectual disabilities. The research was conducted in the Sydney metropolitan area and in the Illawarra and Broken Hill regions. Fifteen Aboriginal and Torres Strait Islander people and people from a non-English speaking background were included in this project.

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4. New South Wales, Disability Council of NSW, *Consultation and People with a Disability: Issues for Public Sector Managers in NSW* (1997) at vii.

5. New South Wales Law Reform Commission, *Review of the Disability Services Act 1993 (NSW) and the Community Services (Complaints, Appeals and Monitoring) Act 1993 (NSW): Consultations* (Research Report 9, 1999) ("RR 9").



***Moxon, Green and Associates***

1.20 Two focus groups were conducted in Sydney. One was with children aged between 11 and 15 years with a physical disability, and the other was with people with an intellectual disability from non-English speaking backgrounds. An informal spontaneous discussion was also held with the parents of the children in the first focus group, facilitated by one of the parents.

***NSW State Network of Young People in Care***

1.21 The NSW State Network of Young People in Care (“SNYPIC”) is the peak consumer group for young people in care. Four focus groups were conducted in Sydney with young people in care (in services in Sydney) and formerly in care.

**Community Visitor Survey**

1.22 A detailed submission was made to the Commission about the Community Visitor Scheme on behalf of all the Community Visitors.<sup>6</sup> To obtain further information from Community Visitors about the operation of the Community Visitor Scheme and their views on how it could be improved, the Commission asked the CSC to distribute a questionnaire in December 1998 to all Community Visitors (31 at that time). Seventeen Community Visitors (55%) provided their completed questionnaires to the Commission. The results of this survey are referred to as the “Community Visitor Survey”.

**Visits to institutions for people with disabilities**

1.23 Staff of the Commission also made several visits to institutions for people with disabilities in the Sydney area. Some of these were with Community Visitors.

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6. Community Visitors, *CAMA Submission*.

## **ACKNOWLEDGEMENT**

1.24 This Report takes into account all the views expressed in written and oral submissions, public seminars, consultations with individuals involved in areas related to CAMA, the focus groups, and research literature. The Commission thanks the individuals and organisations who gave time and resources to the review.

## **STRUCTURE OF THIS REPORT**

1.25 This Report presents the Commission's findings on the terms of reference and its recommendations for changes to CAMA.

1.26 In Chapter 2, the Commission reports on the overwhelming support for the legislative scheme established by CAMA. It reviews the objects of CAMA and the principles intended to guide persons and bodies performing functions under the Act.

1.27 Chapter 3 discusses the CSC. It examines the following issues: support for the CSC; the independence of the CSC; the functions of the CSC generally; the complaints handling function; the monitoring and inquiry function; the review function; the education and development function; the jurisdiction of the CSC; powers of the CSC; enforcement of CSC recommendations; and funding.

1.28 Chapter 4 reviews the Community Visitor Scheme. It briefly describes Visitor Schemes operating in other contexts, and reports both the support for the Community Visitor Scheme and the need to change certain aspects of its operation. It then outlines the key aspects of the Scheme: the independence and appointment of Visitors; skills and qualifications for appointment; Visitors' functions; the frequency of visits; the jurisdiction of the Scheme; training; monitoring and supervision; Visitors' powers; and a right for residents to see a Visitor.

1.29 Chapter 5 discusses the CS Division of the ADT. It considers the major issues affecting the CS Division including its composition and jurisdiction, standing to bring proceedings, and procedural matters. In particular, the Commission examines the impact on community services appeals of the reconstitution of the former CSAT as a Division of the ADT, and outlines the notable changes effected by the *Administrative Decisions Tribunal Act 1997* (NSW) (“ADT Act”).

1.30 In Chapter 6, the Commission examines the role, functions and effectiveness of the Review Council, the last of the four bodies established under CAMA.

# 2. Objects and principles of CAMA

- Legislative framework
- Objects
- Principles
- Section 5

2.1 The terms of reference require the Commission to determine whether the policy objectives of CAMA remain valid and whether the terms of the Act are appropriate to achieve those objectives. Those policy objectives are expressed in the objects clause in Part 1 of the Act. In addition, Part 1 contains a set of principles which must be observed in exercising functions under CAMA. In this chapter, the Commission examines these provisions and also the effect, on the objects and principles of CAMA, of s 5 which provides that decisions or recommendations made under the Act should not be inconsistent with government policy or be beyond the resources earmarked for the provision of community services.

## **LEGISLATIVE FRAMEWORK**

2.2 In public hearings conducted by the Commission and in submissions received in response to IP 15, support for the legislation and the major bodies created under CAMA<sup>1</sup> was overwhelming. The Act is considered the backbone of community services legislation. It provides a legislative framework for an independent complaints mechanism and independent monitoring of community services and reviews of persons in care which are vital to ensure compliance with community welfare legislation and thus safeguard the rights and interests of consumers. Part of this web of safeguards is also a commitment to the review of administrative decisions.

### **CAMA bodies**

2.3 By way of introduction, CAMA establishes three major bodies:

- the CSC, whose functions include handling complaints about service delivery, monitoring services generally, undertaking reviews of persons in care and reporting on its investigations;<sup>2</sup>
- the Community Visitors Scheme, designed to provide residents of funded residential care services with an independent person to talk to

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1. See para 1.5 and 2.3.

2. See Chapter 3.

who has powers to inspect records, talk to staff and management of services and advocate for them with the service provider;<sup>3</sup> and

- the CSAT, which has recently been reconstituted as the CS Division of the ADT.<sup>4</sup>

In addition, CAMA establishes the Community Services Review Council, made up of ex-officio members and community representatives, whose functions are to provide advice to the Minister on the operation of the Act and to encourage co-ordination of the functions of the bodies established by CAMA and other agencies involved in providing community services.<sup>5</sup>

## Support for CAMA

2.4 The broad policy objectives of CAMA have been vigorously defended by consumers, families, carers, advocates and service providers alike.<sup>6</sup> While this review, as required by the Act,<sup>7</sup> is an opportunity to reflect on how well or otherwise the legislation has been operating, serious concerns have been expressed to the Commission that the significant advances made by CAMA should not be watered down.<sup>8</sup> CAMA is considered watershed legislation which needs to be strengthened further, if any change is proposed at all.

2.5 To this end, there have been numerous claims in submissions for an expansion of the jurisdiction of the CSC, the Community Visitors and the Tribunal; an increase in the powers of the CSC; greater enforceability of recommendations by the CSC; and the conferral of additional functions on

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3. See Chapter 4.

4. See Chapter 5.

5. See Chapter 6.

6. Multicultural Disability Advocacy Association of NSW Inc, *Submission* at 9; Burnside, *Submission* at 1-2; Centacare Sydney, *Submission* at 3; The Spastic Centre of NSW, *CAMA Submission* at 1; MS Society of NSW, *Submission* at 3; Barnardos Australia, *Submission* at 3; NCOSS, *CAMA Submission* at 1; and CSC, *CAMA Submission 1* at 1.

7. CAMA s 126.

8. *Consultation* (Advocacy Groups and Carers, Sydney); and *Consultation* (Service Providers, Sydney).

the CSC.<sup>9</sup> These functions relate both to new functions and the transfer of responsibility for certain functions from other agencies to the CSC. The Commission has carefully considered each of these claims.

2.6 In light of the overwhelming community support for CAMA, the Commission's general approach is to preserve the framework of the legislation to ensure that each of the CAMA bodies performs its current roles more effectively rather than significantly change the nature of those roles. To do otherwise could have the undesirable effect of weakening rather than enhancing the effective operation of the Act. In the remainder of this Report, the Commission considers what changes, if any, are warranted to the current legislative scheme. This chapter in particular, considers whether the broad policy objectives of CAMA and the principles intended to guide all persons exercising functions under the Act are appropriate.

## OBJECTS

2.7 The objects of a statute are a statement of what the legislation broadly aims to achieve. Together with the Second Reading Speech when the Bill is introduced into Parliament, the objects of an Act are often used to assist in the interpretation of provisions of the Act. For this reason, the objects of an Act can be very important.

### Current law

2.8 The objects of CAMA are:

- to foster an atmosphere in which complaints and independent monitoring are viewed positively as ways of enhancing service delivery;
- to provide a complaints mechanism for service users, their families and advocates;
- to encourage complaints to be resolved at a local level;

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9. Disability Safeguards Coalition, *CAMA Submission 1* at 9-11; and NSW Council for Intellectual Disability, *CAMA Submission* at 5-6.

- to encourage the use of alternative dispute resolution methods;
- to provide independent and accessible mechanisms for resolving complaints, reviewing administrative decisions and monitoring services, programs and complaint procedures; and
- to encourage compliance with community services legislation.<sup>10</sup>

2.9 Clearly, the main focus of CAMA is to provide a mechanism for persons to make complaints and for the resolution of those complaints, preferably at a local level or by alternative dispute resolution methods. In addition to complaint resolution, the objects demonstrate that another major aspect of the legislation is the independent monitoring of the quality and standard of service provision. In this way, the objects go beyond simply encouraging and dealing with individual complaints. This was pointed out by the then Minister for Community Services, the Hon J Longley MP, when the Bill was introduced into Parliament. In his Second Reading Speech, the Minister stated that:

This bill represents the most far-reaching reform and improvement to client and service provider relationships, complaint and grievance handling and service provision monitoring of any community service legislation in Australia.

He went on to say that:

The organisational framework is aimed at creating a safety net and providing a basis for motivating all agencies to improve client responsiveness. In the end it is a framework to assist in improving the relationships between service providers and their clients or customers. In essence, complaints and grievances are an opportunity to improve services to clients. The organisation framework in this bill provides a motivation for service providers, a safety net for clients and an educational and information base to assist the sector in developing improved processes for clients.<sup>11</sup>

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10. CAMA s 3(1).

11. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 11 March 1993, the Hon J Longley, Minister for Community Services, Second Reading Speech at 767.



## Are the current objects appropriate?

2.10 Although the objects of CAMA are widely supported,<sup>12</sup> many submissions received by the Commission argued that they focus too much on individual complaints and do not adequately reflect the various strategies used to effect the broad aims of the legislation.<sup>13</sup>

### ***Balancing individual focus and systemic measures***

2.11 Providing a mechanism to enable individuals to make complaints and have those complaints dealt with quickly and fairly is considered to be a vital object. However, it is argued that a focus on individual complaints fails to acknowledge the limitations of a complaints process to address the systemic nature of many of the problems faced by service users.<sup>14</sup> The primary limitation is the reliance on individuals to bring complaints. In this jurisdiction, such individuals tend to belong to one of the most disenfranchised groups in modern society and are unlikely to be aware of their rights let alone be in a position to exercise them.<sup>15</sup>

2.12 While individual complaints may raise issues of a systemic nature,<sup>16</sup> and may thus inform the CSC's monitoring functions, more proactive strategies are required to ensure that community services are responsive to consumer needs. In recognition of this, the CSC has adopted a range of measures to identify and investigate systemic issues, and to take action to promote the quality of community services. These strategies include various monitoring activities<sup>17</sup> and undertaking inquiries leading to the formulation of recommendations for service improvement. The CSC also performs an

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12. Multicultural Disability Advocacy Association of NSW Inc, *Submission* at 9; Burnside, *Submission* at 1-2; Centacare Sydney, *Submission* at 3; The Spastic Centre of NSW, *CAMA Submission* at 1; MS Society of NSW, *Submission* at 3; Barnardos Australia, *Submission* at 3; NCOSS, *CAMA Submission* at 1; and CSC, *CAMA Submission 1* at 1.

13. CSC, *CAMA Submission 1* at 5; Disability Council of NSW, *Submission 2* at 27; *Confidential Submission 3* at 4; and Institute for Family Advocacy and Leadership Development Association Inc, *Submission* at 15.

14. CSC, *CAMA Submission 1* at 5.

15. CSC, *CAMA Submission 1* at 5; and People With Disabilities (NSW) Inc, *CAMA Submission* at 12.

16. P Hutten, *CAMA Submission* at 7.

17. For example, monitoring patterns raised in complaints, monitoring the sector generally; monitoring the progress of recommendations made by the CSC and monitoring the circumstances of vulnerable persons or groups. See CSC, *CAMA Submission 1* at 5-6.

educative function, increasing community awareness of standards of service delivery and complaints handling mechanisms.<sup>18</sup> These functions are not reflected in the current objects of CAMA.

2.13 The CSC is considered to have established a balanced approach between its various functions.<sup>19</sup> Nonetheless, it is felt that this balance should be reflected in the objects,<sup>20</sup> which should also acknowledge the interrelationship between the complaints, monitoring and review functions, and systemic change.<sup>21</sup> As one submission noted:

The Support Group is of the view that the objects of the Act are important and valid. Given the broad monitoring and inquiry powers of the [CSC], it may be useful to strengthen the objects by emphasising that an overall systemic approach is as important to improving outcomes for clients as is resolution of individual complaints.<sup>22</sup>

#### **Community Visitor Scheme**

2.14 The objects clause makes no reference to the Community Visitor Scheme. This is considered to be a major omission and it has been suggested that the objects be amended to refer specifically to the Community Visitor Scheme.<sup>23</sup>

#### **Consistency between objects in CAMA and the ADT Act**

2.15 As the powers and procedures of the CS Division are now found in both CAMA and the ADT Act, it is argued that the objects of CAMA should be made consistent with the objects of the ADT Act.<sup>24</sup> The CSAT has proposed that *administrative review* be included in s 3(1)(a). It also suggested that a new object be added which mirrors that contained in s 3 of the ADT

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18. CSC, *CAMA Submission 1* at 5.

19. Multicultural Disability Advocacy Association of NSW Inc, *Submission* at 9; and Autism Association of NSW, *Submission* at 9.

20. Carers NSW Inc, *Submission* at 12; CSC, *CAMA Submission 1* at 5; People With Disabilities (NSW) Inc, *CAMA Submission* at 4; and NSW Council for Intellectual Disability, *CAMA Submission* at 4.

21. Barnardos Australia, *Submission* at 3; Physical Disability Council of NSW Inc, *Submission* at 11; and NCOSS, *CAMA Submission* at 1.

22. Western Sydney Intellectual Disability Support Group Inc, *CAMA Submission* at 1.

23. Community Visitors, *CAMA Submission* at 38.

24. CSAT, *Submission* at 1-2.

Act, namely to ensure that proceedings in the Tribunal are conducted in a timely, fair and informal manner.<sup>25</sup>

***Suggested objects clause***

2.16 The CSC has submitted that the objects of CAMA should include:

- to facilitate the improvement of standards of community services;
- to promote the rights of consumers by providing independent mechanisms for the resolution of complaints, reviews of the circumstances of individuals in care, and review of administrative decisions;
- to provide for the independent monitoring of the sector including issues and patterns that arise in service delivery and the implementation of its recommendations;
- to disseminate information about consumer rights and the mechanisms for promoting those rights, “best practice” models of service delivery, and other issues affecting consumers;
- to provide for independent monitoring of the quality of individual services and the access of residents to independent support and assistance through the operation of a Community Visitor Scheme; and
- to foster community attitudes which are informed and vigilant about consumer rights and needs and the state of community services in NSW by informing public debate and discussion, and ensuring that information about community services and consumers is accessible and available.<sup>26</sup>

2.17 The Commission has considered these as well as a number of other suggestions such as ensuring complaints are resolved quickly;<sup>27</sup> protecting staff members who make complaints;<sup>28</sup> requiring the Minister to act upon the recommendations of the CSC;<sup>29</sup> ensuring children are heard in matters that affect them;<sup>30</sup> and noting links with other community welfare laws.<sup>31</sup>

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25. CSAT, *Submission* at 1-2.

26. CSC, *CAMA Submission 1* at 6-7.

27. P Hutten, *CAMA Submission* at 3.

28. L Moffit, *Submission* at 1.

29. *Confidential Submission 2* at 4.

30. Burnside, *Submission* at 2.

31. NCOSS, *CAMA Submission* at 1.

## **The Commission's view**

2.18 As they are an important statement about what the Act is about, the Commission believes the objects should clearly reflect what the legislation aims to achieve and how it plans to achieve it. The Commission notes that the objects are intended to be a broad statement of the major goals of the legislation and the strategies and mechanisms designed to achieve these goals. The details of the mechanisms should be left to the substantive provisions of the Act. For this reason, not all of the suggestions which were made in submissions, as outlined above, will be appropriately included in the objects clause.

2.19 The Commission is satisfied that the objects clause should acknowledge all existing programs under the Act, including the Community Visitor Scheme. It needs to acknowledge that the other functions of the CSC, and the functions of the Community Visitors and the CS Division, are as important as providing a complaints mechanism for consumers of services. The Commission also agrees that it is desirable, where appropriate, to ensure consistency between CAMA and the ADT Act. A reference in the first object to administrative review of reviewable decisions is appropriate, in the Commission's view. However, an object dealing with how the CS Division should conduct itself is a matter which is relevant to the ADT Act, under which it is now constituted, not CAMA. Accordingly, the Commission believes that the objects clause should be amended as follows.

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## **RECOMMENDATION 1**

**Section 3(1) should be amended to provide that the objects of CAMA are:**

- **to foster, in community services and programs, and in related services and programs, an atmosphere in which complaints, independent monitoring, *reviews of persons in care and administrative review* are viewed positively as ways of enhancing service delivery;**
  - **to provide an independent and accessible process for the resolution of complaints;**
  - **to encourage, wherever reasonable and practical, the resolution of complaints at a local level or through alternative dispute resolution methods;**
  - **to provide for independent monitoring of the sector generally and services in particular (including monitoring the progress of recommendations made by the Community Services Commission);**
  - **to provide an independent process for the review of persons in care;**
  - **to promote access by residents to independent persons for support and assistance through the Community Visitor Scheme;**
  - **to encourage compliance with provisions of community welfare legislation; and**
  - **to facilitate greater community awareness of CAMA and the agencies it establishes.**
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## **PRINCIPLES**

2.20 The Act lays down a number of principles which must be observed by persons or bodies exercising any of the functions under CAMA. Those principles are:

- (a) the paramount consideration in providing a service is the best interests of the consumer;
- (b) a person who receives or who is eligible to receive a service is entitled to receive an adequate explanation of the service, is to be consulted in matters relating to the service and may question decisions or actions in relation to the service that may affect him or her;
- (c) a service provider is to promote and respect the legal and human rights of the consumer and must respect any need for privacy or confidentiality;
- (d) a service provider should provide such information to the consumer to enable the consumer to make an informed choice;
- (e) a service provider should enable a complaint to be dealt with fairly, informally and quickly;
- (f) a complaint about the provision of a service is to be dealt with even where it is made by another person on behalf of the person who receives or is eligible to receive a service.<sup>32</sup>

These principles are intended to guide the legal and administrative process. They do not create enforceable rights.

## Best interests

2.21 The most important principle is that the best interests of the person receiving the service are to be the paramount consideration in providing a service to that person. Some concern has been expressed that this principle is too vague and subjective. Accordingly, it has been suggested that CAMA should be amended to provide some guidance as to what matters a decision-maker should take into account when determining a person's best interests.<sup>33</sup>

### ***Approach taken in other jurisdictions***

2.22 Similar concerns have been voiced in the area of guardianship, access and custody of children. In a High Court case concerning the sterilisation of a young girl with an intellectual disability, Justice Brennan was very critical of the best interests approach.<sup>34</sup> He said that it offers no hierarchy of values or

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32. CAMA s 3(2).

33. Barnardos Australia, *Submission* at 4; and P Hutten, *CAMA Submission* at 8.

34. *In Re Marion* (1992) 175 CLR 218 at 270-274 per Brennan J.

any general legal principle which might guide the courts. Further, it depends on the value system of the decision maker and creates “an unexaminable discretion” in the decision maker.<sup>35</sup> The majority of judges in that case, however, supported the best interests approach but acknowledged the concept was imprecise.

2.23 The *Family Law Act 1975* (Cth) has since been amended to provide an inclusive list of factors which a court must take into account when determining what is in a child’s best interests. These include the expressed wishes of the child, the relationship of the child with each of the parents, the likely effect of any changes on the child’s circumstances and the capacity of each parent to provide for the needs of the child.<sup>36</sup>

2.24 The best interests approach has also been espoused in State laws relating to the adoption of children, child protection matters and the provision of children’s services. The concept is not defined in any of these laws, except for the recently enacted *Children (Protection and Parental Responsibility) Act 1997* (NSW). This Act, which makes parents responsible for the actions of their children, provides a list of factors which a court is to consider when determining whether action it is considering taking is in a child’s best interests.<sup>37</sup>

2.25 The concept of best interests is defined by implication in some legislation. The *Guardianship Act 1987* (NSW), for example, provides that paramount consideration be given to the “welfare and interests” of persons with disabilities.<sup>38</sup> Similarly, the new *Children and Young Persons (Care and Protection) Act 1998* (NSW), which replaces the *Children (Care and Protection) Act 1987* (NSW), provides that paramount consideration must be given to the “safety, welfare and well-being of the child or young person”,<sup>39</sup> and elsewhere speaks of a child’s or young person’s best interests.<sup>40</sup>

### **The Commission’s view**

2.26 The Commission agrees that the concept of best interests is imprecise and some guidance is required to assist the decision-maker when determining

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35. See also *P v P* (1994) 181 CLR 583 at 612.

36. *Family Law Act 1975* (Cth) s 68F.

37. *Children (Protection and Parental Responsibility) Act 1997* (NSW) s 6.

38. *Guardianship Act 1987* (NSW) s 4(a).

39. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 9(a).

40. See for example, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 9(e).

a person's best interests. It has been suggested that some of the factors which a decision-maker should take into account are safety, stability of care, lifelong identity, connection and "development of emotional resilience".<sup>41</sup> It has also been suggested that the decision-maker should ascertain and give due regard to the views and wishes of the person concerned<sup>42</sup> even though conflicts may arise between what a person may wish to do and what is considered to be in that person's best interests.<sup>43</sup>

2.27 Rather than list the factors which the decision-maker should take into account, the Commission's preferred approach is to rephrase the first principle in terms of the safety, welfare and interests of the person receiving a service. The Commission agrees that the decision-maker should take into consideration the views of the person concerned whenever making a decision or taking action that affects, or is likely to affect that person. The Commission believes this should be a principle in itself.<sup>44</sup>

### **Are the existing principles appropriate?**

2.28 There was some concern that the six principles laid down in CAMA relate more to service providers than to the agencies intended to perform the various functions under the Act.<sup>45</sup> Three of the principles specifically relate to what service providers should do, namely:

- promote and respect the legal and human rights of service users including respecting their privacy;
- provide information to enable the service user to make informed choices; and
- enable complaints about the service to be dealt with fairly, informally and quickly at a place that is convenient to the service user.

The other principles are expressed in terms of what the consumers should expect, presumably from service providers and other persons or bodies exercising functions under the Act. For example, the principles state that

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41. Barnardos Australia, *Submission* at 4.

42. Barnardos Australia, *Submission* at 4.

43. Autism Association of NSW, *Submission* at 9.

44. See Recommendation 2 at para 2.32.

45. CSC, *CAMA Submission 1* at 9.



consumers should receive an adequate explanation of the service to the consumer, should be able to have their views heard and should be able to question decisions or action taken in relation to the service. The last principle states that complaints should be dealt with even if brought by another person on behalf of the consumer.

2.29 One organisation has submitted that the principles relating to service providers demonstrate the important role that service providers play in complaints resolution generally.<sup>46</sup> They also illustrate to the CAMA bodies, and to the public generally, what is to be reasonably expected of service providers. Nonetheless, it has been suggested that additional principles are required to guide the exercise of the functions of the CSC, the Community Visitors and the CS Division specifically.<sup>47</sup> How relevant the principles are to the CS Division, which now performs most of its functions under the ADT Act, is questionable. When reviewing a decision, the CS Division is required to have regard to the principles laid down in the legislation under which the decision is made.<sup>48</sup>

***Suggested amendments***

2.30 It has been suggested that CAMA bodies should, when exercising their functions:

- give paramount consideration to the best interests of the person;
- recognise the difficulties faced by consumers in seeking redress for themselves and operate in a manner that is sensitive to this difficulty; and
- consult with consumers to ascertain their views about any proposed decisions, action or reviews.<sup>49</sup>

The CSC submitted that there should be two lists of principles: one to guide service providers and the other to guide the CAMA bodies. It proposed that those which apply to the CAMA bodies should include:

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46. NCOSS, *CAMA Submission* at 1.  
47. See for example, Physical Disability Council of NSW Inc, *Submission* at 11; Disability Safeguards Coalition, *CAMA Submission 1* at 9; and NSW Council for Intellectual Disability, *CAMA Submission* at 4.  
48. CSAT, *Submission* at 2.  
49. Physical Disability Council of NSW Inc, *Submission* at 11; Disability Safeguards Coalition, *CAMA Submission 1* at 9; NSW Council for Intellectual Disability, *CAMA Submission* at 4.

- to make the best interests of the consumer the paramount consideration in all processes, decisions and actions;
- consult with those consumers directly affected by the function being exercised to ascertain their views and wishes regarding any proposed actions, decisions or processes;
- give due regard to the views and wishes of consumers in any decision or action taken, although the agency is not bound by these views or wishes particularly if there is a significant question of safety or appropriate care or treatment of a consumer, or public interest;
- have regard to the needs of those persons (such as children) who are receiving or are eligible to receive community services and are the least likely or able to protect or advance their own interests;
- preserve the privacy and confidentiality of consumers in all actions and decisions taken;
- ensure adequate provision for the hearing and resolution of complaints about the way in which functions were exercised, provide adequate explanation of the operations of the Act and provide reasons for decisions made under the Act;
- recognise and respect the role of family members, guardians and advocates of consumers of community services; and
- to consult and cooperate with other relevant agencies and persons concerned with the rights and interests of persons receiving, or eligible to receive, community services, or with an interest in the provision of community services.<sup>50</sup>

Some of these suggestions are already included in CAMA albeit framed narrowly in terms of service provision.

### ***The Commission's view***

2.31 In general, the principles were widely supported in submissions and the Commission's public consultations. While they focus on service provision and are largely framed in terms of what service providers should do, the Commission nevertheless considers that they are still relevant to CAMA bodies in the exercise of their functions. By creating a set of standards for service providers, particularly in relation to complaint handling

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50. CSC, *CAMA Submission 1* at 8; and People With Disabilities (NSW) Inc, *CAMA Submission* at 5.

at the local level, the principles assist the CSC, Community Visitors and the Tribunal when called upon to deal with issues relating to service provision.

2.32 The Commission notes that the principles are intended to be observed in the performance of functions under the Act. Curiously, service providers do not perform any of the functions under the Act, except that they are encouraged to implement complaints procedures at the service level. However, there is a need to ensure that the principles apply explicitly to service provision, complaints handling, service monitoring and administrative review. The Commission has considered the suggestions proposed in various submissions and has also considered what principles apply in related legislation, such as the *Guardianship Act 1987* (NSW) and the *Children and Young Persons (Care and Protection) Act 1998* (NSW). The Commission recommends that s 3(2) should be redrafted along the following lines.

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## **RECOMMENDATION 2**

**Section 3(2) should be amended so that the following principles must be observed by all persons when exercising functions under this Act:**

- **in relation to all administrative or legal processes under the Act, the safety, welfare and interests of a person receiving a service, or eligible to receive a service, should be given paramount consideration;**
- **the views of a person receiving a service, or eligible to receive a service, should be taken into consideration in relation to any decision, process or action taken under the Act;**
- **a person receiving a service, or eligible to receive a service, is entitled to an adequate explanation of the service and of any decision, process or action taken under the Act, and may question decisions or actions that affect the person in relation to the service;**

- **the legal and human rights of a person receiving a service, or eligible to receive a service should be respected (including any need for privacy or confidentiality);**
  - **the importance of family relationships and the cultural and linguistic backgrounds of persons receiving a service, or eligible to receive a service, should be recognised;**
  - **the importance of encouraging consultation and cooperation with other relevant agencies and persons should be recognised;**
  - **a service provider is, to the best of his or her ability, to provide such information about the service as may enable an appropriate decision to be made by the person for whom the service is, or is to be, provided;**
  - **a service provider is to enable a complaint about the service to be dealt with fairly, informally and quickly at a place convenient to the complainant;**
  - **a complaint about a service is to be dealt with even if it is made by another person on behalf of the person receiving, or eligible to receive, the service; and**
  - **the community should be encouraged to apply and promote these principles.**
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## **SECTION 5**

2.33 Section 5 of CAMA provides that neither the CSC nor the CS Division may determine an issue under CAMA, or make a decision or a recommendation that is (or that requires the taking of action that is):

- beyond the resources appropriated by Parliament for community services;
- inconsistent with the way those resources have been allocated by the Minister for Community Services, Aged Services or Disability

Services or the Directors General of their departments, in accordance with Government policy; or

- inconsistent with Government policy, as certified in writing by the Minister for Community Services, Aged Services or Disability Services and notified to the Tribunal, CSC or other person or body making the determination.

2.34 This section reveals the tension inherent in establishing independent agencies to review the decisions of government and non-government funded service providers. It is affirmation that, while the Government recognises the importance of establishing independent mechanisms for monitoring standards of service delivery and for the review of administrative decisions, it retains control over determining policy and allocating resources. As the Minister said in his Second Reading Speech when introducing the Bill:

[The Act] clearly empowers the Commission and the Tribunal to be effective in reviewing not only Government decisions but those of bodies funded by the Government to provide services in the community services area. On the other hand, the legislation sets out the primacy of responsibility of the elected representatives of the people for policy determination and resource allocation.<sup>51</sup>

## Effect of section 5

2.35 Although they are intended to be independent bodies, the CSC and the CS Division are constrained by the requirement not to make decisions or requirements that are inconsistent with government policy or resource allocation. In practice, this means that those considerations will override any decision or recommendation that the CSC or CS Division considers is in the best interests of the person concerned, quite contrary to the “guiding principle” of CAMA.

2.36 In a submission to a Parliamentary inquiry into children’s advocacy, the NSW Ombudsman considered s 5 to be a “serious impediment” to the work of the CSC, resulting in it being “far more restricted in [its] powers than

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51. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 11 March 1993, the Hon J Longley, Minister for Community Services, Second Reading Speech at 768.

the Ombudsman”.<sup>52</sup> Section 5 is also more prohibitive than the equivalent provision in the legislation governing the Health Care Complaints Commission, a watchdog body similar to the CSC. Section 91 of the *Health Care Complaints Act 1993* (NSW) restricts the recommendations the Health Care Complaints Commission may make by reference to resource allocation, not policy.

### **Inconsistency with s 64 of the ADT Act**

2.37 Section 5 is also far more prohibitive than the equivalent provision in the ADT Act.<sup>53</sup> Section 64 of that Act provides that, when determining an application for a review of a reviewable decision, the Tribunal:

must give effect to any relevant Government policy in force at the time the relevant decision was made except to the extent that the policy is contrary to law or the policy produces an unjust decision in the circumstances of the case.

This is significantly different to s 5(c) of CAMA which simply provides that the Tribunal must not make decisions which are inconsistent with government policy. The relevant section in the ADT Act contains two very important exceptions. First, if the policy is unlawful, the Tribunal may make a decision which is inconsistent with government policy. Second, if the policy is lawful but it produces a result which is not fair in the circumstances of the particular case, the Tribunal may depart from government policy.<sup>54</sup> There are no qualifications in s 5(c) of CAMA.

2.38 The inconsistency between CAMA and the ADT Act is of special concern to the CS Division which now exercises functions and powers under both Acts.<sup>55</sup> However, it appears probable that the CS Division is no longer bound by s 5 because it exercises most of its functions and powers under the

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52. New South Wales, Legislative Council, Standing Committee on Social Issues, *Inquiry into Children's Advocacy* (1996) at 177.

53. See also discussion at para 5.211-5.215.

54. This exception, moved by amendment to the Bill by the Greens in the Upper House, effectively nullifies the intention of the section. See L Katz, “ADT-ABC: An Introduction to the New South Wales Administrative Decisions Tribunal”, paper presented at the *Government Lawyers CLE Convention* (Sydney, 31 July 1997) at 26-27.

55. CSAT, *Submission* at 3.

ADT Act. The only powers it exercises under CAMA are powers to refer matters to alternative dispute resolution and to decline applications,<sup>56</sup> neither of which are likely to raise issues of government policy.<sup>57</sup> Nonetheless, it would be preferable for the Acts to be consistent.

2.39 The Administrative Review Council has rejected a view that review tribunals should implement government policy. In its *Better Decisions* report, the Council argues that the basis of merits review is to reconsider afresh the facts, law and policy aspects of the original decision and to reach a new decision either affirming, varying or setting aside the original decision.<sup>58</sup> In the Council's view, the purpose of merits review is to ensure that the correct and preferable decision is made by government administrators.<sup>59</sup> To require tribunals to implement government policy would, it says, change this objective from ensuring that all decisions of government are correct and preferable to ensuring that the agency's decision is lawful and not unreasonable.<sup>60</sup>

## Submissions

2.40 All of the submissions which considered the appropriateness of s 5 called for its repeal.<sup>61</sup> This was echoed in the Commission's public seminars. The CSAT has submitted that requiring the Tribunal to be bound by government policy changes the objectives of merits review and compromises the independence of the Tribunal. It therefore suggested that s 5(c) be repealed or, at the very least, be made consistent with s 64 of the ADT Act.<sup>62</sup> The CSAT has also submitted that the provisions of s 5(a) and (b), which

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56. CAMA s 43 and 44 respectively.

57. See CSAT, *Submission* at 3.

58. Australia, Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, 1995) (the "Better Decisions Report") at para 2.2.

59. Better Decisions Report at para 2.9.

60. Better Decisions Report at para 2.17-2.18.

61. People With Disabilities (NSW) Inc, *CAMA Submission* at 6; Western Sydney Intellectual Disability Support Group Inc, *CAMA Submission* at 1; The Spastic Centre of NSW, *CAMA Submission* at 2; Disability Safeguards Coalition, *CAMA Submission 1* at 9; Physical Disability Council of NSW Inc, *Submission* at 12; and Institute for Family Advocacy and Leadership Development Association Inc, *Submission* at 15.

62. CSAT, *Submission* at 4.

relate to the allocation of resources, are inconsistent with its powers to review funding decisions under the DSA and therefore should be repealed.<sup>63</sup>

2.41 In relation to its effect on the CSC, the majority of submissions received by the Commission on this issue consider s 5 to be an unnecessary and unreasonable limitation on the independence of the CSC.<sup>64</sup> It is unnecessary because, like many other watchdog agencies, the CSC can only make recommendations which the Government is under no obligation to implement. There is therefore no question of the CSC usurping executive control over policy determination or resource allocation. As the CSC itself noted:

Our recommendations are offered as advice, and the making of them cannot be construed as overriding the primacy of elected representatives to make policy and resource allocation decisions.<sup>65</sup>

2.42 Submissions called for the repeal of s 5 or, alternatively, its amendment to make it consistent with s 64 of the ADT Act.<sup>66</sup> As improving the quality and consumer responsiveness of services may require changes to government policy or resource allocation, the CSC argued that it should be permitted to make comments on issues affecting policy or resources outside the scope of its recommendations. A similar allowance is made in relation to the Health Care Complaints Commission.<sup>67</sup>

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63. CSAT, *Submission* at 4.

64. CSC, *CAMA Submission 1* at 9; Australian Quadriplegic Association Ltd (NSW), *Submission* at 4; Institute for Family Advocacy and Leadership Development Association Inc, *Submission* at 15; Autism Association of NSW, *Submission* at 9; NSW Council for Intellectual Disability, *CAMA Submission* at 5; NCOSS, *CAMA Submission* at 2; and Disability Council of NSW, *Submission* at 56-57.

65. CSC, *CAMA Submission 1* at 9.

66. People With Disabilities (NSW) Inc, *CAMA Submission* at 6; Western Sydney Intellectual Disability Support Group Inc, *CAMA Submission* at 1; The Spastic Centre of NSW, *CAMA Submission* at 2; Disability Safeguards Coalition, *CAMA Submission 1* at 9; Physical Disability Council of NSW Inc, *Submission* at 12; and Institute for Family Advocacy and Leadership Development Association Inc, *Submission* at 15.

67. CSC, *CAMA Submission* at 10.



## **The Commission's view**

2.43 The Commission believes s 5 should be repealed. The provision is clearly aimed at retaining executive control over recommendations and decisions made by the CSC and the CS Division respectively. However, there is some doubt that s 5 has any application at all in relation to the CS Division which now exercises all of its major functions and powers under the ADT Act. The Tribunal is bound by the provisions of s 64 of the ADT Act which is far less restrictive than s 5.

2.44 As far as it relates to the CSC, s 5 clearly affects the independence of the CSC. In the Commission's view, s 5 compromises the benefit to Government policy-making of the advice of a body with established expertise in the area of community services and which is, significantly, separate from the government agency responsible for funding or providing community services. In order to reap that benefit, the CSC should be able to formulate its advice or recommendations without restriction. It should be allowed to make recommendations that depart from government policy where it considers that policy unlawful or no longer appropriate. It should also be able to make recommendations for the improvement of the quality of service provision regardless of the resource implications of those recommendations.

2.45 The recommendations of the CSC are not enforceable, with the exception of those recommendations arising out of a complaint which may be enforceable through an appeal to the Tribunal.<sup>68</sup> In the rare case that such an appeal is brought, the Tribunal would be bound by s 64 of the ADT Act. Effectively, therefore, the Government's primary control over policy determination and resource allocation is unthreatened. Section 5 is thus superfluous.

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### **RECOMMENDATION 3**

**Section 5 should be repealed.**

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68. CAMA Reg cl 6(1)(a). See also discussion at para 5.98-5.103.

## Review of CAMA

2.46 As previously mentioned, the impetus for this review was the statutory obligation under s 126 of CAMA.<sup>69</sup> In the Commission's view, there are two sound reasons to require a further review of CAMA within a similar time period. First, this Act, together with the DSA to which it is inextricably linked, is a significant statement of current policy in the community services area. Uniquely in Australia, CAMA provides an independent complaints-handling system and processes for monitoring services and reviewing people in care. It is therefore important that the objectives and terms of CAMA are reviewed regularly in order to ensure that the Act continues to reflect current policy and community opinion and that it remains relevant to the people it seeks to protect.

2.47 In Report 91, the Commission recommends some significant changes to the process of assisting services move towards full conformity with the DSA.<sup>70</sup> It also recommends the establishment of an independent accreditation system.<sup>71</sup> If these changes are implemented, the Commission believes a further review of the DSA should be required after a reasonable period to ensure the new transition process and accreditation system are operating effectively.<sup>72</sup> Given the links between the two Acts, these recommendations will have a consequential effect on CAMA. For this reason also, therefore, the Commission believes CAMA should be reviewed again within five years of the date that this Report is tabled in Parliament. The Act should require the Minister to table a report of the review in both Houses of Parliament within a further 12 months.

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### RECOMMENDATION 4

**Section 126 of CAMA should be amended to provide that the Act be reviewed as soon as possible after the period of five years from the date that this Report is tabled in Parliament. The purpose of the review would be to determine whether the objectives of the Act remain valid and the terms of the Act remain**

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69. See para 1.2 and 2.4.

70. Report 91 at Ch 6.

71. Report 91 at Ch 7.

72. Report 91 at para 1.30 and Recommendation 1.

**appropriate for securing those objectives. The Act should require that the Minister table a report of the review in both Houses of Parliament within a further 12 months.**

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# 3 • Community Services Commission

- Introduction
- Support for the CSC
- Independence of the CSC
- Functions of the CSC
- Complaints handling
- Monitoring and inquiry
- Review
- Education and development
- Jurisdiction
- Powers of the CSC
- Enforcement of CSC recommendations
- Resources

## INTRODUCTION

3.1 The CSC is one of the primary bodies established under CAMA. Part 6 of the Act outlines the constitution of the CSC, the appointment of the Community Services Commissioner (and an Acting Commissioner if required), and the functions and powers of the CSC. Parts 3 and 4 deal with how the CSC should exercise its functions concerning reviews of persons in care and complaints handling respectively.

3.2 The CSC is a discrete statutory “watchdog” body which is headed by the Community Services Commissioner (“Commissioner”). It has a highly specialised focus on community services. The CSC is the only body of its kind in Australia.<sup>1</sup>

3.3 In the years since it was formally launched in October 1994,<sup>2</sup> the CSC has developed a focus on two particular target populations:

- children and adults with a disability in care, or in need of care; and
- children and young people, particularly those involved in or requiring access to the child protection or substitute care systems.<sup>3</sup>

3.4 In its Strategic Plan for 1998-2001, the CSC identifies its mission as:

- being a major catalyst for improving the culture, quality and reputation of community services in NSW;
- exposing abuses of human rights, serious injustices and systemic weaknesses in community services, and making positive recommendations for reform;
- empowering consumers of community services and promoting their right to services which are responsive to their needs; and
- promoting informed attitudes about community services by fostering a commitment to the rights and needs of consumers.<sup>4</sup>

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1. M Hogan and G Rogers, “Contracting of Community Services: Can it be Done in the Public Interest?” in L Pearson (ed) *Administrative Law: Setting the Pace or Being Left Behind?* (Australian Institute of Administrative Law, 1996 Administrative Law Forum) at 355.

2. New South Wales, CSC, *Annual Report 1993/94* at 14.

3. New South Wales, CSC, *Annual Report 1997/98* at 4. See also New South Wales, CSC, *Annual Report 1996/97* at 4.

3.5 This chapter discusses the following issues: support for the CSC; the independence of the CSC; the functions of the CSC generally; the complaints handling function; the monitoring and inquiry function; the review function; the education and development function; the jurisdiction of the CSC; powers of the CSC; enforcement of CSC recommendations; and funding. It also outlines recommendations for change concerning some of these aspects of the CSC's operation.

3.6 In making its recommendations, the Law Reform Commission has considered three factors in particular. First, the need to ensure consistency with the principles identified in the literature for good complaints-handling systems. As the Administrative Review Council points out, this literature is well-developed.<sup>5</sup> For example, the Commonwealth Ombudsman's Office has developed a set of principles for government agencies developing complaints-handling systems. These state that an effective complaints system should be:

- supported by a strong *commitment* to it at all levels of the agency;
- *fair*, and viewed as fair, by both clients and staff;
- easily *accessible* and well-publicised for all people, including those who have special needs;
- *responsive* to clients by providing a full, impartial, timely investigation of the complaint and appropriate remedies where appropriate;
- *effective* – addressing both individual complaints and using the data collected during the investigation to improve service delivery at a systemic level, and being regularly reviewed to ensure that it meets clients' needs; and
- open and *accountable* so that clients can make their own assessment as to whether the complaint system is working well.<sup>6</sup>

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4. New South Wales, CSC, *Strategic Plan 1998-2001* (1998) at 4.

5. Australia, Administrative Review Council, *The Contracting Out of Government Services* (Report No 42, AGPS, 1998) at para 4.7.

6. Australia, Commonwealth Ombudsman's Office, *A Good Practice Guide for Effective Complaint Handling* (1997) at 13. See also the principles identified in: Standards Australia, *Complaints Handling* (Sydney, 1995) at 6; Australia, Administrative Review Council, *Administrative Review and Funding Programs (A Case Study of Community Services Programs)* (Report No 37, 1994) at 41; Australia, Access to Justice Advisory Committee, *Access to*

3.7 Secondly, the Commission has considered the practices adopted by other complaints bodies in NSW, to ensure that there are not significant inconsistencies between the practices adopted for these bodies and the CSC.

3.8 Thirdly, the Commission has taken account of the characteristics identified as critical to the success of the New York Commission on Quality of Care for the Mentally Disabled (“New York Commission”).<sup>7</sup> The New York Commission has operated since 1977,<sup>8</sup> and fulfils a similar role to the CSC in relation to mental health and intellectual disability services.<sup>9</sup> These characteristics are:

- a clear and well-defined set of specific responsibilities, coupled with a broad authority to undertake investigations and provide policy advice;
- ample access rights to visit services and obtain all necessary information;
- a broad discretion to identify and change key priorities and activities considering both the finite resources available to the New York Commission and the areas where work is “most likely to yield constructive reform and change”;
- strong and principled leadership;
- credibility as a “fair and objective observer” amongst all stakeholders; and

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*Justice: An Action Plan* (AGPS, Canberra, 1994) at para 12.41; and Australian Law Reform Commission, *Making Rights Count: Services for People with a Disability* (Report 79, 1996) at para 14.29. For a discussion of “best practice” principles for handling complaints against lawyers, see New South Wales Law Reform Commission, *Scrutiny of the Legal Profession: Complaints Against Lawyers* (Report 70, 1993) at Ch 3.

7. N K Ray, “Elements of an Effective Governmental Watchdog Agency” in V J Bradley and H A Bersani (ed), *Quality Assurance for Individuals with Developmental Disabilities* (Paul H Brookes Publishing Co, Baltimore, 1990).
8. N K Ray, “Elements of an Effective Governmental Watchdog Agency” in V J Bradley and H A Bersani (ed), *Quality Assurance for Individuals with Developmental Disabilities* (Paul H Brookes Publishing Co, Baltimore, 1990) at 173.
9. New York State Commission on Quality of Care for the Mentally Disabled, “About the Commission” (as at 3 March 1999) <<http://www.cqc.state.ny.us/aboutcqc.htm>>.

- rigorous and public accountability to consumers.<sup>10</sup>

## SUPPORT FOR THE CSC

3.9 A number of proposals have been put forward in recent years to allocate various functions of the CSC to other existing “watchdog” bodies such as the NSW Ombudsman and the newly-created Commission for Children and Young People.<sup>11</sup> Submissions to the Commission and participants at our public seminars overwhelmingly opposed this suggestion. They strongly supported the work carried out by the CSC and felt it should remain as a separate independent “watchdog” body.<sup>12</sup> The views expressed were consistent with the conclusion of the NSW Premier’s Department review of the CSC in 1996, that the CSC’s achievements are “commendable” and that it:

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10. N K Ray, “Elements of an Effective Governmental Watchdog Agency” in V J Bradley and H A Bersani (ed), *Quality Assurance for Individuals with Developmental Disabilities* (Paul H Brookes Publishing Co, Baltimore, 1990).
  11. See, for example, New South Wales, Royal Commission into the New South Wales Police Service, *Final Report. Volume V: The Paedophile Inquiry* (NSW Government, 1997) at 1296-1297 and 1299; and New South Wales, Office of Children and Young People, *A NSW Children’s Commission: Green Paper* (Sydney, 1997) at 19-20. See New South Wales, DOCS, *Report of the Working Party on Appeals and Complaints Mechanisms for Community Services in NSW* (1992) (“CAMA Working Party Report”) at 16-22.
  12. Multicultural Disability Advocacy Association of NSW Inc, *Submission* at 9; H Seares, *Submission* at 9; Citizen Advocacy NSW, *Submission* at 8; *Confidential Submission 3* at 3; NSW Council for Intellectual Disability, *CAMA Submission* at 5-6; The Northcott Society, *Submission* at 3; Disability Council of NSW, *Submission 2* at 33; Autism Association of NSW, *Submission* at 10; Physical Disability Council of NSW Inc, *Submission* at 12; Action for Citizens with Disabilities, *Submission* at 17; Burnside, *Submission* at 3; Centacare, *Submission* at 4; Barnardos Australia, *Submission* at 5; Carers NSW Inc, *Submission* at 13; NCOSS, *CAMA Submission* at 3; and People With Disabilities (NSW) Inc, *CAMA Submission* at 8. See also P Parkinson, “Overview” in New South Wales, Child Protection Council, *Report of the ACWA, CPC, SNYPIC and YAPA Forum to Discuss the Green Paper “A NSW Children’s Commission”* (Sydney, 1998) at 7.



has in place transparent decision making processes, clear lines of accountability and reporting, comprehensive operational policies and procedures and effective support systems. The management and staff are committed to the goals of the organisation.<sup>13</sup>

3.10 The strength of public support for the work of the CSC is indicated by a prominent newspaper advertisement which appeared in December 1998 sponsored by 98 community organisations outlining the body's achievements and calling on the Premier and Leader of the Opposition to clearly commit themselves to "an independent, strong and adequately funded" CSC.<sup>14</sup>

3.11 In the Commission's view, the CSC is working well and has a broad base of community support. There does not appear to be any compelling argument or change of circumstances since the establishment of the CSC to justify altering this arrangement.

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#### **RECOMMENDATION 5**

**The current structure of the Community Services Commission should be retained.**

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3.12 In the remaining part of this chapter, the Commission considers what changes (if any) might be made to enhance and strengthen the CSC's roles and functions.

### **INDEPENDENCE OF THE CSC**

3.13 Independence is essential for the CSC and its Commissioner: it removes any actual or perceived conflict of interest between it and the

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13. New South Wales, Premier's Department, *Community Services Commission Review Report* (1996) at ii. See also New South Wales, Legislative Council, Standing Committee on Social Issues, *Inquiry into Children's Advocacy* (1996) at 175.

14. "Strengthen the Community Services Commission" *Sydney Morning Herald* (10 December 1998) at 10.

services it monitors and investigates, enhances the confidence of stakeholders in the impartiality of any processes and decisions, and encourages consumers to come forward with complaints.<sup>15</sup> The Working Party whose report led to the establishment of CAMA (“CAMA Working Party”) emphasised that:

The main argument for independence of ... bodies [such as the CAMA bodies] from service provider departments/agencies is that independence removes a conflict of interest. The conflict arises from a feeling of loyalty to, or control by, departments. Such control can be through administrative direction and control on budget and staffing.

The conflict gives rise to a perception amongst consumers that they cannot rely on the impartiality and strength of purpose of the rights protection system. Even if this perception is unjustified, it undermines community confidence in such bodies. This combined with fear of retribution may make consumers very reluctant to raise complaints.<sup>16</sup>

3.14 In his Second Reading Speech, the then Minister for Community Services emphasised the degree of independence which CAMA achieved for the CSC and Commissioner and the degree to which this satisfied the concerns of the community sector.<sup>17</sup> A large number of submissions and participants in the Commission’s public seminars similarly stressed that the CSC and Commissioner must be independent to be effective and credible.<sup>18</sup>

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15. CAMA Working Party Report at 22-23.

16. CAMA Working Party Report at 22-23.

17. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 11 March 1993, the Hon J Longley, Minister for Community Services, Second Reading Speech at 767.

18. The Northcott Society, *Submission* at 3; Institute for Family Advocacy and Leadership Development Association Inc, *Submission* at 15; Multicultural Disability Advocacy Association of NSW Inc, *Submission* at 9; Dare to Care, *Submission* at 2; Disability Assistance for Shoalhaven Inc, *Submission* at 3; K and J Clifton, *Submission* at 3; NCOSS, *CAMA Submission* at 2; Kurrajong-Waratah Industries, *Submission* at 3; People With Disabilities (NSW) Inc, *CAMA Submission* at 7; The Spastic Centre of NSW, *Submission* at 2-3; Burnside, *Submission* at 3 and 5; Australian Quadriplegic Association Ltd (NSW), *Submission* at 4; and Carers NSW Inc, *Submission* at 14-15.

## Independence of the Commissioner

3.15 The Commissioner is appointed by the Governor-in-Council<sup>19</sup> on the recommendation of the Minister for Community Services. The Minister must first consult with the Review Council.<sup>20</sup> If the Commissioner is ill or absent or the position is vacant, an Acting Commissioner can be appointed by the Governor-in-Council and removed at any time.<sup>21</sup>

3.16 One of the most significant and frequent concerns raised about CAMA both in submissions and at the Commission's public seminars was that the current process for appointing the Commissioner could compromise the independence of the CSC.<sup>22</sup> It was felt that there was a significant potential conflict of interest in the Minister being responsible for appointment of the Commissioner.<sup>23</sup> On the one hand, the Minister has responsibility for the Department of Community Services ("DOCS") which is the major service provider, and for the Ageing and Disability Department ("ADD") which is the primary funder. On the other hand, he or she must also appoint a Commissioner who will monitor and may well make criticisms of those Departments.<sup>24</sup> As has been pointed out in relation to the New York Commission, "watchdog agencies by their nature are often the bearers of 'bad news'"<sup>25</sup>.

3.17 This is of particular significance in a climate where DOCS has been subjected to severe criticism by the CSC and many others in recent years.

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19. This means that the Governor determines the appointment based on advice from Cabinet and the Executive Council.
  20. CAMA s 78(1).
  21. CAMA s 79(1) and (2).
  22. Barnardos Australia, *Submission* at 13; CSC, *CAMA Submission 1* at 5; People With Disabilities (NSW) Inc, *CAMA Submission* at 14; and P Hutten, *CAMA Submission* at 13.
  23. NCOSS, *CAMA Submission* at 2; P Hutten, *Submission* at 13; Burnside, *Submission* at 3; and CSC, *CAMA Submission 1* at 14.
  24. B Semmler, *Submission* at 1; Disability Assistance for Shoalhaven Inc, *Submission* at 3; and K and J Clifton, *Submission* at 3.
  25. N K Ray, "Elements of an Effective Governmental Watchdog Agency" in V J Bradley and H A Bersani (ed), *Quality Assurance for Individuals with Developmental Disabilities* (Paul H Brookes Publishing Co, Baltimore, 1990) at 176.

The bulk of complaints to the CSC concern DOCS,<sup>26</sup> and the CSC has been very critical of the Department in the course of its work.<sup>27</sup> DOCS had also been the focus of regular and intense criticism by the media<sup>28</sup> and a plethora of official inquiries and reports in recent years.<sup>29</sup> This is a very different climate to that which existed when the CSC was established, when one of the features of the community services sector according to the former Commissioner was “the relative lack of interest and awareness that the media and most of the public showed in the area”.<sup>30</sup>

3.18 The decision by the Minister for Community Services not to re-appoint the first Commissioner, Roger West, when his term expired was regarded by many as demonstrating her conflict of interest.<sup>31</sup> It was reported that disability and child welfare groups regarded Mr West very highly, and viewed the Minister’s action as ‘punishment’ for his fearless efforts to protect

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26. For example, in 1997/98, 81% of the formal complaints handled by the CSC were about DOCS, compared to 75% in 1996/97: New South Wales, CSC, *Annual Report 1997/98* at 25.

27. See, for example, New South Wales, CSC, *Inquiry into the Death of Jordan Dwyer and the Role of the Department of Community Services* (1997); and R West, “Putting DOCS in the Dock” (1996) 6 *Can Do* 1.

28. See, for example, M Chulov, “Why Did Kody Die? Police to Quiz DOCS Staff over Tragedy” *Sun-Herald* (6 December 1998) at 5; A Horin, “Tweed Heads Trauma for DOCS” *Sydney Morning Herald* (29 October 1998) at 3; and A Bernoth and D Murphy, “Tough Times at DOCS” *Sydney Morning Herald* (28 April 1998) at 15.

29. New South Wales, Council on the Cost of Government, *Review of Aspects of the Management of the NSW Department of Community Services* (1997); New South Wales, Royal Commission into the New South Wales Police Service, *Final Report. Volume V: The Paedophile Inquiry* (NSW Government, 1997), particularly ch 8; New South Wales, Child Death Review Team, *Annual Report 1996-1997* at Pt C; New South Wales, Legislative Council, Standing Committee on Social Issues, *Inquiry into Children’s Advocacy* (1996) at ch 3; New South Wales, Child Protection Council, *Systems Abuse: Problems and Solutions* (1994) at 39-42; and NCOSS, *The Relationship Between Community Based Organisations and the Department of Community Services (DOCS): Report on a Survey Undertaken by the New South Wales Council of Social Service* (Sydney, 1998). See Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report 84, 1997) at Ch 17.

30. R West, “Candidly Speaking” (1998) 14 *Can Do* 1 at 1.

31. B Semmler, *Submission* at 1; Barnardos Australia, *Submission* at 5; Burnside, *Submission* at 3; and *Confidential Submission 3* at 7.

the rights of community service consumers.<sup>32</sup> The decision and the surrounding events even led to a lengthy debate in Parliament, following an (ultimately unsuccessful) motion by the Shadow Minister for Community Services to condemn the Government's handling of the advertising of Mr West's position and calling upon the Government and Minister to withdraw what she claimed were misleading statements about the position made in the media.<sup>33</sup>

3.19 While the Commission makes no comment on the Minister's decision not to re-appoint Mr West, the appointment process does raise an important issue of principle. The very nature of the current Minister's portfolio responsibilities raises a potential conflict. As the NSW Council of Social Service ("NCOSS") pointed out:

Maintaining the capacity of the Commission to speak publicly about its findings is one of the surest ways of guaranteeing its independence.<sup>34</sup>

## Rationale for the current accountability mechanism

3.20 The CAMA Working Party carefully considered the most appropriate accountability mechanism to ensure that there was no perception of a conflict of interest. It was argued that including the CSC within the portfolio responsibility of the Minister for Community Services would ensure that it did not lose touch with the Minister and DOCS,<sup>35</sup> and that there was direct access to the Minister. In a paper delivered soon after the establishment of the CSC, the former Commissioner also noted that:

there is a body of opinion and theory that a Minister's responsibility in administering an area of activity should encompass the whole of that

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32. A Horin, "Outspoken Welfare Commissioner Finds he's out of a Job" *Sydney Morning Herald* (24 October 1998) at 1. A similar view is expressed in the following letters to the editor: J Jacobsen, Letter to the Editor, *Sydney Morning Herald* (27 October 1998) at 12; and J Simpson, Letter to the Editor, *Sydney Morning Herald* (27 October 1998) at 12.

33. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 28 October 1998 at 9091-9112.

34. NCOSS, *CAMA Submission* at 2.

35. At that stage DOCS also had responsibility for the issues now in the portfolio of ADD.

area including appropriate review, monitoring and quality control mechanisms, and that this is consistent with the “Westminster” notion of ministerial responsibility. I have the tentative view that, subject to ultimate oversight by the courts, this approach has significant merit and is more likely to produce the desired results both in individual cases and in addressing systemic problems. It may also help to avoid the levels of hostility and defensiveness that often develop and operate against the success of such schemes.<sup>36</sup>

However the Commissioner did acknowledge the argument that this arrangement could potentially reduce the independence of the CSC.<sup>37</sup> The CAMA Working Party, too, commented that the conflict of interest which it was keen to avoid was “reduced but not removed”.<sup>38</sup>

3.21 The CAMA Working Party considered whether to place the CSC within the portfolio responsibility of another Minister such as the Attorney General or the Minister for Consumer Affairs,<sup>39</sup> but rejected this. It was argued that on balance, and considering the desire by the community and Minister for prompt implementation of CAMA, it was “initially” preferable to make the CSC accountable to the Minister for Community Services. The CAMA Working Party did, however, raise the possibility that “at a later stage, this arrangement might be reviewed”.<sup>40</sup>

3.22 This raises the issue of whether it is now preferable to provide a different chain of accountability and oversight for the CSC.

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36. R West, “The New Community Services Review Package – A New Initiative in the Development of Modern Administrative Review Systems”, paper presented at the Australian Institute of Administrative Law (NSW Chapter) conference *The State of Administrative Law: Current Issues and Recent Developments* (Sydney, 4 November 1994) at 8-9.

37. R West, “The New Community Services Review Package – A New Initiative in the Development of Modern Administrative Review Systems”, paper presented at the Australian Institute of Administrative Law (NSW Chapter) conference *The State of Administrative Law: Current Issues and Recent Developments* (Sydney, 4 November 1994) at 8.

38. CAMA Working Party Report at 23.

39. Now the Minister for Fair Trading.

40. CAMA Working Party Report at 23.

## Alternative mechanisms of accountability

3.23 Submissions raised various alternative processes of accountability for the CSC. These included having another Minister involved, such as the Attorney General.<sup>41</sup> Other submissions suggested various other bodies. These included:

- the Premier, Leader of the Opposition and Chief Justice;<sup>42</sup> or
- a Parliamentary Joint Committee (“PJC”).<sup>43</sup>

### **A Parliamentary Joint Committee**

3.24 The most popular model favoured in submissions was a PJC to oversee the operation of the CSC and play a role in the appointment of the Commissioner and Community Visitors. A PJC is a committee made up of Members of Parliament from both Houses of Parliament.<sup>44</sup>

3.25 There are two types of PJCs: one is an ad hoc committee, appointed by resolution of both Houses for the life of a Parliament or to look at a specific issue,<sup>45</sup> while the other is a statutory committee, appointed under the provisions of an Act.<sup>46</sup> The latter is more relevant in this context. Usually the legislation sets out the terms of reference, powers and procedures of the

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41. Autism Association of NSW, *Submission* at 12; and People With Disabilities (NSW) Inc, *CAMA Submission* at 8 (this option was favoured in consultation with a PJC).

42. Barnardos Australia, *Submission* at 5; and NCOSS, *CAMA Submission* at 3.

43. NCOSS, *CAMA Submission* at 2; NSW Council for Intellectual Disability, *CAMA Submission* at 5; CSC, *CAMA Submission 1* at 11; Disability Safeguards Coalition, *CAMA Submission 1* at 12; Carers NSW Inc, *Submission* at 14; NSW Statewide Disability Coalition, *CAMA Submission* at 2; and Action for Citizens with Disabilities, *Submission* at 17.

44. Australia, *House of Representatives Practice* (2nd edition, AGPS, 1989) at 588.

45. Australia, *House of Representatives Practice* (2nd edition, AGPS, 1989) at 588.

46. For examples of statutory PJCs, see Australia, *House of Representatives Practice* (2nd edition, AGPS, 1989) at 588 for Commonwealth Committees; and *Independent Commission Against Corruption Act 1988* (NSW) Pt 7 for a NSW Committee.

PJC.<sup>47</sup> The Independent Commission Against Corruption<sup>48</sup> and the Health Care Complaints Commission<sup>49</sup> are useful models to consider for CAMA.

3.26 The legislation setting up these bodies typically contains a standard requirement that the PJC consist of three members from the Upper House and eight from the Lower, and that the appointment of members should follow the usual practices of Parliament for such appointments.<sup>50</sup> In practice this means that both major parties must be represented, and minor parties may also be represented.<sup>51</sup> The government of the day always has a majority of members.<sup>52</sup>

3.27 In the Commission's view a PJC is the most viable alternative to the current accountability arrangement. There are three main arguments in favour of this model. First, it is a multi-party process.<sup>53</sup> Since the Committee includes members from all political parties, it is most likely that it will elicit confidence from all the major stakeholders. As the CAMA Working Party observed, the *perception* of independence is of critical importance in maintaining community confidence in the CSC and encouraging consumers to make complaints.<sup>54</sup>

3.28 Secondly, PJCs are frequently used to oversee other independent "watchdog" bodies. For example, they are used for the Health Care Complaints Commission,<sup>55</sup> the Independent Commission Against Corruption,<sup>56</sup> and the NSW Ombudsman.<sup>57</sup> The relevant PJC is typically

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47. See, for example, *Independent Commission Against Corruption Act 1988* (NSW) Pt 7.

48. *Independent Commission Against Corruption Act 1988* (NSW) s 5A and Pt 7.

49. *Health Care Complaints Act 1993* (NSW) s 78 and Pt 4.

50. See, for example, *Independent Commission Against Corruption Act 1988* (NSW) s 65(1) and (2); *Ombudsman Act 1974* (NSW) s 31C(1) and (2); and *Health Care Complaints Act 1993* (NSW) s 67.

51. Changes to Acts such as the *Independent Commission Against Corruption Act 1988* (NSW) s 65 (amended in 1995) to increase the number of members from nine to 11 reflected the recognition of the need to include Independents and cross-benchers: information provided by R Miller, Clerk Assistant (Procedure), Legislative Assembly (12 February 1999).

52. Information provided by R Miller, Clerk Assistant (Procedure), Legislative Assembly (12 February 1999).

53. CSC, *CAMA Submission 1* at 11. See Carers NSW Inc, *Submission* at 14.

54. CAMA Working Party Report at 23.

55. *Health Care Complaints Act 1993* (NSW) s 78 and Pt 4.

56. *Independent Commission Against Corruption Act 1988* (NSW) s 5A and Pt 7.



given an oversight and monitoring role for the body and a power to approve appointments.<sup>58</sup> In its submission, the CSC claimed that it had as much need for independence and open accountability as these other bodies.<sup>59</sup> While it is not unprecedented for the appointment of a Commissioner (or equivalent) to be made by the relevant Minister, this is less common. For example, the Legal Services Commissioner is appointed by the Governor-in-Council on the recommendation of the Attorney General.<sup>60</sup> However, it is unlikely that the Attorney General would face the same issue of potential conflict of interest in relation to the Legal Services Commission as the Minister for Community Services does with the CSC. This is because the Attorney General is not a provider of the services being monitored, unlike the Minister for Community Services.

3.29 Thirdly, a PJC could enhance the public accountability of the CSC, since it provides a public forum for information about the CSC and its operations to be considered.<sup>61</sup> Provisions for PJC's in other Acts typically give the PJC responsibility for:

- monitoring and reviewing the body and the exercise of its functions and reporting to both Houses of Parliament on these issues (with any relevant comments);
- examining annual reports and reporting on any matter in those reports or arising out of them;
- reporting to both Houses on any recommended changes to the body's functions, structures and procedures; and
- inquiring into and reporting on any question in connection with the PJC's functions which is referred to it by both Houses.<sup>62</sup>

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57. *Ombudsman Act 1974* (NSW) s 6A(1) and Pt 4A. See also *Commission for Children and Young People Act 1998* (NSW) Pt 6 and Sch 1.

58. See, for example, *Independent Commission Against Corruption Act 1988* (NSW) s 5A and Pt 7.

59. CSC, *CAMA Submission 1* at 11.

60. *Legal Profession Act 1987* (NSW) s 129(1).

61. CSC, *CAMA Submission 1* at 11.

62. *Independent Commission Against Corruption Act 1988* (NSW) s 64; *Commission for Children and Young People Act 1998* (NSW) s 28; and *Health Care Complaints Act 1993* (NSW) s 65.

## Appointment of the Commissioner

3.30 One of the key responsibilities for the body or person with responsibility for oversight of the CSC is to appoint the Commissioner. For the reasons discussed above, the Commission favours appointment by the Governor-in-Council on the advice of the Minister, following approval by the PJC. It is also important that a comprehensive, transparent and open process of merit selection be used, including public advertisement of the position. There should also be community input into the process,<sup>63</sup> by, for instance, including community representatives on the selection panel for appointment.

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### RECOMMENDATION 6

**A Parliamentary Joint Committee should be established to oversee the operation of the Community Services Commission.**

**The Community Services Commissioner should be appointed by the Governor-in-Council, after approval by the Parliamentary Joint Committee.**

**The selection process for the Community Services Commissioner should include community input (for example, including community representatives on the selection panel).**

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## Term of appointment and re-appointment

3.31 The Act does not lay down a specific term of appointment for the Commissioner. However, it does provide that the employment of the Commissioner is subject to Part 2A of the *Public Sector Management Act 1988* (NSW), but is not subject to Part 2 of the Act.<sup>64</sup> This means that the Commissioner can hold office for a period up to five years, and is eligible for

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63. Action for Citizens with Disabilities, *Submission* at 17; Carers NSW Inc, *Submission* at 14; People With Disabilities (NSW) Inc, *CAMA Submission* at 7; and CSC, *CAMA Submission 1* at 14 and 53.

64. CAMA s 78(3).

re-appointment if he or she is suitably qualified.<sup>65</sup> Both Commissioners appointed to date have been given terms of five years.

3.32 In the Commission's view, the current term of appointment is appropriate. It is comparable to that for the heads of other "watchdog" bodies. A fixed-term contract is a standard provision. The terms used are typically either a maximum of five years<sup>66</sup> or seven years.<sup>67</sup> It provides adequate employment security for the Commissioner to act independently and allows him or her to undertake longer-term projects.<sup>68</sup> The CSC<sup>69</sup> and others<sup>70</sup> argued that the term should be *required* to be five years (rather than a maximum) to enhance independence. Whilst in the Commission's view it would generally be unsatisfactory to appoint Commissioners for periods of less than five years, the provision of a mandatory term would be inconsistent with practice for other comparable organisations. However, the Commission considers that it is unnecessary to adopt the practice of some other complaints bodies of limiting the Commissioner's total length of appointment (including any re-appointments) to a certain period, such as five<sup>71</sup> or ten<sup>72</sup> years.

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#### **RECOMMENDATION 7**

**There should be no change to s 78(3). The Community Services Commissioner may be appointed for a term of up to five years and is eligible for re-appointment.**

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65. *Public Sector Management Act 1988* (NSW) s 42F.

66. *Health Care Complaints Act 1993* (NSW) s 77(1); *Commission for Children and Young People Act 1998* (NSW) s 5(2) and (3); and *Independent Commission Against Corruption Act 1988* (NSW) s 4(1).

67. *Ombudsman Act 1974* (NSW) s 6(2); and *Legal Profession Act 1987* (NSW) s 129(3) and (4).

68. CSC, *CAMA Submission 1* at 11.

69. CSC, *CAMA Submission 1* at 11.

70. The Northcott Society, *Submission* at 3; Action for Citizens with Disabilities, *Submission* at 17; Carers NSW Inc, *Submission* at 17; *Confidential Submission 3* at 7; CSC, *CAMA Submission 1* at 11; and People With Disabilities (NSW) Inc, *CAMA Submission* at 7.

71. *Independent Commission Against Corruption Act 1988* (NSW) s 4(2).

72. *Health Care Complaints Act 1993* (NSW) s 77(2); and *Commission for Children and Young People Act 1998* (NSW) s 5(3).

## Termination of appointment

3.33 The Act states that the Commissioner can be removed by the Governor, but only for “incapacity, incompetence or misbehaviour”,<sup>73</sup> but does not explain what behaviour would satisfy these criteria. This is identical to the criteria used for dismissal of the Health Care Complaints Commissioner,<sup>74</sup> the Legal Services Commissioner,<sup>75</sup> and the Commissioner for Children and Young People.<sup>76</sup> For some ‘watchdog’ bodies such as the Independent Commission Against Corruption<sup>77</sup> and the NSW Ombudsman,<sup>78</sup> dismissal can only be by the Governor-in-Council on the address of both Houses of Parliament.

3.34 It is important that the dismissal criteria be transparent and specific.<sup>79</sup> As has been commented in relation to the New York Commission, this assures explicit protection from “political retribution”.<sup>80</sup> The Commission considers that the current criteria for dismissal of the Commissioner preclude this possibility.<sup>81</sup>

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### RECOMMENDATION 8

**The criteria for dismissal of the Community Services Commissioner in s 78(4) should be retained.**

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73. CAMA s 78(4).

74. *Health Care Complaints Act 1993* (NSW) s 77(3).

75. *Legal Profession Act 1987* (NSW) s 129.

76. *Commission for Children and Young People Act 1998* (NSW) s 5(4).

77. *Independent Commission Against Corruption Act 1988* (NSW) Sch 1 cl 6(2).

78. *Ombudsman Act 1974* (NSW) s 6(5).

79. Carers NSW Inc, *Submission* at 14. See also NSW Statewide Disability Coalition, *Submission* at 2.

80. N K Ray, “Elements of an Effective Governmental Watchdog Agency” in V J Bradley and H A Bersani (ed), *Quality Assurance for Individuals with Developmental Disabilities* (Paul H Brookes Publishing Co, Baltimore, 1990) at 177.

81. Carers NSW Inc, *Submission* at 14.

## **FUNCTIONS OF THE CSC**

### **Current functions of the CSC**

3.35 Under CAMA, the CSC has four broad functions: handling of complaints, monitoring and inquiry, review, and education and development.<sup>82</sup> The nature and appropriateness of each of these is discussed below.

### **Exercising the CSC's functions**

3.36 In exercising its functions, the CSC must, whenever possible:

- consult and co-operate with relevant investigative agencies and those concerned with determining the rights and interests of consumers;
- consult people and groups with an interest in the provision of community services, particularly consumer organisations and their advocates; and
- have regard to the needs of consumers (such as children) who are least likely or able to complain.<sup>83</sup>

The CSC must also comply with the general principles laid down for the operation of the bodies established under CAMA. These general principles are described in Chapter 2.<sup>84</sup>

3.37 In the Commission's view, in association with the general set of principles recommended to guide the functions of all bodies created by CAMA,<sup>85</sup> these provide appropriate legislative guidance to the CSC on how to exercise its functions.

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82. CAMA s 11 and 83.

83. CAMA s 83(2).

84. See para 2.20.

85. See Recommendation 2 at 2.32.

## Other potential functions for the CSC

3.38 The NSW Government argued that the CSC's current functions are adequate and do not need to be expanded.<sup>86</sup> However, a number of other submissions suggested some additional functions that could be exercised by the CSC. Most of these are discussed under the relevant heading (complaints, monitoring and inquiry, review, and education and development) below. Two other suggestions did not fall within any of these existing functions: these were facilitating improved relations for the benefit of consumers, and distributing funding for advocacy.

### ***Facilitating improved relations for the benefit of consumers***

3.39 The CSC has recently begun to perform a role in promoting and facilitating improved relationships between various stakeholders in the community services area, in order to improve services to consumers.<sup>87</sup> For example, it has played a role in facilitating the Transition Plan Appeals Working Group, which has developed a strategy for resolving the outstanding transition plan appeals.<sup>88</sup> The Working Group has also examined ways in which to improve collaboration to resolve disputes and determine issues, policy directions and advice to government.<sup>89</sup> The group has representatives from consumer and service provider peak bodies and government agencies. As another example, in response to concerns raised by the Foster Care Association, the CSC chaired a series of "round table" discussions between DOCS and foster carers to assist in the development of an action plan for the management of foster care by DOCS.<sup>90</sup>

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86. NSW Government, *CAMA Submission* at 5.

87. CSC, *CAMA Submission 1* at 17; and People With Disabilities (NSW) Inc, *CAMA Submission* at 9.

88. People With Disabilities (NSW) Inc, *CAMA Submission* at 9. In 1996, People With Disabilities (NSW) Inc and NSW Council for Intellectual Disability lodged appeals under clause 6(1)(c) of the CAMA Regulation against the Minister's decisions to adopt transition plans for 189 disability services. Two were chosen as test cases. In March 1998, the Minister asked the Community Services Commissioner to convene a "Transition Plan Appeals Working Group" to work out how to resolve the outstanding appeals. A large number were sought to be resolved through mediation: New South Wales, CSAT, *Annual Report 1996-1997* at 12 and New South Wales, CSAT, *Annual Report 1997-1998* at 12-13. See also para 5.137 and 5.142-5.147.

89. New South Wales, CSC, *Annual Report 1997/98* at 36.

90. CSC, *CAMA Submission 1* at 17.

3.40 In the Commission's view, the CSC can play an important role as an independent broker in these sorts of situations. This should be formally recognised as one of the statutory functions of the CSC.<sup>91</sup>

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## RECOMMENDATION 9

**The functions of the Community Services Commission should include the promotion and encouragement of improved relationships between service providers, consumers, family members, carers, advocates and their representatives.**

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### ***Administration of funding to advocacy programs***

3.41 It was also suggested in some submissions that responsibility for distributing funding to advocacy programs for people with a disability and children should be given to an independent body. Some submissions suggested this role could be performed by the CSC.<sup>92</sup> Others favoured the establishment of a separate body under CAMA.<sup>93</sup> For example, it was suggested that such a body could be administratively attached to the CSC and either be a body responsible to a Minister who made final funding decisions, or an Advocacy Board with one or more members.<sup>94</sup> It was argued that there is a need for security of funding and that there is a conflict of interest in a government department fulfilling the role of administering funding for advocacy programs,<sup>95</sup> since such programs may wish to criticise those departments.<sup>96</sup>

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91. CSC, *CAMA Submission 1* at 17; and People With Disabilities (NSW) Inc, *CAMA Submission* at 9.

92. Institute for Family Advocacy and Leadership Development Association Inc, *Submission* at 12; and NSW Council for Intellectual Disability, *CAMA Submission* at 6 and *DSA Submission* at 13-14.

93. Disability Safeguards Coalition, *DSA Submission* at 4 and *CAMA Submission 2* at 2. See Carers NSW Inc, *Submission* at 13; and H Seares, *Submission* at 9.

94. Disability Safeguards Coalition, *CAMA Submission 2* at 2.

95. Institute for Family Advocacy and Leadership Development Association Inc, *Submission* at 12.

96. NSW Council for Intellectual Disability, *DSA Submission* at 14.

3.42 The importance of advocacy for people with disabilities is recognised in the DSA. The applications of principles specifically include the need to ensure that persons with disabilities have access to advocacy support so that they can participate in decisions about the services they receive.<sup>97</sup> The need for advocacy for children has also been clearly recognised.<sup>98</sup>

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97. DSA Sch 1 cl 2(1).

98. See, for example, New South Wales, Legislative Council, Standing Committee on Social Issues, *Inquiry into Children's Advocacy* (1996).



3.43 Although the Commission agrees that advocacy programs are vital, the distribution of funding for advocacy programs is not an appropriate function for the CSC. While the CSC has a duty under CAMA to “support the development of advocacy programs”,<sup>99</sup> the proposed function is of a very different nature to any of the CSC’s existing functions. Further, as has been argued in relation to the Commission for Children and Young People, there is a potential conflict of interest in locating advocacy and complaints-handling functions within the one body. A complaints-handling body must be impartial and deal with both the complainant and the agency in an even-handed manner. In contrast, an advocate promotes the interests of the individual or group it represents.<sup>100</sup>

3.44 The CSC and others have distinguished between systemic advocacy and individual advocacy.<sup>101</sup> A systemic advocate:

can look across the agencies providing services ... to identify duplication, gaps, conflicts, and poor practice, draw this to the attention of the agencies, Ministers, and the community, and work towards remedy of these problems.<sup>102</sup>

The CSC has played a role in systemic advocacy, and there is no conflict of interest in performing this role and dealing with complaints. As one commentator points out:

the two go hand in hand. More than that, they need to be together because unless you know what is happening at the grass roots level you have no basis for systemic arguments.<sup>103</sup>

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99. CAMA s 83(1)(i).

100. New South Wales, Office of Children and Young People, *A NSW Children’s Commission: Green Paper* (Sydney, 1997) at 18. See also NCOSS, *Response to the Green Paper, A NSW Children’s Commission, December 1997* (Sydney, 1998) at 7.

101. New South Wales, CSC, *Inquiry into Children’s Advocacy: Submission to the Committee of Inquiry by Community Services Commission* (1995) at 12; and P Parkinson, “Overview” in New South Wales, Child Protection Council, *Report of the ACWA, CPC, SNYPIC and YAPA Forum to Discuss the Green Paper “A NSW Children’s Commission”* (1998) at 7.

102. New South Wales, CSC, *Inquiry into Children’s Advocacy: Submission to the Committee of Inquiry by Community Services Commission* (1995) at 12.

103. P Parkinson, “Overview” in New South Wales, Child Protection Council, *Report of the ACWA, CPC, SNYPIC and YAPA Forum to Discuss the Green Paper “A NSW Children’s Commission”* (1998)

This is different from individual advocacy, which involves standing by a particular individual or group and representing their interests unreservedly.<sup>104</sup> Involvement in the distribution of funding to those performing individual advocacy is therefore not an appropriate function for the CSC.

3.45 It may be appropriate for a separate small body to be established under CAMA to fulfil the function of distributing funding for advocacy programs. The Commission makes no formal recommendation on this issue. Essentially it is a matter of whether appropriate resources are available to establish such a body.

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#### **RECOMMENDATION 10**

**The Community Services Commission should not be given an additional function of administering funding for advocacy programs.**

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### **COMPLAINTS HANDLING**

3.46 The CSC's complaints handling function involves:

- receiving, assessing, resolving and investigating complaints made under s 12;
- assisting service providers to improve their internal complaints procedures;
- helping consumers make complaints;
- providing information, education and training in making, handling and resolving complaints (and helping others to do so); and

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at 7; see also New South Wales, CSC, *Inquiry into Children's Advocacy: Submission to the Committee of Inquiry by Community Services Commission* (1995) at 12.

104. New South Wales, CSC, *Inquiry into Children's Advocacy: Submission to the Committee of Inquiry by Community Services Commission* (1995) at 18.

- reviewing the causes and patterns of complaints and identifying how these causes could be removed or minimised.<sup>105</sup>

### **When can a complaint be made?**

3.47 The CSC investigates complaints that a service provider has “acted unreasonably” in one of five ways:

- by not providing a community service to a particular person;
- by providing a community service to a particular person;
- the way in which a community service was provided to a particular person;
- by withdrawing or varying a community service to a particular person; or
- the way in which a community service is administered in relation to a particular person.<sup>106</sup>

3.48 Some submissions argued that the legislative definition should be broadened to allow for other cases which might fall outside the specified (and apparently exhaustive) categories.<sup>107</sup> However no examples were provided of cases that would not fit within these categories<sup>108</sup> and accordingly, the Commission does not consider this necessary.

### **Standing**

3.49 CAMA provides that a complaint may be brought to the CSC by any person with a genuine concern in the subject matter of the complaint, including a person who is responsible for, or is the next friend of, the person to whom the service was provided.<sup>109</sup> A person who the CSC believes is

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105. CAMA s 83(1)(e), (f), (g), (j) and (k).

106. CAMA s 12.

107. CSC, *CAMA Submission 2* at 22; Autism Association of NSW, *Submission* at 10; and Disability Safeguards Coalition, *CAMA Submission 1* at 7.

108. CSC, *CAMA Submission 2* at 22.

109. CAMA s 13.

unjustifiably interfering is not entitled to lodge a complaint.<sup>110</sup> In determining whether a person is unjustifiably interfering, the CSC must take into account the views and wishes of any other persons who have an interest in the matter.<sup>111</sup>

3.50 This provision is equivalent to the standing provision which applies to applications to the CS Division of the ADT.<sup>112</sup> Although the issue of standing before the ADT has attracted some controversy recently,<sup>113</sup> it is less contested, if at all, in its application to the CSC. It is generally agreed that, in view of the inability or reluctance of consumers to bring complaints, it is important that the standing provision be as broad as possible to allow complaints about service provision to be brought on behalf of consumers or in their interests.<sup>114</sup> The current standing provision is supported by the CSC.<sup>115</sup> It is also supported by the NSW Government which, in its submission, says that a broad standing provision is appropriate in respect of complaints to the CSC and is consistent with the policy to improve the informality of complaints to the CSC.<sup>116</sup> It says that, like the *Ombudsman Act 1974* (NSW), “any person” should be able to bring a complaint to the CSC.<sup>117</sup>

3.51 The Commission notes that the existing provision contains a built-in safeguard in that the CSC can reject a complaint brought by a person who it thinks is unjustifiably interfering in the matter. **The Commission considers that the current standing provision is appropriate and therefore makes no recommendations for change.**

## Procedures for withdrawing complaints

3.52 There is no requirement in CAMA that complaints to the CSC must be in writing. No submissions objected to this requirement. In contrast to the

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110. CAMA s 13(3).

111. CAMA s 13(4).

112. CAMA s 41.

113. See discussion of standing provision at para 5.137-5.155.

114. People With Disabilities (NSW) Inc, *CAMA Submission* at 12; Disability Safeguards Coalition, *CAMA Submission 1* at 13; Citizen Advocacy NSW, *Submission* at 9; and Barnardos Australia, *Submission* at 6.

115. CSC, *CAMA Submission 1* at 22.

116. NSW Government, *CAMA Submission* at 2.

117. *Ombudsman Act 1974* (NSW) s 12.

procedure for making complaints however, *withdrawal* of a complaint must be in writing.<sup>118</sup> Submissions expressed mixed views on the desirability of this provision. On the one hand, some favoured removing the requirement for written withdrawal to remove an inconsistency with the process for making complaints and encouraging the ease and informality associated with that process for complainants.<sup>119</sup> Complainants to the CSC may suffer from multiple disadvantages,<sup>120</sup> for example often having language or writing difficulties.<sup>121</sup> On the other hand, some supported the current provision because it means that a clear, considered decision has been made and documented about withdrawal.<sup>122</sup> On balance the Commission favours the latter view.

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#### RECOMMENDATION 11

**The requirement in s 15(1) for written withdrawal of a complaint should be retained.**

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3.53 When a complaint is withdrawn, the CSC still retains a discretion to continue dealing with the complaint where the matter either raises a significant issue of public safety or public interest, or a significant question as to the appropriate care or treatment of a consumer by a service provider.<sup>123</sup> There may be many pressures on complainants to withdraw, but it may still be appropriate for the CSC to continue its investigations.<sup>124</sup> **Therefore, the**

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118. CAMA s 15(1).

119. NSW Council for Intellectual Disability, *CAMA Submission* at 7; Disability Council of NSW, *Submission 2* at 39; Autism Association of NSW, *Submission* at 11; and CSC, *CAMA Submission* at 23.

120. CSC, *CAMA Submission 1* at 23; P Hutten, *CAMA Submission* at 26; People With Disabilities (NSW) Inc, *CAMA Submission* at 12; and NSW Government, *CAMA Submission* at 4.

121. CSC, *CAMA Submission 1* at 23.

122. Barnardos Australia, *Submission* at 7; and P Hutten, *CAMA Submission* at 27.

123. CAMA s 15(2).

124. CSC, *CAMA Submission 1* at 23; NSW Council for Intellectual Disability, *CAMA Submission* at 7; and People With Disabilities (NSW) Inc, *CAMA Submission* at 13.

**Commission considers that the CSC should retain its discretion to continue dealing with complaints which have been withdrawn.**

### **Procedures for dealing with complaints**

3.54 CAMA sets out the procedure the CSC must follow when a complaint is made. The steps include notifying the service provider, except in certain circumstances;<sup>125</sup> and carrying out a preliminary assessment during which a decision about how to proceed is made.<sup>126</sup> The options available are:

- referring the matter to the service provider for resolution;<sup>127</sup>
- referring it to voluntary alternative dispute resolution;<sup>128</sup>
- investigating it;<sup>129</sup>
- referring it elsewhere for investigation;<sup>130</sup> or
- declining to entertain it.<sup>131</sup>

3.55 The legislation includes time limits for the CSC to assess the complaint and to decide what to do with it,<sup>132</sup> a detailed list of reasons why the CSC might decide not to deal with a complaint,<sup>133</sup> the conciliator's functions<sup>134</sup> and requirements for notice to both parties at various stages.<sup>135</sup>

3.56 Soon after the establishment of the CSC, the former Commissioner argued that CAMA's encouragement of local dispute resolution and the requirement on service providers to establish local complaints handling mechanisms<sup>136</sup> were vital to help produce a cultural change in the community services sector towards a much greater "consumer focus" and willingness to

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125. CAMA s 25.

126. CAMA Pt 4 Div 2.

127. CAMA s 17(a).

128. CAMA s 23 and Pt 4 Div 3.

129. CAMA s 23 and Pt 4 Div 4.

130. CAMA s 20.

131. CAMA s 21.

132. CAMA s 19.

133. CAMA s 21.

134. CAMA s 30.

135. CAMA s 25.

136. See, for example, CAMA s 3(2)(e) and 83(1)(f) and (j).

“resolve grievances quickly, informally, at the coalface”.<sup>137</sup> The CSC has strongly promoted this philosophy in the way it deals with complaints, the vast majority of which do not proceed to the investigation stage. For example, in 1997-98 the CSC:

- received 1,689 contacts about complaints;
- dealt with 1385<sup>138</sup> (82%) of these as complaint inquiries;
- assessed 583 formal complaints;<sup>139</sup>
- referred 39 of these to service providers and other organisations for investigation;
- conducted one formal conciliation (which did not resolve the matter satisfactorily);<sup>140</sup> and
- fully investigated only 26 matters.<sup>141</sup>

3.57 If the CSC does decide to investigate a complaint, however, it is required to do this as soon as possible.<sup>142</sup> If the Commissioner thinks that there are grounds for making adverse comment about a service provider he or she must, before doing so, tell the service provider of these grounds and give the service provider an opportunity to respond in writing within 28 days or such longer period as the Commissioner allows.<sup>143</sup> The Commissioner is not required to give the service provider this opportunity if he or she is satisfied that it is in the public interest to take immediate action without informing the service provider.<sup>144</sup> After the investigation is completed, the Commissioner must provide a copy of the report (including any recommended action) to the

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137. R West, “The New Community Services Review Package – A New Initiative in the Development of Modern Administrative Review Systems”, paper presented at the Australian Institute of Administrative Law (NSW Chapter) conference *The State of Administrative Law: Current Issues and Recent Developments* (Sydney, 4 November 1994) at 10.

138. Calculated from data provided in New South Wales, CSC, *Annual Report 1997/98* at 25.

139. This included 309 new complaints and 247 complaints from 1996-97.

140. New South Wales, CSC, *Annual Report 1997/98* at 25 and 29.

141. New South Wales, CSC, *Annual Report 1997/98* at 25.

142. CAMA s 36(2).

143. CAMA s 37(1) and (2).

144. CAMA s 37(3).

complainant and the service provider against whom the complaint was made, and may give it to the Minister.<sup>145</sup>

3.58 Two aspects of the procedural requirements for dealing with complaints are discussed in more detail below.

***Streamlining complaints-handling provisions***

3.59 CAMA provides for the establishment of an Investigation Division and a Conciliation Division. This would appear to be to satisfy the CAMA Working Party's desire that:

so far as possible ... [the] functions [of investigation, mediation and conciliation] be administered separately by the ... [CSC] in order to maximise the effectiveness of these functions ...<sup>146</sup>

These separate units have not in fact been established by the CSC. Rather, all complaints assessments, investigations and conciliations are conducted from within one organisational unit: the Complaints, Investigation and Review Unit.<sup>147</sup>

3.60 CAMA also provides extremely detailed provisions on how each Division should deal with complaints.<sup>148</sup> The CAMA Working Party did not explain why this is,<sup>149</sup> although it appears to reflect concern that there be a clear and established process for dealing with complaints that would be known to all parties involved. This level of detail has however created problems in practice for the CSC.<sup>150</sup> It has been suggested that this part of the Act be simplified. There is no similar level of detail provided on how the CSC should exercise its other functions.<sup>151</sup> It has also been argued that the amount of detail makes the Act harder for people to understand, particularly

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145. CAMA s 38(1).

146. CAMA Working Party Report at 11.

147. The CSC reports that this has been more cost-effective than having separate divisions, and does not appear to have any disadvantages: CSC, *CAMA Submission 1* at 24.

148. CAMA Pt 4.

149. CAMA Working Party Report at 11.

150. CSC, *Preliminary Submission* (18 August 1998) at 4.

151. See, for instance, Pt 3 on how the CSC should conduct reviews of people in care.



consumers and their families and advocates.<sup>152</sup> As the NSW Ombudsman commented:

The effect is to proscribe and to limit the discretions available to the ... [CSC], often for little apparent purpose, as well as imposing administrative burdens which may not in practice serve any good purpose.<sup>153</sup>

This level of detail is also inconsistent with legislation governing other comparable complaints bodies.<sup>154</sup>

3.61 The Commission considers that Part 4 should be re-drafted to keep the core rights and powers in the Act, including moving any from the Regulation where necessary, and make the provisions less detailed and prescriptive. This approach was strongly supported in submissions.<sup>155</sup>

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## RECOMMENDATION 12

**Part 4 should be redrafted to ensure that it contains all core provisions conferring substantive rights and duties on the Community Services Commission and on parties involved in complaints.**

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152. P Hutten, *CAMA Submission* at 20 and 27. See also Disability Council of NSW, *Submission 2* at 39.

153. NSW Ombudsman, *Submission* at 4.

154. NSW Ombudsman, *Submission* at 4. For example, see *Health Care Complaints Act 1993* (NSW) Pt 2; *Independent Commission Against Corruption Act 1988* (NSW) Div 2; and *Ombudsman Act 1974* (NSW) Pt 3.

155. NCOSS, *CAMA Submission* at 7; Barnardos Australia, *Submission* at 7; Western Sydney Intellectual Disability Support Group Inc, *CAMA Submission* at 2; Action for Citizens With Disabilities, *Submission* at 21; P Hutten, *CAMA Submission* at 27; and CSC, *CAMA Submission 1* at 23.

**All references in the Act to the Investigative Division and the Conciliation Division of the Community Services Commission should be removed. Section 16 should be repealed, and other related sections amended to delete references to these Divisions.**

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***Notifying the service provider of the complaint***

3.62 When the CSC is notified of a complaint about a service provider, it must give written notification to the service provider of:

- the fact that the complaint was made;
- the nature of the complaint; and
- the identity of the complainant.<sup>156</sup>

3.63 However, this notification is not required where the notification will, or is likely to:

- prejudice the investigation of the complaint;
- place the health or safety of a client at risk; or
- put the complainant at risk of intimidation or harassment.<sup>157</sup>

Submissions generally felt that this provision was satisfactory.<sup>158</sup> **The Commission does not consider it requires amendment.**

***Timeframes for assessment***

3.64 CAMA sets down specific time limits for completion of assessments by the CSC after it receives a complaint. These are:

- If the CSC has not asked for more information from either party, it must assess the complaint as soon as possible, but not later than 28 days after receiving the complaint.<sup>159</sup>

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156. CAMA s 14(1).

157. CAMA s 14(2).

158. NCOSS, *CAMA Submission* at 7; CSC, *CAMA Submission 1* at 24; Barnardos Australia, *Submission* at 7; and NSW Council for Intellectual Disability, *CAMA Submission* at 7.

159. CAMA s 19(1).

- If the CSC has asked for more information, it has 28 days from the date specified in the request for more information.<sup>160</sup> If the request made is to someone other than the complainant, the CSC must tell the complainant it needs more time to assess the complaint and get their agreement to this specified date.<sup>161</sup>

3.65 There are competing factors to be considered in assessing whether this section requires reform. On the one hand, most submissions on this issue favoured the current provision. They stressed the importance of this relatively short time limit, since it provides some assurance to complainants that their complaints will be dealt with in this timeframe.<sup>162</sup> Often parties to complaints feel that their life is “put on hold” while awaiting the outcome of an assessment.<sup>163</sup> On the other hand the CSC finds that, in reality, 28 days is usually an insufficient time period to conduct a comprehensive assessment, particularly given the complexity of many complaints and the need to obtain written information from the parties involved.<sup>164</sup> The CSC also spends considerable time and resources in helping consumers to complain effectively.<sup>165</sup>

3.66 Comparable complaints bodies adopt a variety of approaches: they either do not have a mandatory period for assessment of complaints at all;<sup>166</sup> require only that the investigation be “conducted as expeditiously as possible”;<sup>167</sup> or specify a longer timeframe than in CAMA, for example, 60 days for the Health Care Complaints Commission (“HCCC”).<sup>168</sup>

3.67 In balancing the competing considerations outlined above, the Commission’s conclusion is that the current time limit should be retained. Although in reality the deadline laid down cannot always be met, it is important to retain this in the legislation as a target for which to aim. The

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160. CAMA s 19(2) and (3).

161. CAMA s 19(3).

162. People With Disabilities (NSW) Inc, *CAMA Submission* at 14; Autism Association of NSW, *CAMA Submission* at 11; and Action for Citizens with Disabilities, *Submission* at 20.

163. Disability Safeguards Coalition, *CAMA Submission 1* at 4.

164. CSC, *CAMA Submission 1* at 25.

165. CSC, *CAMA Submission 1* at 25.

166. *Ombudsman Act 1974* (NSW).

167. *Legal Profession Act 1987* (NSW) s 154.

168. *Health Care Complaints Act 1993* (NSW) s 22.

Commission also considers that the 60 days set down for the HCCC is too long a period to adopt in this context.<sup>169</sup>

3.68 Nonetheless, at least some submissions favoured a limited, structured discretion to extend the time period, in recognition of the fact that there will be some cases which require a longer timeframe for an adequate assessment.<sup>170</sup>

3.69 The Commission does not support the inclusion in the Act of a discretion to allow the CSC to extend the time period for the assessment. Rather, in the small number of cases when a complaint cannot be dealt with within the specified timeframe, the CSC should notify the parties that it proposes to continue the investigation and the reasons for it. The CSC should also be required to report on the number of such cases and the reasons for the extension in its Annual Report.

3.70 The Act should also provide that where the deadlines in the Act are not met, this does not in itself invalidate the findings or decisions of the CSC. This is to protect the CSC from any challenges on this basis. There are other Acts which similarly provide that actions taken under them are not to be invalidated merely because of a failure to comply with the statutory requirements laid down.<sup>171</sup>

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169. The CSC reports from its consultations that most consumer and advocacy groups also feel that 60 days is too long: CSC, *CAMA Submission 1* at 25.

170. People With Disabilities (NSW) Inc, *CAMA Submission* at 14; Autism Association of NSW, *Submission* at 11; and Disability Council of NSW, *Submission 2* at 41.

171. See, for example, *Social Security Act 1991* (Cth) s 1281(3) and 1244(2); *Administrative Appeals Tribunal Act 1975* (Cth) s 27A(3); and *Police Service Act 1990* (NSW) s 138(1).

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**RECOMMENDATION 13**

**Section 19 should be amended to provide that where the Community Services Commission is unable to deal with a complaint within the specified timeframe and where it proposes to continue its investigation, the Community Services Commission must notify all parties of this fact and the reasons for it.**

**The Community Services Commission should also be required to report on the number of such cases and reasons for the extension of the timeframe in its Annual Report.**

**Section 19 should also provide that failure to comply with the specified timeframe does not invalidate any finding or decision of the Community Services Commission.**

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***Written notice of a complaint by the CSC***

3.71 The CSC is required to give the service provider who is the subject of a complaint written notice of this fact when they receive a complaint.<sup>172</sup> The CSC argued that this should be modified to require the CSC to provide written notification within a certain timeframe (for example, seven days) rather than “on receiving a complaint”.<sup>173</sup> The CSC also argued that this notice should not be required where the complaint has been resolved. This is because many complaints are dealt with and resolved very quickly, making the requirement for notification unnecessary.<sup>174</sup> In practice the CSC has tended to categorise concerns raised with them as “inquiries” or “contacts” rather than “complaints” in order to avoid the need to comply with this requirement.<sup>175</sup>

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172. CAMA s 14(1).

173. Information supplied by the CSC (18 March 1999).

174. Information supplied by the CSC (18 March 1999).

175. Information supplied by the CSC (18 March 1999).

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**RECOMMENDATION 14**

**Section 14(1) should be amended to require the Community Services Commission to give written notice of the making of a complaint to the person against whom the complaint is made within seven days unless the complaint has been resolved.**

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***Alternative dispute resolution***

3.72 CAMA allows the CSC to refer a complaint to alternative dispute resolution (“ADR”).<sup>176</sup> ADR refers to a wide range of non-litigious mechanisms to resolve disputes, including mediation, conciliation and negotiation.<sup>177</sup> Various forms of ADR are now used in a wide variety of legal contexts, such as disputes in family, commercial, intellectual property, tenancy, personal injury and industrial relations law. In his Second Reading Speech on CAMA, the then Minister for Community Services hailed the availability of ADR as an “especially innovative” way of dealing with complaints.<sup>178</sup>

3.73 CAMA describes the process of ADR as “conciliation”.<sup>179</sup> The criteria for referral to ADR are that:

- it appears to the CSC that the complainant has taken all reasonable steps to resolve the matter with the service provider; and
- both parties consent.<sup>180</sup>

When the conciliation proceedings are completed, the conciliator must report the outcome to the CSC, who must then notify the parties. The report by the

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176. CAMA s 22.

177. See H Astor and C Chinkin, *Dispute Resolution in Australia* (Butterworths, Sydney, 1992) at 66-68.

178. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 11 March 1993, the Hon J Longley, Minister for Community Services, Second Reading Speech at 768.

179. CAMA Pt 4 Div 3.

180. CAMA s 22.

conciliator may include a recommendation that the Commission conduct an investigation of the complaint.<sup>181</sup>

3.74 In practice, there have been few formal conciliations conducted by the CSC.<sup>182</sup> In 1997-98, only one was conducted, and this did not achieve an outcome which satisfied all parties.<sup>183</sup> In the three preceding financial years, there were only a total of 23 formal conciliations conducted.<sup>184</sup> According to the CSC, ADR is used relatively infrequently since complaints tend to fall into two categories. On the one hand, the majority of complaints are relatively easy to resolve, and are therefore dealt with by less formal means than ADR.<sup>185</sup> This includes providing information to encourage dispute resolution at a local level by the parties themselves, or assisting in this process by informally contacting the service provider.<sup>186</sup> Although the CSC classifies these matters as locally resolved, they could also be regarded as having been resolved by ADR.<sup>187</sup> On the other hand, there are disputes for which ADR is inappropriate, either because they are very protracted (and therefore the parties are unlikely to agree to, or successfully use, ADR), or they involve abuse or poor treatment of residents.<sup>188</sup>

3.75 There was general recognition in submissions that ADR will be inappropriate in some situations. These include cases where there is evidence of imminent harm or the threat of harm,<sup>189</sup> violence,<sup>190</sup> other significant abuses of human rights,<sup>191</sup> or marked power imbalances.<sup>192</sup> Submissions

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181. CAMA s 34.

182. CSC, *CAMA Submission 1* at 27.

183. New South Wales, CSC, *Annual Report 1997/98* at 29.

184. New South Wales, CSC, *Annual Report 1997/98* at 29.

185. Information supplied by CSC (23 March 1999) at 5. See para 3.56.

186. I Robinson, "Good CAMA: What We Do – The Community Service Commission Handles Complaints, Reviews People in Care, and Conducts Enquiries. Part 1" (1997) 10 *Can Do* 6 at 6-7. See also New South Wales, CSC, *Annual Report 1997/98* at 29.

187. I Robinson, "Good CAMA: What We Do – The Community Service Commission Handles Complaints, Reviews People in Care, and Conducts Enquiries. Part 1" (1997) 10 *Can Do* 6 at 7.

188. Information supplied by CSC (23 March 1999) at 5.

189. NCOSS, *CAMA Submission* at 8.

190. NCOSS, *CAMA Submission* at 8; Autism Association of NSW, *Submission* at 11; and People With Disabilities (NSW) Inc, *CAMA Submission* at 15.

191. Disability Safeguards Coalition, *CAMA Submission 1* at 13.

varied in their views on the extent to which ADR would be desirable and useful to resolve complaints. For example, one service provider wanted greater prominence given to ADR in the legislation and for its use to be encouraged,<sup>193</sup> whilst another service provider argued that ADR would generally be inappropriate since by the time an issue reaches the complaint stage most alternative informal means of resolution have usually been explored.<sup>194</sup> Nonetheless, there was general support in submissions for the retention of ADR as one of the methods available to the CSC for resolving complaints.<sup>195</sup>

It was claimed in one submission that ADR has the potential not only to resolve complaints, but also to improve relationships between the parties involved.<sup>196</sup> ADR is also commonly available for use by other complaints bodies.<sup>197</sup>

3.76 CAMA places a blanket restriction on the disclosure of information in any context obtained during the conciliation, and imposes a financial penalty for its breach.<sup>198</sup> The legislation governing other complaints bodies likewise restricts disclosure of this information, although the CAMA restriction is broader in prohibiting disclosure for any purpose rather than just in the course of legal or other official proceedings.<sup>199</sup> Although the CSC favoured narrowing the restriction in this way,<sup>200</sup> in the Commission's view this is undesirable. The provision is important to ensure as full and frank disclosure as possible during the conciliation. **This and the other provisions on ADR should therefore not be amended.**

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192. Autism Association of NSW, *Submission* at 11; and People With Disabilities (NSW) Inc, *CAMA Submission* at 15.

193. Burnside, *Submission* at 1.

194. Barnardos Australia, *Submission* at 7.

195. CSC, *CAMA Submission 1* at 27; Disability Council of NSW, *Submission 2* at 43; NSW Council for Intellectual Disability, *CAMA Submission* at 8; and *Confidential Submission 3* at 11. But see P Hutten, *CAMA Submission* at 31.

196. People With Disabilities (NSW) Inc, *CAMA Submission* at 15.

197. *Health Care Complaints Act 1993* (NSW) Div 8; *Legal Profession Act 1987* (NSW) Div 4; and *Ombudsman Act 1974* (NSW) s 13A.

198. CAMA s 32.

199. *Health Care Complaints Act 1993* (NSW) Div 8; *Legal Profession Act 1987* (NSW) Div 4; and *Ombudsman Act 1974* (NSW) s 13A.

200. CSC, *CAMA Submission 1* at 57-58.



## Protection of complainants from retributive action

3.77 The Act protects complainants from retributive action being taken against them because they have made or propose to make a complaint to a service provider, the CSC, a Community Visitor or the CSAT. This also covers a person who provides information, documents or evidence to any of those bodies.<sup>201</sup> This is an important provision, since the Commission's focus groups with consumers found that fear of retribution (for example, loss of services) was one of the factors which would discourage them from complaining.<sup>202</sup>

3.78 In practice the provision has never been used.<sup>203</sup> People With Disabilities (NSW) Inc argue that the police are reluctant to act on or enforce this provision.<sup>204</sup> It suggested that the CSC become the primary investigator of such complaints, and be able to refer matters to the Director of Public Prosecutions.<sup>205</sup> The Commission does not consider that the CSC has the expertise to undertake this role. Nor is it appropriate for the resources of the CSC to be diverted to fulfil what is essentially a police function.

3.79 The Commission does consider, however, that the Act should be amended to state that a service user is protected by the retribution provision even if he or she was not the person making the complaint or providing information, documents or evidence. Currently this is not the case.

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### RECOMMENDATION 15

**Section 117(1) should include retribution against a service user as a ground for the offence, in addition to retribution against a person who makes a complaint or provides information, documents or evidence.**

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201. CAMA s 117(1). The defendant in such an action potentially faces a financial penalty and maximum prison sentence of 12 months.

202. RR 9 at para 1.146.

203. CSC, *CAMA Submission 1* at 56.

204. People With Disabilities (NSW) Inc, *CAMA Submission* at 20.

205. People With Disabilities (NSW) Inc, *CAMA Submission* at 20.

## Protected Disclosures Act 1994 (NSW)

3.80 Section 117 protects those who make complaints to a service provider or to one or more of the bodies established under CAMA. The CSC suggested that the protection afforded to staff members who make complaints should be further bolstered by amending the *Protected Disclosures Act 1994* (NSW). This Act provides protection from reprisal for public officials who report corrupt conduct, maladministration or waste within the public sector to “investigating authorities”. “Investigating authorities” is currently defined to include the Auditor-General, the NSW Ombudsman, the Independent Commission Against Corruption, the Police Integrity Commission and the Police Integrity Commission Inspector.<sup>206</sup>

3.81 The CSC argued that it should also be included within the definition of an “investigating authority”, so that public officials (in this context, employees of DOCS and ADD) who complain to the CSC would be covered by the *Protected Disclosures Act 1994* (NSW).<sup>207</sup> A person found guilty of taking action in retribution against a public official who reports corrupt conduct, maladministration or waste is liable to a financial penalty or a prison sentence of up to 12 months.<sup>208</sup>

3.82 When the CSC was established in 1994, responsibility for investigating the majority of complaints concerning services provided by DOCS, ADD and the Home Care Service was transferred from the NSW Ombudsman to the CSC.<sup>209</sup> CAMA states that complaints about the conduct of public authorities within the CSC’s jurisdiction cannot be investigated by the NSW Ombudsman except in very limited circumstances.<sup>210</sup> Whereas previously, disclosures concerning maladministration, waste or corrupt conduct would have been protected under the Ombudsman legislation, it appears that since the introduction of the *Protected Disclosures Act 1994* (NSW), such disclosures are no longer protected.<sup>211</sup>

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206. *Protected Disclosures Act 1994* (NSW) s 4.

207. CSC, *CAMA Submission 1* at 56.

208. *Protected Disclosures Act 1994* (NSW) s 20.

209. New South Wales, Committee on the Office of the Ombudsman and the Police Integrity Commission, *Review of the Protected Disclosures Act 1994* (NSW Parliament, Sydney, 1996) (“*Protected Disclosures Act 1994 Report*”) at 29.

210. CAMA s 121(1).

211. *Protected Disclosures Act 1994 Report* at 30.

3.83 The Committee reviewing the *Protected Disclosures Act 1994* (NSW), however, decided that it was inappropriate to make the CSC an “investigating authority” for two main reasons. First, there was concern that creating further “investigating authorities” would “lead to confusion, duplication of effort and co-ordination problems”, since those bodies currently defined as “investigating authorities” are the specialists in dealing with issues of corrupt conduct, maladministration or waste.<sup>212</sup> The Committee felt these bodies were “best placed to receive and investigate protected disclosures”.<sup>213</sup> It also stated that it was not in a position to assess the extent to which public officials are making disclosures to bodies other than these.<sup>214</sup>

3.84 Secondly, the bodies which are currently defined as “investigating authorities” are independent of the Executive, but also accountable to the Legislature. It was felt to be inappropriate to make bodies which did not fulfil this criteria, such as the CSC, “investigating authorities”.<sup>215</sup> The Committee did, however, leave open the possibility that the issue may be re-examined when the Act is next reviewed.<sup>216</sup>

3.85 In the Commission’s view, there appears to be some justification to extend the protection of the *Protected Disclosures Act 1994* (NSW) to public officials making complaints to the CSC. Nonetheless the Commission considers that this issue is more appropriately considered when the next review of the *Protected Disclosures Act 1994* (NSW) is conducted later in 1999, rather than in the context of the review of CAMA. **Currently, however, the Commission does not support extension of the *Protected Disclosures Act 1994* (NSW) to cover the CSC.**

### What decisions of the CSC should be reviewable?

3.86 Decisions of an administrative nature made under an enactment which affect, or are likely to affect, the interests of a person should, in the

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212. *Protected Disclosures Act 1994* Report at 31.

213. *Protected Disclosures Act 1994* Report at 39.

214. *Protected Disclosures Act 1994* Report at 39.

215. *Protected Disclosures Act 1994* Report at 32.

216. The Act is required to be reviewed every two years by a Joint Parliamentary Committee: *Protected Disclosures Act 1994* (NSW) s 32.

Commission's opinion, be reviewable.<sup>217</sup> Currently, CAMA provides that only the following decisions of the CSC are reviewable:

- a decision to investigate a complaint, where that investigation is beyond its powers; and
- a decision of the CSC that was beyond its powers.<sup>218</sup>

These provisions are discussed in more detail in Chapter 5 where the Commission concludes that they are inappropriate for merits review and should be repealed.<sup>219</sup>

3.87 In the exercise of its complaints-handling functions, the CSC may make decisions which could significantly affect a person's interests. It may, for example, decline to entertain a complaint, dismiss a complaint or terminate a complaint.<sup>220</sup> In Chapter 5, the Commission recommends that these decisions should also be reviewable by the CS Division of the ADT.<sup>221</sup>

## Reasons for decisions

3.88 Providing an avenue for the review of administrative decisions, and thus making government accountable for decisions which affect the interests of persons, is the primary goal of an administrative law framework. A key element of this framework is ensuring that administrators give reasons for decisions which are reviewable.<sup>222</sup>

3.89 The Act provides that the CSC, among others, must give reasons for any reviewable decision it makes,<sup>223</sup> subject to certain exceptions.<sup>224</sup> A similar requirement applies generally to the public sector under the recently enacted ADT Act.<sup>225</sup> Significantly, the major difference between the two Acts is that CAMA requires reasons to be given to persons directly affected by the

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217. See para 5.51.

218. CAMA s 40(1)(b) and (c).

219. See para 5.95-5.96 and Recommendation 46.

220. CAMA s 21, 39(1)(a) and (b) respectively.

221. See para 5.97 and Recommendation 47.

222. See discussion at para 5.125-5.135.

223. CAMA s 114.

224. CAMA Reg cl 10(a)(i).

225. ADT Act s 49(1). See para 5.128-5.129.

reviewable decision automatically when notice of the decision is given. There is no need for a separate request to be made.

3.90 CAMA provides expressly that the CSC must give reasons to the complainant for any decision it makes to decline to entertain a complaint.<sup>226</sup> In the Commission's view, the CSC should also be required to give reasons for its decisions to dismiss or terminate a complaint. If these decisions become reviewable as recommended by the Commission,<sup>227</sup> CAMA will operate automatically to require the CSC to give notice of, and reasons for, such decisions.<sup>228</sup>

### **Notification of appeal rights**

3.91 Another key element of an administrative law framework is to ensure that persons affected by an administrative decision are aware of their rights to have the decision reviewed by a tribunal. The ADT Act achieves this by requiring the decision-maker to give notice of the decision to interested persons and inform them of their right to have the decision reviewed.<sup>229</sup> This requirement is now reflected in CAMA.<sup>230</sup> Clearly, if decisions of the CSC to decline to entertain a complaint, dismiss a complaint or terminate a complaint become reviewable, as recommended, the CSC will be required to give notice of the decision to any person directly affected by it and of that person's rights to appeal the decision.

## **MONITORING AND INQUIRY**

### **Current monitoring power**

3.92 The monitoring and inquiry functions of the CSC involve:

- inquiring into matters affecting service providers and consumers (on its own initiative or at the request of the relevant Minister); and

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226. CAMA s 25(3).

227. See para 5.97 and Recommendation 47.

228. CAMA s 114.

229. ADT Act s 48(1).

230. CAMA s 114(3).

- monitoring and reviewing the delivery of community services.<sup>231</sup>

Whereas the complaints function focuses attention on the problems of individuals, the monitoring function:

involves identifying patterns of complaints and grievances, and using other techniques to collect information and make observations about the performance of the decision-makers from a consumer perspective.<sup>232</sup>

3.93 This has allowed the CSC to conduct a number of major inquiries which have identified significant deficiencies which occur at a broader systemic level. These inquiries have included, for example, reports into:

- the use of solitary confinement and related issues at one large residential centre,<sup>233</sup> and a subsequent follow-up report on progress made in implementing the recommendations;<sup>234</sup>
- a performance audit report of large residential centres for people with a disability in conjunction with the Audit Office,<sup>235</sup> and subsequent development of a set of baseline criteria to ensure that residents' basic human and legal rights are protected;<sup>236</sup>
- an inquiry into the death of an individual child and the role of DOCS;<sup>237</sup>
- a report on the drift of children in care into the juvenile justice system,<sup>238</sup> and a subsequent follow-up report;<sup>239</sup> and

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231. CAMA s 83(1)(c) and (d).

232. R West, "Commentary" (1996) 24(2) *Federal Law Review* 343 at 345.

233. New South Wales, CSC, *Exclusionary Time-out or Solitary Confinement?* (1995).

234. New South Wales, CSC, *The Lachlan Inquiry 1998: An Assessment of the Standard of Care at the Lachlan Residential Centre and of Progress since the 1995 Investigation* (1998).

235. New South Wales, CSC, *Performance Audit Report: Large Residential Centres for People with a Disability in New South Wales* (1997).

236. New South Wales, CSC, *The Lachlan Inquiry 1998: An Assessment of the Standard of Care at the Lachlan Residential Centre and of Progress since the 1995 Investigation* (1998) at 5. See also New South Wales, Audit Office, Performance Audit Branch, *Methodology for the Review of Residential Services for People With Disabilities* (draft, April 1998).

237. New South Wales, CSC, *Inquiry into the Death of Jordan Dwyer and the Role of the Department of Community Services* (1997).

- a review of the respite care system.<sup>240</sup>

3.94 Submissions spoke very highly of the quality of the reports produced by the CSC.<sup>241</sup> The performance audit report also received a commendation in the 1997 Premier's Public Sector Awards for its contribution to improving services for people with a disability.<sup>242</sup>

3.95 The CAMA Working Party emphasised that the CSC's ancillary functions of monitoring, review and inquiry were of vital importance since the consumers it deals with:

are, due to factors such as disability or youth, very often vulnerable to abuse and exploitation, unaware of redress they can obtain and lacking the capacity or confidence to pursue redress. In the absence of ancillary functions a complaints body may well be assisting the more articulate and confident consumers whilst being of little use to those most in need of assistance.<sup>243</sup>

3.96 Although the NSW Government argued that the CSC needed to focus more on its complaints handling function,<sup>244</sup> some other submissions argued that there should be greater emphasis given to the CSC's other functions such as monitoring and inquiry<sup>245</sup> as well as review,<sup>246</sup> and education and development.<sup>247</sup> Many submissions<sup>248</sup> and participants at the Commission's

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238. New South Wales, CSC, *The Drift of Children in Care into the Juvenile Justice System: Turning Victims into Criminals* (1996).

239. New South Wales, CSC, *Just Solutions – Wards and Juvenile Justice* (1999).

240. New South Wales, CSC, *Respite Care – A System in Crisis: A Review of the Respite Care System in NSW by the Community Services Commission* (1998).

241. Burnside, *Submission* at 2; Citizen Advocacy NSW, *Submission* at 8; People With Disabilities (NSW) Inc, *CAMA Submission* at 8; and Barnardos Australia, *Submission* at 1. See also the advertisement "Strengthen the Community Services Commission" *Sydney Morning Herald* (10 December 1998) at 10.

242. New South Wales, CSC, *Annual Report 1997/98* at 33.

243. CAMA Working Party Report at 39.

244. NSW Government, *CAMA Submission* at 1.

245. Burnside, *Submission* at 3; NCOSS, *CAMA Submission* at 1; and CSC, *CAMA Submission* at 5.

246. NCOSS, *CAMA Submission* at 1; and CSC, *CAMA Submission* at 5.

247. CSC, *CAMA Submission* at 5.

248. Carers NSW Inc, *Submission* at 13; Physical Disability Council of NSW Inc, *Submission* at 12; Disability Safeguards Coalition, *CAMA Submission 1* at 3;

public seminars stressed that the CSC's systemic role needs to be preserved and strengthened. It was suggested that monitoring is vital to ensure that problems do not escalate to become complaints.<sup>249</sup> The importance of the CSC being able to initiate its own inquiries was also highlighted.<sup>250</sup> The former Commissioner has also described the monitoring function as:

an important and extremely valuable loop in the quality assurance and continuous improvement mechanisms which are so much a part of modern administration and managerialism.<sup>251</sup>

He has also commented that the CSC is aware of the need to “quarantin[e] resources away from complaints-handling” for the other functions of the CSC, to ensure that the CSC does not increasingly focus on complaints-handling as the number of complaints increases.<sup>252</sup>

### **Should the monitoring power be broadened?**

3.97 Some submissions favoured expanding the CSC's monitoring role to cover some specific types of monitoring. These were: reviewing and monitoring deaths of people with a disability in care; and monitoring compliance with various types of service standards.

#### ***Reviewing and monitoring deaths of people with a disability in care***

3.98 Following an informal process of monitoring deaths of people with a disability in care by the CSC,<sup>253</sup> a Disability Death Review Team was established within the CSC in December 1998. Its role is to investigate, review and monitor the deaths of adults and children with disabilities in government and non-government care, identify systemic problems and

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*Confidential Submission 2* at 39; and NSW Statewide Disability Coalition, *CAMA Submission* at 1.

249. Burnside, *Submission* at 3.

250. The Northcott Society, *Submission* at 3; Action for Citizens with Disabilities, *Submission* at 17; and Physical Disability Council of NSW Inc, *Submission* at 12.

251. R West, “Commentary” (1996) 24(2) *Federal Law Review* 343 at 345.

252. Evidence of R West taken on 29 November 1995 in New South Wales, Legislative Council, *Report of Proceedings Before Standing Committee on Social Issues: Children's Advocacy Hearing at Sydney on 29 November 1995* at 42.

253. New South Wales, CSC, *Annual Report 1997/98* at 35.



contribute to service improvement and preventative strategies.<sup>254</sup> Only deaths of “persons in care”<sup>255</sup> and “children in care”<sup>256</sup> in “visitable services”,<sup>257</sup> as defined under CAMA,<sup>258</sup> or temporarily absent from such services at the time of death,<sup>259</sup> are to be examined by the Disability Death Review Team.

3.99 The CSC envisages that the functions of the Disability Death Review Team will include:

- maintaining a register of deaths;
- assessing reports of deaths;
- providing oversight of reviews or investigations by service providers of the circumstances surrounding deaths;
- undertaking reviews or investigations where service providers are unable to perform this task or where it is in the public interest for the Disability Death Review Team to do so;
- monitoring actions by service providers after an investigation or review; and
- contributing to the development of strategies to ensure high quality service provision and minimise the occurrence of preventable deaths, by conducting and overseeing reviews and investigations and analysis of data.<sup>260</sup>

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254. New South Wales, *Public Service Notices: The Public Sector Information and Vacancies Weekly* (Issue no 32 98/99, 17 February 1999) at 16.

255. New South Wales, CSC and ADD, *Joint Submission to Minister* (for Community Services and Disability Services) (21 October 1998) Attachment 1 at 2.

256. Information supplied by CSC (23 March 1999) at 6.

257. New South Wales, CSC and ADD, *Joint Submission to Minister* (for Community Services and Disability Services) (21 October 1998) Attachment 1 at 2.

258. CAMA s 11(6) and 8(4) respectively.

259. New South Wales, CSC and ADD, *Joint Submission to Minister* (for Community Services and Disability Services) (21 October 1998) Attachment 1 at 2.

260. CSC, *CAMA Submission 3* at 1-2. The Mental Hygiene Medical Review Board of the New York Commission performs a comparable set of functions concerning deaths in mental health and intellectual disability services: New York State Commission on Quality of Care for the Mentally Disabled,

It has been estimated that the Disability Death Review Team would receive between 66 and 77 death reports annually, and undertake between 20 and 40 reviews or investigations.<sup>261</sup>

3.100 The role of the Disability Death Review Team differs from that of the coroner. The primary focus of the coroner is establishing the cause of death of a person, whereas the Disability Death Review Team has a much broader function of identifying systemic problems in policy and practice and preventative strategies.<sup>262</sup>

3.101 A number of submissions argued that there should be explicit reference to the Disability Death Review Team as one of the CSC's functions.<sup>263</sup> In the Commission's view, this is appropriate. Although the creation of this additional function will result in some overlap with the role of the Child Death Review Team in NSW,<sup>264</sup> the Commission does not consider that this creates a particular problem as there may be special issues concerning children with disabilities which are more appropriately dealt with by the Disability Death Review Team. Issues of overlap can be dealt with by way of protocols between them. These protocols are currently being developed.<sup>265</sup>

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## RECOMMENDATION 16

### **The functions of the Community Services Commission should include investigating, reviewing and monitoring deaths of "persons in care" and "children**

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"Deaths, Abuse/Neglect" (as at 3 March 1999)  
«<http://www.cqc.state.ny.us/death.htm>».

261. New South Wales, CSC and ADD, *Joint Submission to Minister* (for Community Services and Disability Services) (21 October 1998) at 1.
262. New South Wales, CSC and ADD, *Joint Submission to Minister* (for Community Services and Disability Services) (21 October 1998) Attachment 1 at 1.
263. CSC, *CAMA Submission 1* at 16; NSW Council for Intellectual Disability, *CAMA Submission* at 6; H Seares, *Submission* at 9; Disability Safeguards Coalition, *CAMA Submission 1* at 3; People With Disabilities (NSW) Inc, *CAMA Submission* at 3; and Citizen Advocacy NSW, *Submission* at 10.
264. *Children and Young Persons (Care and Protection) Act 1998* (NSW) Chap 11.
265. CSC, *CAMA Submission 3* at 1.

**in care” who reside in “visitable services” or are temporarily absent from such services at the time of death.**

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***Monitoring compliance with service standards***

3.102 Currently one of the functions of the CSC is to “promote and assist the development of standards for the delivery of community services”.<sup>266</sup> Some submissions argued that this should be further developed to give the CSC a role in monitoring compliance by community service providers with service standards.<sup>267</sup>

3.103 There were three areas identified in particular where the CSC should monitor standards:

- standards compliance and accreditation in the area of substitute care and Supported Accommodation and Assistance Program (“SAAP”) services;<sup>268</sup>
- transition plans under the DSA;<sup>269</sup> and
- s 9 plans under the DSA.<sup>270</sup>

3.104 In the Commission’s view, it is inappropriate for the CSC to be given functions relating to this form of monitoring. This is qualitatively very different to the form of monitoring which the CSC currently conducts, which

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266. CAMA s 83(1)(a).

267. Barnardos Australia, *Submission* at 6; CSC, *CAMA Submission 1* at 16.

268. CSC, *CAMA Submission 1* at 15-16; People With Disabilities (NSW) Inc, *CAMA Submission* at 9; and NCOSS, *CAMA Submission* at 3-4. See also NCOSS, *Discussion Paper on the Development of Standards for Children’s and Family Services and the Establishment of an Independent Monitoring Mechanism* (Sydney, 1996).

269. DSA s 7. NSW Council for Intellectual Disability, *CAMA Submission* at 6; and NCOSS, *CAMA Submission* at 3. For a discussion of transition plans under the DSA, see Report 91 at Chapter 6.

270. H Seares, *Submission* at 9; NCOSS, *CAMA Submission* at 3 and 10; Australian Quadriplegic Association Ltd (NSW), *Submission* at 4; Intellectual Disability Rights Service, *Submission* at 9; People With Disabilities (NSW) Inc, *CAMA Submission* at 19; and Physical Disability Council of NSW Inc, *Submission* at 4. Section 9 plans are discussed in detail in Report 91 at Chapter 4.

is extremely selective monitoring of services with a focus on identifying broad systemic problems. To undertake comprehensive monitoring of the compliance of all services with particular service standards is a very different task. Nor do other comparable complaints bodies have such roles. It is more appropriate for ADD to ensure compliance with the terms and conditions of the funding agreements it enters into with service providers, notwithstanding any criticism of the Department's shortcomings in doing so.

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#### **RECOMMENDATION 17**

**The Community Services Commission should not be given the function of monitoring compliance with service standards.**

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## **REVIEW**

### **Current review power**

3.105 CAMA empowers the CSC to review the situation of a “child in care” or a “person in care” either on application or on its own initiative.<sup>271</sup> The focus is on identifying what needs to be done to improve the situation of the child or adult being reviewed.<sup>272</sup> The CSC must look at such aspects as the welfare, status, progress and circumstances of the person as referred to in the application or as it thinks fit.<sup>273</sup> This includes:

- where the person is living and whether the child or adult is having any problems with the arrangement;
- what services the child or adult requires, such as accommodation, education, family support and advocacy;
- the future of the child or adult; and

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271. CAMA s 11(1).

272. New South Wales, CSC, “Reviews of People in Care” (pamphlet, 1996).

273. CAMA s 11(2).

- what actions are required to improve the quality of care and promote the welfare and interests of the child or adult.<sup>274</sup>

3.106 Reviews can be either “proactive” or “reactive”. “Proactive” reviews are initiated by the CSC, whereas “reactive” reviews are requested by someone concerned about the child or adult in care.<sup>275</sup>

3.107 The CSC uses three “vulnerability criteria” to determine which requests for review should be given priority. These are:

- the person’s vulnerability: their age, disability, limited communication, challenging behaviour or self-injury, dual diagnosis, Aboriginal and Torres Strait Islander people or people from a non-English speaking background;
- situational vulnerability: respite or institutional care, limited contact with family or advocate, involvement by the police, complexity, multiple services, isolation and safety issues; and
- the public interest: whether there are systemic issues involved.<sup>276</sup>

3.108 In undertaking a review the CSC can:

- inspect files, records and papers about the person held by the relevant Department and a service provider; and
- hear and receive submissions from anyone, including the person whose situation is being reviewed.<sup>277</sup>

When the review is finished, the CSC must provide a report to the Minister outlining the result of the review. This includes the CSC’s advice as to whether, in its opinion, any change in the person’s circumstances or status would promote the person’s welfare or interests, and if so what this change should be.<sup>278</sup>

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274. New South Wales, CSC, “Reviews of People in Care” (pamphlet, 1996).

275. New South Wales, CSC, “Reviews of People in Care” (pamphlet, 1996).

276. New South Wales, CSC, *Annual Report 1997/98* at 44.

277. CAMA s 11(4).

278. CAMA s 11(3).

## How effective is the review power?

3.109 Submissions argued that the review power is a very important one. For example, People With Disabilities (NSW) Inc argued that:

The CSC's review function has been very effective to date in promoting the interests of children and young people and adults with disability in care. The primary strengths of the function are its relatively expansive and flexible operation, and the capacity of the Commissioner to initiate a review (rather than relying on an external party to raise concerns). In practice, both the process and the recommendations arising from reviews of people in care have usually led to major improvements in their circumstances.<sup>279</sup>

This is consistent with the conclusion of the review of the CSC by the NSW Premier's Department in 1996, which argued that:

Feedback from key stakeholders suggests that these reviews are a valuable record and provide opportunities to identify systemic issues.  
...

This external auditing function should continue in its current form and with a focus on systemic issues.<sup>280</sup>

3.110 The CSC argued that the review power can also be a more appropriate mechanism than complaints for promoting the interests of people in care in some circumstances, since its approach is more positive and focused on the future in contrast to the backward-looking perspective of complaints. It also allows ongoing events in the person's life to be considered. This is particularly important for children and young people in care, whose life circumstances may often change rapidly.<sup>281</sup> Reviews have also allowed the CSC to identify systemic issues that affect people in care.<sup>282</sup>

3.111 The CSC's review function is "essentially a higher level of review" rather than a comprehensive review process.<sup>283</sup> In 1997-98, the CSC received

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279. People With Disabilities (NSW) Inc, *CAMA Submission* at 10. See also Disability Council of NSW, *Submission 2* at 34; Citizen Advocacy NSW, *Submission* at 8.

280. New South Wales, Premier's Department, *Community Services Commission Review Report* (1996) at 13.

281. CSC, *CAMA Submission 1* at 18.

282. New South Wales, CSC, *Annual Report 1996/97* at 35.

283. CSC, *CAMA Submission 1* at 18.

22 requests for reviews; it conducted reviews for 13 people and provided advice and support to six people.<sup>284</sup>

### Potential overlap with the role of the Children's Guardian

3.112 The new *Children and Young Persons (Care and Protection) Act 1998* (NSW) has a potential impact on the CSC's review power, since it provides for reviews of children and young people in care by the Children's Guardian.<sup>285</sup> The Act was assented to on 14 December 1998 but will not come into effect until the Regulation has been proclaimed. This will not be before January 2000.<sup>286</sup>

3.113 The new Act requires two levels of review for children and young people who are in out-of-home care as a result of an order by the Children's Court. First, "designated agencies" with responsibility for the placement of such children must review the placement to determine whether their safety, welfare and well-being is being promoted by the placement.<sup>287</sup> "Designated agencies" include both government service providers, and non-government service providers who have been duly accredited.<sup>288</sup> These reviews must be completed within statutory timeframes,<sup>289</sup> and in accordance with guidelines prepared by the Children's Guardian.<sup>290</sup> Reports of the reviews must be presented to the Children's Guardian.<sup>291</sup> The Children's Guardian is vested with the legal functions of guardianship, and promotes and safeguards the

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284. New South Wales, CSC, *Annual Report 1997/98* at 45.

285. *Children and Young Persons (Care and Protection) Act 1998* (NSW) Chap 8 Pt 2 Div 2.

286. Information supplied by DOCS (29 March 1999).

287. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 150(1).

288. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 139. To be accredited, agencies must comply with minimum standards to be set out in the Regulation to the Act: *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 139. As discussed at para 3.112, the Regulation is still to be drafted.

289. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 150(2) and (3).

290. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 150(4).

291. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 150(5).

welfare of children in substitute care.<sup>292</sup> The second level of review is to be conducted by the Children's Guardian, who can carry out reviews at any time.<sup>293</sup>

3.114 If this mechanism works effectively, it should largely satisfy the desire expressed by many for a comprehensive, systematic review process,<sup>294</sup> at least for children in care. This had been provided for in the Act which preceded the new legislation, the *Children (Care and Protection) Act 1987* (NSW). However, the relevant Part of that Act had never been proclaimed.<sup>295</sup> The lack of such a review mechanism was a key criticism of the old legislation.<sup>296</sup>

3.115 As discussed above, the new Act is not in force yet.<sup>297</sup> At this stage it is unclear precisely how this new review power will work in practice. However, there is an area of potential overlap between the reviews conducted by the Children's Guardian under the new Act, and those conducted by the CSC pursuant to its review power concerning children in care.

3.116 Some submissions raised the possibility that the reviews conducted by the Children's Guardian may subsume the CSC's review function in relation to children in care altogether.<sup>298</sup> In the Commission's view, it is preferable that the CSC retain this aspect of its review power for several reasons. First, the CSC's jurisdiction covers a broader group of children than the Children's Guardian. The reviews by the Children's Guardian only cover children in care pursuant to court orders, whereas the CSC's review power is not limited in this way and can cover children in temporary or voluntary care.<sup>299</sup> Secondly, although it is intended that the Office of the Children's

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292. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 181.

293. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 150(6).

294. Barnardos Australia, *Submission* at 6; NSW Council for Intellectual Disability, *CAMA Submission* at 5-6; NCOSS, *CAMA Submission* at 4-5; Disability Safeguards Coalition, *CAMA Submission 1* at 4; New South Wales, CSC, *Annual Report 1997/98* at 48; and New South Wales, Legislative Council, Standing Committee on Social Issues, *Inquiry into Children's Advocacy* (1996) at 177.

295. *Children (Care and Protection) Act 1987* (NSW) Pt 7.

296. New South Wales, DOCS, *Review of the Children (Care and Protection) Act 1987. Discussion Paper 1: Law and Policy in Child Protection* (1996) at 118.

297. See para 3.112.

298. NCOSS, *CAMA Submission* at 5.

299. *CAMA* s 11(6).



Guardian be a specialist and accountable unit which is operationally separate from the role of service provision, it is not intended to be a ‘watchdog’ agency in the same way as the CSC.<sup>300</sup> It is also important to retain the CSC’s focus on broader systemic issues and problems in this area. Thirdly, the number of reviews conducted by the CSC is so small that there is unlikely to be a major problem with overlap in practice.

3.117 The Commission believes that the CSC and the Children’s Guardian should develop protocols to deal with issues of overlap and thus minimise potential duplication of work.<sup>301</sup>

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**RECOMMENDATION 18**

**The Community Services Commission and the Children’s Guardian should develop protocols concerning reviews of children in care to ensure there is no unnecessary overlap in the work carried out by them.**

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**Should the review power be amended?**

3.118 There were two main issues concerning the review power: jurisdictional gaps, and the absence of guidelines governing how the review power should be exercised. The power to require a service provider to conduct a review under the direction of the CSC is also discussed later in this chapter.<sup>302</sup>

***Jurisdictional gaps***

3.119 ***Time frame for eligibility for review.*** The primary restriction on the exercise of the review power is that the person whose situation is to be reviewed must have been in care for at least three months, or for periods totalling six months in the

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300. New South Wales, DOCS, Legislative Review Unit, *Review of the Children (Care and Protection) Act 1987* (1997) at 104.

301. See NCOSS, *CAMA Submission* at 4-5.

302. See para 3.172-3.173.

12 months before the review.<sup>303</sup> Submissions argued that this was an unnecessary, arbitrary and artificial restriction.<sup>304</sup> It was claimed that a number of groups of very vulnerable children in care, or people with disabilities whom it might be expected that the review power would cover, fall outside this definition.<sup>305</sup> These include those who are homeless or itinerant, those who have been moved frequently between different facilities, and those who have been placed in respite or crisis services on a long-term basis but have been there for under three months.<sup>306</sup> Such people may be precisely those most in need of reviews because they “fall through the gaps” or do not find satisfactory long-term facilities. The Commission therefore recommends that this restriction on the exercise of the review power be removed.

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## RECOMMENDATION 19

**The time limit restriction on the exercise of the review power should be removed.**

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3.120 *Definition of person in care.* The jurisdiction of the review power is also limited by the definitions of “child in care” and “person in care”. A “child in care” includes a child who is:

- in the custody of the Director General of DOCS under a temporary care arrangement;
- living in a residential care centre;
- a foster child; or

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303. CAMA s 11(5).

304. Barnardos Australia, *Submission* at 6; CSC, *CAMA Submission 1* at 20; NCOSS, *CAMA Submission* at 5; and Physical Disability Council of NSW Inc, *Submission* at 13.

305. CSC, *CAMA Submission 1* at 20.

306. CSC, *CAMA Submission 1* at 20. See also Disability Council of NSW, *Submission 2* at 36.

- a State ward.<sup>307</sup>

A “person in care” is a person in the care of the Director General of DOCS, ADD or a service provider.<sup>308</sup>

3.121 Some suggestions were made in submissions concerning ways to expand the definition of one or both of these to include, for example:

- people under guardianship orders which make them subject to the guardianship of the Office of the Public Guardian or the financial management of the Office of the Protective Commissioner,<sup>309</sup> and
- people with a disability living in:
  - mental health facilities;<sup>310</sup>
  - licensed boarding houses;<sup>311</sup>
  - juvenile justice facilities;<sup>312</sup> or
  - accommodation rented in their own name.<sup>313</sup>

This issue is discussed below in the discussion of the CSC’s jurisdiction generally.<sup>314</sup>

3.122 **Reviewing groups of people in care.** The review power is focused on reviewing the circumstances of individuals. The CSC does not have a specific power to carry out reviews of groups of people in care. Where groups of individuals have shared common features, the CSC has relied on conducting a number of individual reviews.<sup>315</sup> For example, in 1996-97 an intensive review was conducted of 16 children living in the residential services Ormond and Minali, run by DOCS.<sup>316</sup> The CSC produced a report (which was

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307. CAMA s 11(6). This definition is to be amended by the *Children and Young Persons (Repeal and Amendment) Act 1998* (NSW) Sch 2.8. This Act has not yet come into effect.

308. CAMA s 11(6).

309. CSC, *CAMA Submission* at 20.

310. NSW Council for Intellectual Disability, *CAMA Submission* at 6; and Disability Council of NSW, *Submission 2* at 34.

311. NSW Council for Intellectual Disability, *CAMA Submission* at 6; Disability Council of NSW, *Submission 2* at 34.

312. Disability Council of NSW, *Submission 2* at 34.

313. Autism Association of NSW, *Submission* at 10.

314. See para 3.130-3.160.

315. Information supplied by CSC (23 March 1999) at 5.

316. New South Wales, CSC, *Annual Report 1996/97* at 33. See also New South Wales, CSC, *Annual Report 1997/98* at 4.

not publicly released), highlighting the unsatisfactory nature of large residential institutions for children. There has since been a general move away from such settings towards more individualised care. This has included the closure of Ormond and Minali, announced in October 1997<sup>317</sup> and completed in 1998.<sup>318</sup> The CSC produced a final report on its investigations into Ormond in April 1999.<sup>319</sup>

3.123 The submissions which addressed the issue of whether the CSC should be able to conduct reviews of groups of children and adults in care all favoured this option.<sup>320</sup> It was argued that this would be beneficial because:

- people in care often share common difficulties;
- it allows the CSC to focus on and make recommendations about broader systemic issues; and
- it would be cost-efficient since it allows the CSC to undertake similar reviews together and the government to make required policy changes at the one time.<sup>321</sup>

The Commission agrees with these arguments.

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## RECOMMENDATION 20

**The Community Services Commission should have the power under s 11 to review groups of children and adults in care as well as individuals.**

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317. A Bernoth, "A Home of their Own" *Sydney Morning Herald* (31 October 1997) at 15; and L Hannon and M Chulov, "I hid to avoid sex, bashings" *Sun-Herald* (26 October 1997) at 4.

318. See New South Wales, CSC, *Annual Report 1997/98* at 45 and 47; and New South Wales, CSC, *The Ormond Centre – A Complaint Investigation into Institutional Care of Children* (1999) at 5.

319. New South Wales, CSC, *The Ormond Centre – A Complaint Investigation into Institutional Care of Children* (1999).

320. Institute for Family Advocacy and Leadership Development Association Inc, *Submission* at 15; Carers NSW Inc, *Submission* at 13; M Bowles, *Submission* at 8; and CSC, *CAMA Submission 1* at 21-22.

321. NSW Council for Intellectual Disability, *CAMA Submission* at 6.

3.124 Submissions also discussed ways of ensuring implementation of recommendations which are made by the CSC as a result of reviews. This issue is discussed below in the context of enforcement of the CSC's recommendations generally.<sup>322</sup>

***Guidelines for assessing and declining applications for review***

3.125 The CSC argued that there should be guidelines in the legislation for assessing and declining applications to conduct reviews, in the same way as there are for complaints.<sup>323</sup> However the Commission has recommended that procedural issues should generally be omitted from CAMA in the context of complaints.<sup>324</sup> **Consistently with this view, the Commission considers that it is unnecessary to provide statutory guidelines for assessing and declining applications for review. Instead, the CSC should develop guidelines for dealing with reviews for inclusion in its procedures manual.**

## **EDUCATION AND DEVELOPMENT**

3.126 The CSC's education and development functions include:

- promoting and assisting the development of standards for the delivery of community services;
- educating service providers, clients, carers and the community as a whole about those standards; and
- promoting, liaising with and assisting advocacy services, and supporting the development of advocacy programs.<sup>325</sup>

3.127 In 1997-98 some of the activities carried out by the CSC pursuant to these functions included:

- training and support for consumers, their families and other advocates;

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322. See para 3.174-3.177.

323. CSC, *CAMA Submission 1* at 21.

324. See Recommendation 12 at 3.61.

325. CAMA s 83(1)(a), (b) and (c).

- speaking to a wide variety of audiences at conferences and other events;
- briefings of residents, family members, advocates and professionals about two major reports by the CSC;
- presenting workshops to service providers about issues such as establishing complaints-handling mechanisms and resolving customer complaints;
- widely distributing a number of CSC publications; and
- frequently contributing to media debates.<sup>326</sup>

### **Community awareness of CAMA**

3.128 One of the consistent themes in the Commission's public seminars, submissions and focus groups was that there is a lack of awareness of CAMA and the bodies it establishes amongst consumers of community services in particular. This was a key finding of the focus groups conducted for the Commission with children and adults with disabilities (including Aboriginal and Torres Strait Islander people and people from a non-English speaking background), and children and young people in care.<sup>327</sup> The lack of knowledge about CAMA by consumers was also raised in submissions. Blind Citizens Australia, for example, commented that "people with disabilities are rarely told" about the provisions of CAMA.<sup>328</sup>

3.129 As discussed above, the CSC has already identified training for consumers and their associates as an area for its educational activities.<sup>329</sup> The Commission encourages the CSC to further develop its education activities towards this target group. This should include providing further information to service providers and their staff about CAMA, and encouraging them to promote a greater awareness and use of the CAMA bodies by residents.

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### **RECOMMENDATION 21**

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326. New South Wales, CSC, *Annual Report 1997/98* at 50-54.

327. RR 9 at para 1.135, 2.40, 2.69, 3.6-3.10, 3.17-3.23 and 3.45-3.55.

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**The Community Services Commission should make education of consumers and their families and advocates about CAMA a priority under its education and development function.**

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## JURISDICTION

### Current jurisdiction of the CSC

3.130 The jurisdiction of the CSC is determined by the definitions of “community services” and “service providers”.<sup>330</sup> In general terms the jurisdiction covers service providers and people receiving, or eligible to receive, community services.

3.131 A “service provider” is:

- DOCS;
- ADD;
- a person or organisation funded by, or authorised by, the Minister for Community Services, the Minister for Aged Services or the Minister for Disability Services to provide a service;
- the Home Care Service of NSW or a person or organisation funded by it to provide a service; and
- a person or organisation deemed to be a service provider by agreement of a State or Federal Minister under an arrangement between the relevant Minister and the Minister for Community Services.

3.132 A “community service” is:

- a service rendered under the community welfare legislation;<sup>331</sup> or

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328. Blind Citizens Australia, *Submission* at 4.

329. See para 3.127.

330. CAMA s 4.

331. This means CAMA and the CAMA Reg, and the *Home Care Service Act 1988* (NSW) administered by the Minister of Community Services or by the Minister of Aged Services or the Minister for Disability Services.

- a service rendered by a person or organisation authorised by the Minister for Community Services, the Minister for Aged Services or the Minister for Disability Services to provide a service.

3.133 It is significant that the CSC, unlike the typical complaints-handling body, can examine complaints about service providers from the non-government as well as government sector. This aspect of the CSC's jurisdiction is particularly important since there has been an increasing move towards the contracting out of community services which were previously provided by government.<sup>332</sup> This is part of a broader trend towards the contracting out of government services generally.<sup>333</sup> The Administrative Review Council has argued that it is vital that the process of contracting out of government services should not remove access to complaints-handling mechanisms, to ensure that such services are fully accountable.<sup>334</sup>

### **Should the CSC's jurisdiction be extended?**

3.134 There was considerable support in submissions for the expansion of the CSC's jurisdiction to cover the following:

- people with disabilities:

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332. M Hogan and G Rogers, "Contracting of Community Services: Can it be Done in the Public Interest?" in L Pearson (ed) *Administrative Law: Setting the Pace or Being Left Behind?* (Australian Institute of Administrative Law, 1996 Administrative Law Forum) at 355; and A Tang, "The Changing Role of Government in Community Services: Issues of Access and Equity to Administrative Review" (1997) 56(2) *Australian Journal of Public Administration* 95 at 103.

333. Australia, Administrative Review Council, *The Contracting Out of Government Services* (Report No 42, AGPS, 1998) at para 1.3; and P Ranald, *The Contracting Commonwealth: Serving Citizens or Customers? Public Accountability, Service Quality and Equity Issues in the Contracting and Competitive Tendering of Government Services* (Public Sector Research Centre Paper No 47, University of NSW, Sydney, 1997).

334. Australia, Administrative Review Council, *The Contracting Out of Government Services* (Report No 42, AGPS, 1998) at para 4.6. See also P Ranald, *The Contracting Commonwealth: Serving Citizens or Customers? Public Accountability, Service Quality and Equity Issues in the Contracting and Competitive Tendering of Government Services* (Public Sector Research Centre Paper No 47, University of NSW, Sydney, 1997) at 8.



- living in licenced boarding houses;<sup>335</sup> and
- who come into contact with the criminal justice system;<sup>336</sup>
- all children<sup>337</sup> (or children with disabilities)<sup>338</sup> who come into contact with the juvenile justice system; and
- children in foster care.<sup>339</sup>

3.135 There was some support (although less than the above) for the following to be included:

- people with disabilities living in:
  - mental health facilities;<sup>340</sup> and
  - aged care facilities<sup>341</sup> (including young people with a disability inappropriately placed in such facilities),<sup>342</sup>

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335. C Ferguson, *Submission* at 3-4; Local Government and Shires Association, *Submission* at 4; NCOSS, *CAMA Submission* at 8; Carers NSW Inc, *Submission* at 9; Physical Disability Council of NSW Inc, *Submission* at 14; and Coalition for Appropriate Supported Accommodation, *Submission* at 3. This was also recommended in Coalition for Appropriate Supported Accommodation for People With Disabilities, *Room to Move: A Position Paper on Licensed Boarding Houses* (Sydney, 1998) at 11-12; and New South Wales, Task Force on Private “For Profit” Hostels, *Report of the Task Force on Private “For Profit” Hostels December 1993* (Office on Disability, Sydney, 1993) Volume 1 at 39-40. See also A Tang, “The Changing Role of Government in Community Services: Issues of Access and Equity to Administrative Review” (1997) 56(2) *Australian Journal of Public Administration* 95 at 103.
336. NSW Council for Intellectual Disability, *CAMA Submission* at 9; Disability Council of NSW, *Submission 2* at 45; P Hutten, *CAMA Submission* at 34; Autism Association of NSW, *Submission* at 12; and Multicultural Disability Advocacy Association of NSW Inc, *Submission* at 9.
337. Barnardos Australia, *Submission* at 8; Citizen Advocacy NSW, *Submission* at 9; People With Disabilities (NSW) Inc, *CAMA Submission* at 17; and Multicultural Disability Advocacy Association of NSW Inc, *Submission* at 9.
338. Autism Association of NSW, *Submission* at 12; and Physical Disability Council of NSW Inc, *Submission* at 14.
339. NCOSS, *CAMA Submission* at 9; NSW Council for Intellectual Disability, *CAMA Submission* at 9; Barnardos Australia, *Submission* at 8; People With Disabilities (NSW) Inc, *CAMA Submission* at 18; and Western Sydney Intellectual Disability Support Group Inc, *CAMA Submission* at 2.
340. NSW Council for Intellectual Disability, *CAMA Submission* at 9; and NCOSS, *CAMA Submission* at 10.

- people under the jurisdiction of the Public Guardian and the Protective Commissioner;<sup>343</sup>
- services arranged by, but not provided by, a service provider (to cover services “brokered” by service providers under individual funding packages);<sup>344</sup>
- accommodation rented in the name of the person with a disability,<sup>345</sup> and
- the newly-created Children’s Guardian.<sup>346</sup>

***Populations which should not be included in the CSC’s jurisdiction***

3.136 The Commission feels that it is inappropriate to extend the CSC’s jurisdiction in many of the ways suggested. Three general principles were applied in forming this view.

3.137 The first principle is that there should be consistency with the general practice adopted that complaints bodies specialise in distinct and particular sectors.<sup>347</sup> The jurisdiction of these complaints bodies are based on service systems rather than population groups (such as people with disabilities).<sup>348</sup> The CSC’s jurisdiction should therefore not extend to cover people with disabilities residing (appropriately or inappropriately) in aged care facilities. This is a very large and specific area<sup>349</sup> which extends beyond the current

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341. NSW Council for Intellectual Disability, *CAMA Submission* at 9; and P Hutten, *CAMA Submission* at 34.
342. Western Sydney Intellectual Disability Support Group Inc, *CAMA Submission* at 2; NCOSS, *CAMA Submission* at 8; People With Disabilities (NSW) Inc, *CAMA Submission* at 16; and P Hutten, *CAMA Submission* at 34.
343. NCOSS, *CAMA Submission* at 10; Disability Council of NSW, *Submission 2* at 45; and P Hutten, *CAMA Submission* at 34.
344. CSC, *CAMA Submission 1* at 40; and People With Disabilities (NSW) Inc, *CAMA Submission* at 19. See Disability Council of NSW, *Submission 2* at 46.
345. NCOSS, *CAMA Submission* at 10; and Autism Association of NSW, *Submission* at 10 (jurisdiction for the CSC’s review power). See Disability Council of NSW, *Submission 2* at 46; and Disability Safeguards Coalition, *CAMA Submission 1* at 11.
346. Information supplied by CSC (18 March 1999). The Children’s Guardian is to be created under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) Chap 10.
347. CSC, *CAMA Submission 1* at 34-35.
348. New South Wales, Office of Children and Young People, *A NSW Children’s Commission: Green Paper* (Sydney, 1997) at 18.
349. CSC, *CAMA Submission 1* at 34.

specialisation of the CSC. Since aged care facilities are a federal responsibility, there is also no clear chain of responsibility to the NSW Minister for Community Services or Disability Services.<sup>350</sup>

3.138 The second principle adopted is that the CSC's jurisdiction should not be extended to cover subject populations which are largely covered by other complaint or oversight mechanisms. This is true of children (including those with disabilities) in the juvenile justice system and people with a disability in the criminal justice system; these groups fall clearly within the jurisdiction of the NSW Ombudsman.<sup>351</sup> The services being provided here also cannot be said to involve an identifiable "community service".<sup>352</sup> As discussed above,<sup>353</sup> this is required in order to come within the CSC's jurisdiction.<sup>354</sup>

3.139 There is likewise another oversight mechanism provided for people under a guardianship order which allows the Office of the Public Guardian or the Office of the Protective Commissioner to exercise substitute decision-making powers on behalf of those persons. People with disabilities under such orders who otherwise satisfy the jurisdictional criteria in CAMA are already covered by the Act.<sup>355</sup> Although the CSC cannot review the conduct of the Offices of the Public Guardian or Protective Commissioner as "service providers",<sup>356</sup> the Guardianship Tribunal has the power to review a guardianship order if there are concerns about how either of these bodies is exercising its functions under that order.<sup>357</sup> Further, the substitute decision-making and financial management roles exercised by these bodies are statutory functions, and are of a qualitatively different nature to the services provided under the current CAMA definition.<sup>358</sup>

3.140 People with disabilities resident in mental health facilities are also clearly covered by the Health Care Complaints Commission. The definition

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350. CSC, *CAMA Submission 1* at 34.

351. NSW Ombudsman, *Submission* at 4; and CSC, *CAMA Submission 1* at 37. See *Ombudsman Act 1974* (NSW) s 12(1).

352. CAMA s 4.

353. See para 3.130 and 3.132.

354. NSW Ombudsman, *Submission* at 3-4.

355. CSC, *CAMA Submission 1* at 38.

356. CSC, *CAMA Submission 1* at 38.

357. CSC, *CAMA Submission 1* at 38-39; and Autism Association of NSW, *Submission* at 12. See *Guardianship Act 1987* (NSW) s 25.

358. CSC, *CAMA Submission 1* at 39.

of “health service” for this body explicitly includes psychiatric services.<sup>359</sup> In a review conducted of the Act governing the HCCC, the only aspect felt to require modification or clarification was to change the wording from “psychiatric services” to “mental health services” to reflect current terminology.<sup>360</sup> The Commission therefore disagrees with the view that there is legal ambiguity concerning whether psychiatric disability services are covered by the HCCC or the CSC.<sup>361</sup>

3.141 Thirdly, the Commission considers that it is inappropriate to provide regulatory mechanisms for programs which are in embryonic form. Although it is argued that individual funding packages for people with disabilities will become more common in the future,<sup>362</sup> they are currently used comparatively rarely.<sup>363</sup> The CSC’s jurisdiction should therefore not be extended to include individual funding packages unless the service is provided by a person or organisation within the definition of “service provider”.

3.142 Apart from limiting the jurisdiction of the CSC based on these three principles, the Commission also considers that it is inappropriate to significantly extend the jurisdiction of the CSC for practical reasons. To overload the CSC with a very broad jurisdiction could risk reducing its effectiveness and specialist focus.

3.143 Although there is insufficient justification to warrant the blanket extension of the CSC’s jurisdiction for the reasons discussed above, it would be beneficial for the CSC to develop protocols with relevant complaints bodies such as the NSW Ombudsman and the Health Care Complaints Commission concerning cases within those bodies’ jurisdiction which may be more appropriately dealt with by the CSC and vice versa.<sup>364</sup> There is already some precedent for this in a recent amendment to CAMA which permits the CSC and the NSW Ombudsman to “enter into arrangements regarding the co-

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359. *Health Care Complaints Act 1993* (NSW) s 4.

360. New South Wales, Health Care Complaints Act Review Committee, *Review of the Health Care Complaints Act 1993* (Health Care Complaints Commission, Sydney, 1997) at 18.

361. NCOSS, *CAMA Submission* at 10.

362. CSC, *CAMA Submission 1* at 40.

363. For a discussion of individual funding packages, see Report 91 at para 5.16.

364. Under CAMA s 4, a “service provider” for the purposes of the Act can include a person or organisation deemed to be a service provider by an agreement between the Minister for Community Services and a State or Commonwealth Minister.

operative exercise of their respective functions” concerning the NSW Ombudsman’s new child protection jurisdiction.<sup>365</sup>

3.144 The protocols proposed should outline the type of cases which might be appropriate for referral to the other body. CAMA should also provide for the conferral of the appropriate jurisdiction. This would ensure that the body with the most appropriate expertise deals with individual cases. For example, certain cases involving people with an intellectual disability in the criminal justice and juvenile justice systems and mental health facilities may be more appropriately dealt with by the CSC rather than the NSW Ombudsman<sup>366</sup> and Health Care Complaints Commission respectively – for instance where the nature of the complaint is primarily concerned with disability issues rather than the fact that the person was in a criminal justice setting or a mental health facility.

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365. CAMA s 121(2), inserted by *Ombudsman Amendment (Child Protection and Community Services) Act 1998* (NSW) Sch 2.

366. See New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System* (Report 80, 1996) at para 10.21-10.24.

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**RECOMMENDATION 22**

**The Community Services Commission should develop protocols with other complaints bodies to enable cross-referral of cases where appropriate. There should also be provision in the Act for conferral of appropriate jurisdiction.**

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***Populations which should be included in the CSC's jurisdiction***

3.145 The Commission considers that there are three areas where the jurisdiction of the CSC requires expansion. These are to cover licensed boarding houses, children in foster care, and the Children's Guardian.

3.146 ***Licensed boarding houses.*** In the Commission's view, the CSC's jurisdiction should extend to cover licensed boarding houses. Legal advice obtained by the CSC as to whether licensed services such as boarding houses constitute organisations "authorised by the Minister for Community Services" within the definition of "service provider"<sup>367</sup> indicates that there is some uncertainty about this issue.<sup>368</sup>

3.147 There are over 2000 people in NSW living in more than 120 licensed boarding houses.<sup>369</sup> It has also been repeatedly shown that most of the people living in these boarding houses have disabilities.<sup>370</sup> Licensed boarding houses

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367. CAMA s 4.

368. New South Wales, Crown Solicitor's Office, *Definition of Service Provider in Community Services (Complaints, Appeals and Monitoring) Act 1993* (Advice to CSC, 1 February 1995); and New South Wales, Crown Advocate, *Operation of the Community Services (Complaints, Appeals and Monitoring) Act 1993* (Advice to CSC, 29 June 1995).

369. New South Wales, Minister for Community Services, *Boarding Houses – Fact Sheet* (1998) at 1.

370. New South Wales, Minister for Community Services, *Boarding Houses – Fact Sheet* (1998) at 2 (survey of 1772 residents conducted in February-March 1998 by the Department of Health, DOCS and ADD); New South Wales, Task Force on Private "For Profit" Hostels, *Report of the Task Force on Private "For Profit" Hostels December 1993* (Office on Disability, Sydney, 1993) Volume 1 at i; and J Millard, "Isolation in the Community": People With Disabilities Living in Boarding Houses" in *Culture and Caring: Caring in Culture* (Australian and New Zealand College of Mental Health

have been described as “supported accommodation services for people with disabilities”.<sup>371</sup> People with disabilities find themselves living in boarding houses largely because of an undersupply of places in more appropriate supported accommodation options.<sup>372</sup>

3.148 The residents of boarding houses have similar characteristics to the other consumers with disabilities included in the CSC jurisdiction.<sup>373</sup> There is no other obvious complaint or oversight body to which such residents could complain. They are also a very vulnerable group who are unlikely to have advocates to act on their behalf.<sup>374</sup> This makes them very vulnerable to abuse, neglect, exploitation and poor practice.<sup>375</sup> A number of reports have clearly demonstrated that there are regular abuses of the human rights of residents of licensed boarding houses.<sup>376</sup> For example, one recent report states that residents:

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- Nurses Inc, 22nd Annual Conference Proceedings, Auckland, 10-13 October 1996) at 95.
371. New South Wales, Task Force on Private “For Profit” Hostels, *Report of the Task Force on Private “For Profit” Hostels December 1993* (Office on Disability, Sydney, 1993) Volume 1 at i.
372. People With Disabilities (NSW) Inc, *CAMA Submission* at 17; and Joint Enterprise Service Initiative Boarding House Project, Accommodation Working Party, “*Supported Accommodation*”: *Discussion Paper* (Joint Enterprise Service Initiative, Sydney, 1998) at 4.
373. People With Disabilities (NSW) Inc, *CAMA Submission* at 17; and CSC, *CAMA Submission 1* at 32.
374. NCOSS, *CAMA Submission* at 8; and New South Wales, Task Force on Private “For Profit” Hostels, *Report of the Task Force on Private “For Profit” Hostels December 1993* (Office on Disability, Sydney, 1993) Volume 1 at i.
375. People With Disabilities (NSW) Inc, *CAMA Submission 1* at 17; NSW Council for Intellectual Disability, *DSA Submission* at 15; and New South Wales, Task Force on Private “For Profit” Hostels, *Report of the Task Force on Private “For Profit” Hostels December 1993* (Office on Disability, Sydney, 1993) Volume 1 at i.
376. Coalition for Appropriate Supported Accommodation for People With Disabilities, *Room to Move: A Position Paper on Licensed Boarding Houses* (Sydney, 1998); New South Wales, Task Force on Private “For Profit” Hostels, *Report of the Task Force on Private “For Profit” Hostels December 1993* (Office on Disability, Sydney, 1993) Volume 1 at 7; J Millard, “‘Isolation in the Community’: People With Disabilities Living in Boarding Houses” in *Culture and Caring: Caring in Culture* (Australian and New Zealand College of Mental Health Nurses Inc, 22nd Annual Conference

- often live in appalling physical conditions;
- do not have protection under the *Residential Tenancies Act 1987* (NSW), for example residents are sometimes moved by managers to other boarding houses without permission or notice;
- may have no money of their own if they give all their pension or benefit to the manager;
- often have no say in the way the house is run;
- often have no opportunity to participate in the community; and
- often require other support to participate successfully in the community but have not been assessed and do not receive any other support.<sup>377</sup>

3.149 Boarding houses are licensed under the *Youth and Community Services Act 1973* (NSW).<sup>378</sup> The licensing scheme was intended to provide a guarantee that accommodation provided for people with disabilities would satisfy minimum standards.<sup>379</sup> This has clearly not happened. It should be acknowledged that some positive steps have been taken to redress this situation. The Licensing, Support and Development Unit created within ADD in 1996 (following transfer of responsibility from DOCS) has adopted a more rigorous, proactive approach to monitoring licensed facilities, and increased the rate of prosecutions and actions against boarding house operators.<sup>380</sup> In October 1998, the Minister for

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Proceedings, Auckland, 10-13 October 1996) at 96-98; Australia, Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness. Volume 1* (Australian Government Publishing Service, 1993) (the "Burdekin Report") ch 11; and New South Wales, Health Care Complaints Commission, *The Care and Management of People with a Mental Illness Residing in Boarding Houses, who Require Treatment with Psychotropic Medication* (1996).

377. Coalition for Appropriate Supported Accommodation for People With Disabilities, *Room to Move: A Position Paper on Licensed Boarding Houses* (Sydney, 1998).

378. *Youth and Community Services Act 1973* (NSW) s 11.

379. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 26 September 1979, the Hon R Jackson, Minister for Youth and Community Services, Second Reading Speech at 1349.

380. C Ferguson, *Submission* at 15-17.



Community Services also announced a \$66 million package to be spent over the next three years on:

- relocating residents with the highest needs out of boarding houses and into more appropriate care;
- the capital costs of alternative housing; and
- the support services for residents remaining in boarding houses.<sup>381</sup>

3.150 Nonetheless, it is important that residents of boarding houses have an established complaints mechanism to deal with their concerns. While it is not appropriate to make boarding houses subject to the DSA,<sup>382</sup> the level of documented exploitation and maltreatment of residents and the fact that licences are issued to boarding house proprietors under the *Youth and Community Services Act 1973* (NSW) indicates that there should be some avenue of redress for residents under CAMA.<sup>383</sup>

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### RECOMMENDATION 23

**Boarding houses licensed under s11 of the *Youth and Community Services Act 1973* (NSW) should be included in the jurisdiction of the Community Services Commission.**

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3.151 *Children in foster care.* The Commission also recommends that children in foster care<sup>384</sup> be included in the CSC's jurisdiction. Although such

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381. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 15 October 1998, the Hon F Lo Po, Minister for Community Services, Questions Without Notice at 8445. However, it was reported on 6 May 1999 that little of this money had actually been provided so far, and that licensed boarding houses are continuing to close down: A Horin, "Homes for the Disabled Shut up Shop" *Sydney Morning Herald* (6 May 1999) at 10.

382. See Report 91 at para 2.40-2.45.

383. NSW Council for Intellectual Disability, *DSA Submission* at 15 and *CAMA Submission* at 8-9.

384. Note that the term "foster care" is not used in the *Children and Young Persons (Care and Protection) Act 1998* (NSW) Chap 8. The Act refers to various

children are clearly covered by the CSC's review power, there is some ambiguity as to whether this extends to the CSC's complaints function.<sup>385</sup> The Crown Solicitor has advised the CSC that although an authorised foster carer arguably satisfies the definition of "service provider",<sup>386</sup> the conduct of such a person would not appear to fall within the definition of "unreasonable conduct by service provider".<sup>387</sup> This is because the latter definition is framed in terms of actions by "an administrative body or organisation, rather than an individual foster carer".<sup>388</sup> The CSC suggested that this result would appear to have been unintended when the legislation was drafted.<sup>389</sup>

3.152 There are a number of reasons to favour inclusion of children in foster care within the CSC's jurisdiction. There are many more children in foster care than in residential institutions. As at 30 June 1998 there were 2499 children in foster care compared to only 258 in residential care.<sup>390</sup> If children in foster care are placed elsewhere, it is likely that this placement would be with a service within the CSC's jurisdiction.<sup>391</sup> There is also a significant overlap between children in foster care and disability issues, given that approximately 40% of children in foster care have a disability.<sup>392</sup> Many children also move between residential care and foster care.<sup>393</sup>

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forms of "out-of-home care" provided by "authorised carers". These are defined in s 135 and 137 respectively.

385. CSC, *CAMA Submission 1* at 37.

386. CAMA s 4(d).

387. CAMA s 12.

388. New South Wales, Crown Solicitor's Office, *Request for Advice on Whether "Service Provider" as Identified in the Community Services (Complaints, Appeals and Monitoring) Act 1993 Includes Foster Carers* (Advice to CSC, 15 January 1998) at 13.

389. CSC, *CAMA Submission 1* at 37; and People With Disabilities (NSW) Inc, *CAMA Submission* at 18.

390. DOCS figures from the Integrated Substitute Care Database cited in information supplied by CSC (23 March 1999) at 5. There were also a total of 3,906 other children in care at that date. These children's placements included: other family or kinship care (2,355); non-related family (637); parents (313); independent living (163); supported accommodation (126); adoptive parents (82); DOCS group home (24); other (191); and no fixed place (15).

391. CSC, *CAMA Submission 1* at 37.

392. People With Disabilities (NSW) Inc, *CAMA Submission* at 18.

393. NCOSS, *CAMA Submission* at 9.

3.153 Children in foster care are a particularly hidden and vulnerable group. They have no access to other complaints mechanisms, nor do they have access to the Community Visitor scheme.<sup>394</sup> Although they reside in private homes, there is a public duty to provide oversight of such children since the State is involved in their placement.<sup>395</sup> For example, foster children may be placed as a result of an order of the Children’s Court<sup>396</sup> or a temporary voluntary arrangement made by the Director General.<sup>397</sup> Arrangements for the placement of a child with a particular foster family can also only be made by the Children’s Guardian<sup>398</sup> or a “designated agency”.<sup>399</sup> A “designated agency”<sup>400</sup> may be DOCS or a non-government organisation,<sup>401</sup> and must be accredited under standards to be prescribed in the Regulation.<sup>402</sup>

3.154 As discussed above,<sup>403</sup> under the new *Children and Young Persons (Care and Protection) Act 1998* (NSW) reviews of children in out-of-home care must also be conducted by both the agency who provides (or in this case organises) the placement, and may be conducted by the Children’s Guardian.<sup>404</sup> However, for the reasons outlined above,<sup>405</sup> this should not replace other oversight mechanisms.

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394. NCOSS, *CAMA Submission* at 9; CSC, *CAMA Submission 1* at 38-39.

395. CSC, *CAMA Submission 1* at 38.

396. *Children and Young Persons (Care and Protection) Act 1998* (NSW) Chap 8 Pt 2.

397. *Children and Young Persons (Care and Protection) Act 1998* (NSW) Chap 8 Pt 3 Div 1.

398. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 138(1)(b).

399. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 138(1)(a).

400. This is defined in *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 139(1).

401. New South Wales, DOCS, Legislative Review Unit, *Review of the Children (Care and Protection) Act 1987* (1997) at 98.

402. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 139.

403. See para 3.113.

404. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 150(1).

405. See para 3.116.

3.155 Since government policy is encouraging removal of children from institutions, it is likely that more children will be placed in foster care in the future as well.<sup>406</sup>

3.156 The Commission acknowledges that there is a difference between monitoring of residential institutions and the family settings of foster carers. However, it should be noted that the CSC cannot enter premises used for residential purposes except with the consent of the occupier or under the authority of a search warrant.<sup>407</sup> This would apply to foster care situations.

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#### **RECOMMENDATION 24**

**The jurisdiction of the Community Services Commission to deal with children and young persons in foster care under its review function should be extended to include the complaints and monitoring functions.**

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3.157 *The Children's Guardian.* In the Commission's view, the CSC's jurisdiction should cover the actions of the newly-created Children's Guardian. The Children's Guardian will take over the parental responsibilities exercised by the Minister for Community Services in relation to children and young persons in care.<sup>408</sup> Therefore unless the Children's Guardian is specifically included under the jurisdiction of the CSC, this whole group of cases will be excluded from the existing jurisdiction of the CSC.<sup>409</sup>

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#### **RECOMMENDATION 25**

**The jurisdiction of the CSC should be extended to include the Children's Guardian in exercising the**

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406. NSW Council for Intellectual Disability, *CAMA Submission* at 9.

407. CAMA s 84(2).

408. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 181(1)(a).

409. Information supplied by the CSC (18 March 1999).

**parental responsibilities of the Minister in relation to children and young persons.**

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### **Child protection duties and functions**

3.158 The Crown Solicitor has provided the NSW Ombudsman with advice that the child protection functions carried out by DOCS do not fall within the definition of “community service” for the purpose of the community welfare legislation.<sup>410</sup> The CSC notes that child protection issues constitute a significant part of its work, and suggests that the CAMA definitions of “community service” and “service provider”<sup>411</sup> be amended to clarify that this is part of their jurisdiction for the purposes of all its functions.<sup>412</sup> Although the jurisdiction of the NSW Ombudsman has recently been extended to cover child protection matters, this only concerns allegations or convictions of child abuse offences against employees of designated government and non-government authorities.<sup>413</sup>

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#### **RECOMMENDATION 26**

**The definitions of “community service” and “service provider” should be amended to clarify that the jurisdiction of the Community Services Commission includes all child protection matters for the purposes of all its functions.**

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410. CSC, *CAMA Submission 1* at 55.

411. CAMA s 4.

412. CSC, *CAMA Submission 1* at 55. The CSC also reports that the NSW Ombudsman supports such an amendment: CSC, *CAMA Submission 1* at 55.

413. *Ombudsman Act 1974* (NSW) Pt 3A, inserted by *Ombudsman Amendment (Child Protection and Community Services) Act 1998* (NSW) Sch 1.

## Time limit on jurisdiction

3.159 The Act states that the CSC has a discretion to decline complaints which concern events that occurred more than two years ago.<sup>414</sup> This suggests that there is no actual bar on its examining events which occurred more than two years ago.

3.160 There is an issue, however, about whether the CSC can examine events which occurred before CAMA came into operation (April 1994). DOCS has advised the CSC that it has had legal advice which states that the CSC cannot examine events before that time.<sup>415</sup> Two submissions suggested that CAMA should explicitly state that the CSC has jurisdiction to examine events which occurred before CAMA came into operation.<sup>416</sup> **The Commission does not feel there is enough justification, on the evidence presented to us, to justify any change to the Act in this way.**

## POWERS OF THE CSC

### Current powers of the CSC

3.161 Subject to limitations described in the Act, the Commissioner can enter premises where services are provided.<sup>417</sup> He or she can then:

- inspect the premises and make notes;
- examine, seize, retain or remove equipment;
- require that records be produced and make copies of, or take extracts from, them;
- take possession of, and remove, the records for further examination;
- require the owner or occupier to assist in the exercise of these powers; and
- ask anyone on the premises to answer questions, or produce records, about the delivery of services at or from the premises.<sup>418</sup>

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414. CAMA s 21(h).

415. CSC, *CAMA Submission 1* at 58.

416. CSC, *CAMA Submission 1* at 58; and H Seares, *Submission* at 9.

417. CAMA s 84(1).

***Limitations on the powers***

3.162 The Commissioner cannot enter a service provider's premises unless he or she:

- has a certificate of authority issued by the CSC and produces it if asked to do so;
- gives reasonable notice to the occupier, unless giving notice would defeat the purpose of the visit;
- enters at a reasonable hour of the day, except in an emergency; and
- uses no more force than is reasonably necessary.<sup>419</sup>

As discussed above,<sup>420</sup> the Commissioner can only enter premises used for residential purposes with the permission of the person living there or with a search warrant.<sup>421</sup>

***Enforcing the CSC powers***

3.163 It is an offence:

- to prevent, hinder or obstruct the Commissioner from exercising his or her powers;
- to refuse or fail to comply with a requirement to produce records or to assist, without reasonable excuse;
- to refuse or fail to answer a question, without reasonable excuse; or
- to give the Commissioner information knowing it is false or misleading.

The maximum penalty for the offence is 20 penalty units<sup>422</sup> (currently \$2,200).<sup>423</sup> If a person required to do so fails to produce records or to answer a question,<sup>424</sup> the Commissioner can apply to a magistrate to issue a summons

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418. CAMA s 84(3) and (4).

419. CAMA s 84(1).

420. See 3.156.

421. CAMA s 84(2). A search warrant is available under CAMA s 85.

422. CAMA s 86.

423. *Interpretation Act 1987* (NSW) s 56 provides that one penalty unit is equivalent to \$110.

424. A person with access to the records can be required to produce them: CAMA s 84(3)(c). However, as discussed at para 3.169, although the Commissioner

requiring the person to produce the records or to give evidence on the matter they failed to answer a question about.<sup>425</sup> It is an offence to fail to comply with the summons. The maximum penalty is 20 penalty units.<sup>426</sup>

### **Should the powers of the CSC be extended?**

3.164 There was agreement in submissions that the powers given to the CSC were generally adequate.<sup>427</sup> Some submissions did favour extensions of these powers in a variety of ways.

#### ***Limitations on CSC powers***

3.165 Some submissions argued that all<sup>428</sup> or some of the limitations on powers should be removed, such as the requirement for a certificate of entry to be issued by the CSC before entering,<sup>429</sup> or requiring notice to be given.<sup>430</sup> However, the Commission does not favour this as it has not been presented with evidence that these requirements have proved to be a problem in practice.

#### ***Broaden search and entry powers to cover all CSC functions***

3.166 It was also suggested in some submissions that the powers of entry and search warrants should be broadened to cover all CSC functions, not just complaint investigations.<sup>431</sup> The CSC argued that it is currently unclear from

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can ask questions of any person on the premises, that person is not required to answer the question: CAMA s 84(4).

425. CAMA s 84(6).

426. CAMA s 84(8).

427. *Confidential Submission 3* at 15; CSC, *CAMA Submission 1* at 41; Action for Citizens with Disabilities, *Submission* at 18; and Autism Association of NSW, *Submission* at 12.

428. Disability Council of NSW, *Submission 2* at 46-47.

429. Disability Safeguards Coalition, *CAMA Submission 1* at 5.

430. Carers NSW Inc, *Submission* at 14.

431. CSC, *CAMA Submission 1* at 42-43; People With Disabilities (NSW) Inc, *CAMA Submission* at 19; Disability Safeguards Coalition, *CAMA Submission 1* at 5; and NSW Council for Intellectual Disability, *CAMA Submission* at 9. See Physical Disability Council of NSW Inc, *Submission* at 14. Some other submissions also argued that the powers available under the different functions should be broadly consistent: Disability Safeguards Coalition, *CAMA Submission 1* at 5; and Physical Disability Council of NSW Inc, *Submission* at 14.



the wording of the Act<sup>432</sup> whether this is covered.<sup>433</sup> This is because one of the key provisions outlining the Commissioner's powers<sup>434</sup> refers to the examination, seizure, retention or removal of equipment that the Commissioner reasonably believes has been used in connection with a *complaint* being investigated.<sup>435</sup> The other provisions do not specifically refer to complaints (or any of the CSC's other functions).

3.167 Because of this ambiguity, the CSC often prefers to deal with matters under its monitoring power, by seeking information from a service provider to allow the CSC to monitor the situation, rather than conducting a complaint investigation.<sup>436</sup> Recently some service providers have refused to provide access to information requested by the CSC. This has forced the CSC to deal with the matter as a complaint investigation instead, an unnecessarily adversarial and intrusive process.<sup>437</sup>

3.168 The Commission considers that the wording of the Act should clarify that the CSC's search and entry powers extend to all its functions.

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#### **RECOMMENDATION 27**

**Section 84 should explicitly provide that the Community Services Commission's search and entry powers cover all their functions.**

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#### ***Requiring production of documents and information***

3.169 The CSC can currently only *request* service providers to produce documents and information further to its powers of search and entry.<sup>438</sup> Some submissions argued that service providers should be *required* to comply with this request.<sup>439</sup> The CSC reports that service providers have generally

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432. CAMA s 84 and 85.

433. CSC, *CAMA Submission 1* at 42.

434. CAMA s 84(3)(b).

435. Information supplied by CSC (18 March 1999).

436. CSC, *CAMA Submission 1* at 43.

437. CSC, *CAMA Submission 1* at 43.

438. CAMA s 84(4).

439. Western Sydney Intellectual Disability Support Group Inc, *CAMA Submission* at 2; NCOSS, *CAMA Submission* at 7; Disability Safeguards Coalition, *CAMA*

provided information and documents willingly without the need to resort to its search and entry powers.<sup>440</sup> However, as discussed above there have been instances recently when service providers have refused such requests.<sup>441</sup>

3.170 In the Commission's view, it is vital that service providers be required to provide information to the CSC. Without this requirement, it is very difficult for the CSC to fulfil its functions effectively. This power is also commonly available to other complaints bodies in NSW,<sup>442</sup> and has been identified as an important feature of the New York Commission.<sup>443</sup>

3.171 An explicit requirement to provide information and records to the Commissioner would also be consistent with the other CAMA provisions which state that:

- the Commissioner can, pursuant to his or her search and entry powers, *require* a person having access to records to produce them;<sup>444</sup>
- the Commissioner can apply to a Magistrate for a summons to produce records or provide evidence which they have failed to do “in accordance with a *requirement*” under the Commissioner's search and entry powers;<sup>445</sup> and
- a person who “without reasonable excuse, refuses or fails to comply with a *requirement* made or to answer a question” by the Commissioner under the search and entry powers is guilty of a criminal offence.<sup>446</sup>

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*Submission 1* at 4; Barnardos Australia, *Submission* at 7; and CSC, *CAMA Submission 1* at 43.

440. CSC, *CAMA Submission 1* at 42.

441. CSC, *CAMA Submission 1* at 43.

442. *Legal Profession Act 1987* (NSW) s 152(1); *Independent Commission Against Corruption Act 1988* (NSW) s 21 and 22; and *Ombudsman Act 1974* (NSW) s 18.

443. N K Ray, “Elements of an Effective Governmental Watchdog Agency” in V J Bradley and H A Bersani (ed), *Quality Assurance for Individuals with Developmental Disabilities* (Paul H Brookes Publishing Co, Baltimore, 1990) at 174-175.

444. CAMA s 84(3)(c) (emphasis added).

445. CAMA s 84(6) (emphasis added).

446. CAMA s 86(c) (emphasis added).

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**RECOMMENDATION 28**

**Section 84(4) should be amended to explicitly require service providers to answer questions and produce records where requested to do so by the Community Services Commission.**

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***Referral to service providers***

3.172 The CSC suggested that it should be given the power to refer matters to a service provider for investigation of a complaint or review of individual circumstances.<sup>447</sup> This should include an investigation or review of a death of a person in care.<sup>448</sup> The CSC would oversee this investigation or review process by setting out the methodology and scope of the investigation or review, a timeframe and reporting back procedure. It would then have the right to assess the outcomes, and endorse the outcome if appropriate. It would however also retain the power to conduct its own investigation or review where it was not satisfied with that carried out by the service provider.<sup>449</sup>

3.173 In the Commission's view, it would be beneficial for the CSC to have such a power. There are comparable powers for some other complaint bodies to refer and provide oversight of investigations and other activities.<sup>450</sup> This also has the advantage of saving CSC resources<sup>451</sup> and allowing it to oversee a larger number of investigations. This is because the resource-intensive investigation tasks are carried out by the service provider rather than the CSC.

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447. CSC, *CAMA Submission 1* at 41-42. *Confidential Submission 3* at 10 also recommended providing a power to refer matters to a service provider for review under the review power.

448. CSC, *CAMA Submission 3* at 1.

449. CSC, *CAMA Submission 1* at 41-42.

450. CSC, *CAMA Submission 1* at 41-42. For examples, see *Legal Profession Act 1987* (NSW) s 131(e), (f) and (g); *Independent Commission Against Corruption Act 1988* (NSW) Pt 5; *Police Service Act 1990* (NSW) s 132 (providing for referral of complaints about police officers by the NSW Ombudsman to other bodies); and *Ombudsman Act 1974* (NSW) s 25E and 25F (providing for oversight by the NSW Ombudsman of investigations conducted by other agencies of child protection matters within the NSW Ombudsman's jurisdiction).

451. CSC, *CAMA Submission* at 41.

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**RECOMMENDATION 29**

**The Community Services Commission should have the power to refer matters to service providers for (a) investigation of a complaint and (b) review of individual circumstances. This should include an investigation or review of the death of a person in care.**

**The Community Services Commission should direct the nature and scope of the inquiry and retain the right to conduct its own investigation or review where it is not satisfied with the progress or the outcome.**

**Any recommendations endorsed by the Community Services Commission should be regarded as recommendations of the Community Services Commission for other purposes.**

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**ENFORCEMENT OF CSC RECOMMENDATIONS**

3.174 The CSC makes many recommendations for change in exercising its various functions. Action has been taken in response to a number of these. For example, following the identification by the CSC of significant inadequacies in service provision at the Hall for Children at Hazelbrook,<sup>452</sup> the Government provided almost \$5 million in special capital funds and \$3.4 million in recurrent funds to enable all residents to be relocated to community-based accommodation by early 1999.<sup>453</sup> However, CSC recommendations are simply that – recommendations. There is no power to force a service provider or the government to implement them.

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452. New South Wales, CSC, *Suffer the Children: The Hall for Children Report* (1997).

453. NSW Government, *DSA Submission* at 10.

3.175 Many submissions and participants at the Commission's seminars wanted CSC recommendations to have a greater degree of enforceability.<sup>454</sup> A number of suggestions were made concerning ways to enforce or encourage compliance with CSC recommendations. It was argued that:

- the CSC should be able to publish information on action taken by service providers following recommendations in its Annual Report tabled in Parliament;<sup>455</sup>
- conditions be added to funding and/or licensing agreements requiring the implementation of CSC recommendations;<sup>456</sup>
- non-compliance with CSC recommendations be appellable to the CS Division of the ADT<sup>457</sup> (discussed further below);<sup>458</sup> and
- criminal sanctions such as fines and prison sentences should be imposed on individual employees and board members for non-compliance.<sup>459</sup>

3.176 However, it is generally accepted that complaints bodies can make non-enforceable recommendations only. In the Commission's view, the CSC has been effective with its existing powers and there is no compelling evidence to justify any major extension of these powers in any of the ways suggested.

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454. *Confidential Submission 3* at 11-12; Burnside, *Submission* at 2; Dare to Care, *Submission* at 2; B Semmler, *Submission* at 1; Physical Disability Council of NSW Inc, *Submission* at 13-14; Barnardos Australia, *Submission* at 7; Disability Safeguards Coalition, *CAMA Submission 1* at 10; and Citizen Advocacy NSW, *Submission* at 8-9.

455. CSC, *CAMA Submission 1* at 29; People With Disabilities (NSW) Inc, *CAMA Submission* at 16. Some other submissions favoured the power to name in Parliament: Citizen Advocacy NSW, *Submission* at 9; and Burnside, *Submission* at 2. See also *Confidential Submission 3* at 12.

456. NCOSS, *CAMA Submission* at 8. See Citizen Advocacy NSW, *Submission* at 9.

457. Physical Disability Council of NSW Inc, *Submission* at 13-14; People With Disabilities (NSW) Inc, *CAMA Submission* at 15-16; Barnardos Australia, *Submission* at 7; Autism Association of NSW, *Submission* at 12; Disability Safeguards Coalition, *CAMA Submission 1* at 10; Action for Citizens With Disabilities, *Submission* at 15; and NSW Council for Intellectual Disability, *CAMA Submission* at 8 and *DSA Submission* at 9.

458. See para 5.98-5.107.

459. NSW Council for Intellectual Disability, *CAMA Submission* at 8.

***Requiring service providers to provide information***

3.177 There is however one way in which the Commission considers that the CSC's powers should be extended. This is to *require* service providers to provide information on the implementation of recommendations made by the CSC pursuant to any of its functions.<sup>460</sup> Currently the CSC can only *request* this information, and only concerning recommendations arising from complaint investigations.<sup>461</sup> The Commission's recommendation on this issue is consistent with its recommendation to require service providers to provide information to the CSC when requested.<sup>462</sup>

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**RECOMMENDATION 30**

**Section 38(2)(a) should be amended to require service providers to provide information on the implementation of Community Services Commission recommendations made pursuant to all its functions.**

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**RESOURCES**

3.178 The Commission has recommended a number of extra functions for the CSC. To fulfil these functions effectively, the CSC will require a modest amount of extra funding. This is a matter for the NSW Government.<sup>463</sup>

3.179 A strong concern expressed by community groups on the CAMA Working Party was that inadequate funding of the CSC would seriously prejudice its effectiveness.<sup>464</sup> Many submissions expressed similar concerns

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460. CSC, *CAMA Submission 1* at 29; and *Confidential Submission 3* at 12. See Citizen Advocacy NSW, *Submission* at 9 and Physical Disability Council of NSW Inc, *Submission* at 13, which suggested that the power to request information about implementation of recommendations be extended to cover the review function as well as complaints.

461. CAMA s 38(2)(a).

462. See Recommendation 28 at para 3.171.

463. The Minister for Community Services has already given in-principle approval for funding for one of the most significant of these, the Disability Death Review Team: information supplied by the CSC (18 March 1999).

464. CAMA Working Party Report at 58.

that the CSC is inadequately resourced.<sup>465</sup> A review by the Premier's Department in 1996 concluded that the CSC was under-resourced to carry out its functions.<sup>466</sup> The review recommended that the CSC should receive a further \$897,413 in funding between 1996/97 and 1998/99. This included \$544,660 to employ extra staff for the CSC in the complaints handling, review and policy areas, and a part-time assistant co-ordinator for the Community Visitor Scheme. It also included \$233,460 to cover an extra 240 days of visiting by Community Visitors. Only \$250,000 of this funding has been provided to the CSC, in the 1996/97 financial year.<sup>467</sup>

3.180 The budget for the CSC is allocated by the Minister for Community Services. Some submissions called for a more independent process for determining the CSC's budget allocation.<sup>468</sup> It was suggested that an independent body should objectively determine the budget necessary to fulfil the role of the CAMA organisations<sup>469</sup> and the demand for their services.<sup>470</sup> The CSC suggested this body should be the Auditor-General.<sup>471</sup>

3.181 In the Commission's view, this would be inappropriate. No other agency has this sort of process for determining its budget allocation. However, it should be acknowledged that it is difficult for the CSC to operate effectively if it is inadequately funded.

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465. Burnside, *Submission* at 3; L Moffit, *Submission* at 1; Western Sydney Intellectual Disability Support Group Inc, *CAMA Submission* at 2; The Spastic Centre of NSW, *CAMA Submission* at 3; and NCOSS, *CAMA Submission* at 2.

466. New South Wales, Premier's Department, *Community Services Commission Review Report* (1996) at Appendix 8.

467. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 28 October 1998, the Hon J W Shaw, Attorney General at 9097. See also New South Wales, CSC, *Annual Report 1996/97* at 13; and New South Wales, CSC, *Annual Report 1997/98* at 9.

468. Barnardos Australia, *Submission* at 5; CSC, *CAMA Submission 1* at 11; and NCOSS, *CAMA Submission* at 3.

469. CSC, *CAMA Submission 1* at 11; and NCOSS, *CAMA Submission* at 3.

470. CSC, *CAMA Submission 1* at 11.

471. CSC, *CAMA Submission 1* at 11.







# 4 ● Community Visitor Scheme

- Overview of the Community Visitor Scheme
- Other Community Visitor Schemes
- Support for the Community Visitor Scheme
  
- Appointment of Community Visitors
- Skills and qualifications
- Functions of Community Visitors
- Frequency of visits
- Jurisdiction
- Training
- Monitoring and supervision of Community Visitors
- Powers of Community Visitors
- A right for residents to see a Community Visitor
- Resources

4.1 The Community Visitor Scheme established under CAMA began operation in October 1995.<sup>1</sup> It replaced a much smaller Official Visitor program previously in operation.<sup>2</sup> CAMA outlines the processes for the appointment of Community Visitors,<sup>3</sup> and describes their functions and powers.<sup>4</sup> It also provides for the CSC to have a general oversight and co-ordination role over the Community Visitor Scheme,<sup>5</sup> and requires the CSC to prepare an Annual Report to the Minister for Community Services, which must be tabled in Parliament, on the Community Visitor Scheme.<sup>6</sup>

4.2 This chapter provides an overview of the Community Visitor Scheme, briefly describes Community Visitor programs operating in other contexts, and reports both the support for the Community Visitor Scheme and the need to change certain aspects of its operation. It outlines the key aspects of the Community Visitor Scheme: the independence and appointment of Community Visitors; skills and qualifications for appointment; Community Visitors' functions; the frequency of visits; the jurisdiction of the Community Visitor Scheme; training; monitoring and supervision; Community Visitors' powers; and a right for residents to see a Community Visitor. Arguments are canvassed about possible changes that need to be made to the Community Visitor Scheme.

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1. New South Wales, Community Visitors, *Annual Report 1997/98* (CSC, Sydney) at 3. A much smaller Official Visitor Scheme previously operated in NSW under the *Community Welfare Act 1987* (NSW) s 3B, repealed by CAMA Sch 2. The Community Visitor Scheme under CAMA is unrelated to the Community Visitor Scheme run by the Young Men's Christian Association (YMCA) in NSW: Young Men's Christian Association of Sydney, "The YMCA of Sydney: Community Visitors" (pamphlet, 1997). This latter program is part of the Commonwealth Department of Health and Family Services' Community Visitor Scheme which funds community-based organisations to run programs of volunteer Visitors to visit lonely or isolated elderly and disabled people residing in aged care facilities: Australia, Commonwealth Department of Health and Family Services, *The Community Visitors Scheme: Visitors Handbook* (3rd edition, 1997) at 1.
  2. *Community Welfare Act 1987* (NSW) s 3B, repealed by CAMA Sch 2.
  3. CAMA s 7.
  4. CAMA s 8.
  5. CAMA s 9.
  6. CAMA s 10.

## OVERVIEW OF THE COMMUNITY VISITOR SCHEME

4.3 Services covering three target groups of consumers are visited under the Community Visitor Scheme:

- children and young people in care;
- children and young people with a disability; and
- adults with a disability.<sup>7</sup>

4.4 In the 1997-98 financial year, 34<sup>8</sup> Community Visitors made 2,243 visits to 774 government and non-government services, which account for 90% of the 863 eligible services.<sup>9</sup> Community Visitors may make visits either with or without notice to service providers.<sup>10</sup>

4.5 Soon after the Community Visitor Scheme commenced, the then Minister for Community Services wrote to service providers and stated:

The appointment of Community Visitors is one of the most exciting initiatives of the CAMA legislation. It enables us to reach into the community and to ensure that quality services are provided to children and young people in care and people with a disability in the care of both ... [DOCS] and funded non-government service providers.<sup>11</sup>

4.6 The role of the Community Visitors has been described as:

- protecting and advocating for the interests of children, young people and adults in residential care, including those with disabilities;
- providing advice to the Minister and the Commissioner for Community Services about how to improve residents' quality of care; and

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7. New South Wales, Community Visitors, *Annual Report 1997/98* (CSC, Sydney) at 6.

8. There were 30 Visitors at 8 April 1999: Information supplied by CSC (23 March 1999) at 1.

9. New South Wales, Community Visitors, *Annual Report 1997/98* (CSC, Sydney) at 3.

10. CAMA s 8(1)(a). The CSC does not collect data on the proportion of visits which are with and without notice: Information supplied by the CSC (23 March 1999) at 3. See para 4.86.

11. Letter from the Hon R Dyer, Minister for Community Services, to service providers, 1 November 1995.

- giving priority to visiting those residents at greatest risk.<sup>12</sup>

4.7 Visitors act as the “eyes and ears” of the Minister, by monitoring issues in service delivery at a grass-roots level and using this knowledge to inform the Minister.<sup>13</sup> Community Visitors help to identify and resolve problems with service provision and complaints by residents of visitable services.<sup>14</sup> They carry out their objectives in four ways:

- informing the Minister for Community Services and the Commissioner about service quality by reporting to the CSC after each visit and identifying issues affecting the well-being of residents;
- promoting residents’ rights by raising any problems with service providers and attempting to resolve them quickly and locally;
- consulting with residents to identify concerns and the solutions they would like to see; and
- providing information to service providers about good practice.<sup>15</sup>

4.8 Community Visitors contribute to and complement the work of the CSC in its monitoring and review roles.<sup>16</sup> For example, Community Visitors played a key role in identifying or confirming major concerns about the care and treatment of consumers in two institutions which led to major CSC inquiries.<sup>17</sup> They also provided further information to the CSC during the course of these inquiries and helped facilitate the involvement of consumers, advocates and parents.<sup>18</sup>

4.9 Community Visitors play a “trouble-shooting” role which often relies more on “nuance than documentable fact”.<sup>19</sup> This is particularly true given

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12. New South Wales, Community Visitors, *Annual Report 1997/98* (CSC, Sydney) at 3.

13. CSC, *CAMA Submission 1* at 46.

14. “Visitable services” is defined at para 4.52.

15. New South Wales, Community Visitors, *Annual Report 1997/98* (CSC, Sydney) at 11-13.

16. Disability Council of NSW, *Submission 2* at 47 and 49.

17. New South Wales, CSC, *Suffer the Children: The Hall for Children Report* (1997); New South Wales, CSC, *Inquiry into Care and Treatment of Residents of Cram House* (1998); and CSC, *CAMA Submission 1* at 48.

18. CSC, *CAMA Submission 1* at 48. See also J Quilty, “Hall for Children: Closure and Update” (1997) 10 *Can Do* 1 at 3.

19. Community Visitors, *CAMA Submission* at 12.

the relatively short amount of time a Community Visitor may be at an institution conducting a visit. The standard allotment of time per visit is three to four hours: this includes the visit as well as any follow-up or administration required.<sup>20</sup> This inevitably means that Community Visitors can only get a “snapshot” of a service when they visit.<sup>21</sup> Particularly in large residential settings, Community Visitors will often pick up potential problems by simply being alert to indicators, clues or impressions which may warrant further investigation. For instance, Commission staff accompanied one Community Visitor on a visit to a large institution for people with disabilities. On observing that a resident had bruising to his face, the Visitor questioned the resident about the cause of the injury and noted that she would seek further information on any relevant incident from staff and official records.

4.10 In 1997-98 some of the problems most commonly identified by Community Visitors as a result of their visits were:

- poor or non-existent service plans or inadequate systems for recording plans;
- lack of access by residents to friends and family members, and the community;
- inadequate management practices (for instance, concerning recruitment, training, definition of staff roles, and implementation of policies and procedures);
- concerns about policies and practice concerning behaviour management (such as inadequate or non-existent policies, or inadequate implementation in practice);<sup>22</sup>
- poor environment and conditions within the facility; and
- safety issues.<sup>23</sup>

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20. Information supplied by CSC (30 March 1999) at 1.

21. Information supplied by T Stacey (11 December 1998).

22. Information supplied by CSC (22 March 1999).

23. New South Wales, Community Visitors, *Annual Report 1997/98* (CSC, Sydney) at 11, 19 and 28.

## OTHER COMMUNITY VISITOR SCHEMES

4.11 There are a variety of Community Visitors (or Official Visitors as they are sometimes called) operating in other contexts in NSW and elsewhere in Australia. These include, for example, juvenile justice centres,<sup>24</sup> psychiatric institutions,<sup>25</sup> correctional centres,<sup>26</sup> children's residential services,<sup>27</sup> and services for people with intellectual disabilities.<sup>28</sup> These Schemes operate in a similar way to the CAMA model. Some of these programs will be referred to in this chapter for comparative purposes.

4.12 Where reviews of Community Visitor programs have been conducted, the reports generally indicate that Community Visitors play a valuable role in increasing the "accountability and transparency" of service provision<sup>29</sup> and advocating for the welfare of residents.<sup>30</sup> They also assist in the rapid and effective resolution of complaints at a local level.<sup>31</sup> The independence of Community Visitors from the institutions visited is regarded as a key strength.<sup>32</sup> Some limitations have also been identified, however, such as residents' inability to contact Community Visitors (for example, due to lack

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24. *Children (Detention Centres) Act 1987* (NSW) s 8A; and *Children (Detention Centres) Regulation 1995* (NSW) cl 19(4).
  25. *Mental Health Act 1990* (NSW) Pt 2 of Chap 8 and Sch 5.
  26. *Correctional Centres Act 1952* (NSW) s 8A, 8B and Sch 4A; and *Prisons (General) Regulation 1995* (NSW) Pt 11 Div 1.
  27. *Children's Commissioner and Children's Services Appeals Tribunals Act 1996* (Qld) Pt 4; and *Children's Services Act 1986* (ACT) s 19A and 19B.
  28. *Intellectually Disabled Persons' Services Act 1986* (Vic) Div 5 and Sch 3.
  29. Australian Capital Territory, Department of Education and Training and the Children's, Youth and Family Services Bureau, *Review of the Children's Services Act 1986: Appendix to Public Consultation Paper* (1997) at 45. See also K L Thomas and S McCulloch (ed) "Correctional Reform in Queensland: At the Cross Roads Post-Kennedy" (1994) 5(4) *Criminology Australia* 2 at 2 and 3.
  30. New South Wales, Official Visitors' Advisory Committee, *A Report to the Minister for Health* (Official Visitors' Program, Sydney, 1996) at 25. See also E Mushins, "Proposal for Review of Community Visitors Program" (Unpublished paper, Office of the Public Advocate, Victoria, 1996) at 4.
  31. M Fulford, "Official Visitors' Scheme" [1989] *New South Wales Department of Corrective Services Information Bulletin* (9 August) 2 at 2.
  32. S McCulloch, "The Official Visitor Program in the Queensland Correctional System" (1994) 94 *Prison Service Journal* 47 at 50.

of knowledge or prevention by staff),<sup>33</sup> failure by staff to follow up on issues raised by Community Visitors,<sup>34</sup> ambiguity about the role of Community Visitors, and ensuring that they complement (but do not duplicate) other monitoring mechanisms.<sup>35</sup> Some other Community Visitor programs are also currently being reviewed.<sup>36</sup>

## SUPPORT FOR THE COMMUNITY VISITOR SCHEME

4.13 There was very strong support for the concept of the Community Visitor Scheme in submissions and at the Commission's public seminars. This support came from a broad spectrum of stakeholders, including peak consumer bodies,<sup>37</sup> advocacy bodies,<sup>38</sup> families of people with disabilities,<sup>39</sup> service providers,<sup>40</sup> government advisory bodies,<sup>41</sup> the CSC,<sup>42</sup> and the

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33. McCulloch at 50.

34. McCulloch at 50.

35. *Review of the Queensland Children's Commissioner and Children's Services Appeals Tribunal Act 1996: An Issues Paper* (paper prepared for the Hon Anna Bligh, MLA, Minister for Families, Youth and Community Care, Brisbane, by Dispute Management Services in association with P Gordon and S Parker, 1998) (the "Bligh paper") at 20-21; and Australian Capital Territory, Department of Education and Training and the Children's, Youth and Family Services Bureau, *Review of the Children's Services Act 1986: Appendix to Public Consultation Paper* (1997) at 45-46.

36. These are first, the Scheme run by the Office of the Public Advocate in Victoria (covering three streams of Visitors, including facilities for people with intellectual disabilities). Secondly, the Visitor Scheme covering children's residential facilities which is included in the review of the *Children's Commissioner and Children's Services Appeals Tribunals Act 1996* (Qld): Bligh paper at 19-21.

37. Disability Safeguards Coalition, *CAMA Submission 1* at 5; Physical Disability Council of NSW Inc, *Submission* at 14; and NSW Council for Intellectual Disability, *CAMA Submission* at 9.

38. Western Sydney Intellectual Disability Support Group Inc, *CAMA Submission* at 2.

39. Action for Citizens with Disabilities, *Submission* at 18; and L Moffit, *Submission* at 2.

40. ACROD Ltd NSW Division, *Submission* at 6.

41. Disability Council of NSW, *Submission 2* at 48 and 52-53.

42. CSC, *CAMA Submission 1* at 47-48.



Community Visitors themselves.<sup>43</sup> For example People With Disabilities (NSW) Inc argued that:

The Community Visitors Scheme is a “pro-active” means of promoting the rights and interests of children and young people in care [and people with disabilities]. It does not rely for its effectiveness on a complaint being lodged with the CSC. This is vitally important, as many [residents] are unable to make complaints ... [themselves]. The ... Scheme is an extremely effective way to monitor patterns and trends in service delivery across the State from the perspective of the consumer ...<sup>44</sup>

People With Disabilities (NSW) Inc also stressed the value of Community Visitors’ direct contact with residents as a unique feature of this form of monitoring.<sup>45</sup> The Commission agrees that the Community Visitor Scheme is a valuable program which should be maintained.

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### **RECOMMENDATION 31**

#### **The Community Visitor Scheme should be retained.**

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4.14 Many people also made suggestions to the Commission about how they felt the Community Visitor Scheme could be made more effective. This is perhaps not surprising given the short period of time for which the Community Visitor Scheme has been in operation, and the fact that the process has reportedly required “a very steep learning curve” for both the Community Visitors and the CSC.<sup>46</sup> In the remaining part of this chapter, the Commission examines ways that the Community Visitor Scheme may be improved.

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43. Community Visitors, *CAMA Submission* at 20-22.

44. People With Disabilities (NSW) Inc, *CAMA Submission* at 22.

45. People With Disabilities (NSW) Inc, *CAMA Submission* at 23.

46. New South Wales, *Community Visitors Manual* (CSC, Sydney, November 1997) Section 1 at 1.

## APPOINTMENT OF COMMUNITY VISITORS

### Current process for appointment

4.15 Community Visitors are appointed by the Minister for Community Services, following consultation with the Review Council.<sup>47</sup> In practice, the CSC deals with recruitment (advertising, culling and interviewing) and provides informal recommendations to the Minister.<sup>48</sup> Community Visitors can report to both the CSC and the Minister for Community Services.<sup>49</sup> They are not employees of the CSC. Therefore, the *Public Sector Management Act 1988* (NSW) does not apply to them,<sup>50</sup> and they do not have access to the conditions of employment of public servants. Community Visitors are paid on an hourly basis according to the rates established for part-time, statutory appointees by the Premier applicable to all NSW government agencies.<sup>51</sup>

4.16 When CAMA was being developed in the early 1990s, the Official Visitors argued that their independence should be enhanced under the new legislation.<sup>52</sup> When CAMA was introduced into Parliament, the then Minister for Community Services emphasised that the independence of Community Visitors was critically important to their role:

These community visitors will provide residents of ... [community] services with an independent person who can provide a sympathetic ear for any needs, concerns or difficulties that clients may wish to share with someone who is not directly involved in the delivery of those services.<sup>53</sup>

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47. CAMA s 7(1).

48. CSC, *CAMA Submission 1* at 45; and Disability Safeguards Coalition, *CAMA Submission 1* at 5.

49. CAMA s 8(1)(d).

50. CAMA s 7(4).

51. New South Wales, *Community Visitors Manual* (CSC, Sydney, November 1997) Section 7 at 1 and 3.

52. New South Wales, DOCS, *1992 Annual Report: Official Visitor Scheme, NSW Department of Community Services Residential Care for Wards* at 20.

53. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 11 March 1993, the Hon J Longley, Minister for Community Services, Second Reading Speech at 767.

Submissions and participants in the Commission's public seminars agreed that the independence of the Community Visitors was essential for them to fulfil their role effectively.<sup>54</sup>

### **Should the process be changed?**

4.17 The NSW Government argued that the independence of Community Visitors is sufficiently safeguarded by the current Act.<sup>55</sup> The Disability Council of NSW supported this view.<sup>56</sup> This is consistent with the comment in the report by the Task Force on Private "For Profit" Hostels in 1993, that Community Visitors under CAMA have much greater independence from DOCS than do Official Visitors to mental health facilities from the Department of Health.<sup>57</sup>

4.18 However, most submissions to the Commission on the issue of Community Visitors' appointment and accountability criticised the current process.<sup>58</sup> It was argued that there was potential conflict of interest and scope for political interference created by the Minister also being responsible for services monitored by Community Visitors.<sup>59</sup> Visitors also have very limited

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54. Citizen Advocacy NSW, *Submission* at 10; NCOSS, *CAMA Submission* at 11; B Semmler, *Submission* at 1 (Appendix); P Hutten, *Submission* at 37; Disability Council of NSW, *Submission 2* at 48; and M Bowles, *Submission* at 10.

55. NSW Government, *CAMA Submission* at 6.

56. Disability Council of NSW, *Submission 2* at 49.

57. New South Wales, Task Force on Private "For Profit" Hostels, *Report of the Task Force on Private "For Profit" Hostels December 1993* (Office on Disability, Sydney, 1993) Volume 1 at 56.

58. Disability Safeguards Coalition, *CAMA Submission 1* at 5; Action for Citizens with Disabilities, *Submission* at 18; NCOSS, *CAMA Submission* at 11; Physical Disability Council of NSW Inc, *Submission* at 15; P Hutten, *Submission* at 37; NSW Council for Intellectual Disability, *CAMA Submission* at 10; M Bowles, *Submission* at 9; Barnardos Australia, *Submission* at 8; Autism Association of NSW, *Submission* at 12; and People With Disabilities (NSW) Inc, *CAMA Submission* at 20. This was also the view of the majority of respondents to the Community Visitor Survey.

59. Disability Safeguards Coalition, *CAMA Submission 1* at 5; NCOSS, *CAMA Submission* at 11; Physical Disability Council of NSW Inc, *Submission* at 15; M Bowles, *Submission* at 9; Barnardos Australia, *Submission* at 8; Autism Association of NSW, *Submission* at 12; People With Disabilities (NSW) Inc,

access to busy Ministers in practice.<sup>60</sup> Community Visitors further argued that their status as Ministerial appointees makes it difficult to negotiate their conditions of employment. For example, there is no established process for reviewing Community Visitors' work conditions, schedules or performance, or establishing protocols on issues such as occupational health and safety.<sup>61</sup>

4.19 Other options suggested for appointment of Community Visitors were:

- appointment by the CSC and a PJC;<sup>62</sup>
- appointment by the Attorney General either directly<sup>63</sup> or in consultation with a PJC;<sup>64</sup> or
- changing Community Visitors' status to employees of the CSC.<sup>65</sup>

4.20 After careful analysis, the Commission concludes that there is no compelling reason to justify changing the appointment process for Community Visitors from Ministerial appointees. The Commission considered whether Community Visitors should be made employees of the CSC, but this option was rejected for three primary reasons. First, the Commission is not convinced that it would improve the operation of the Community Visitor Scheme or address any of the shortcomings identified (discussed in more detail below). Secondly, a system of Ministerial appointment is the standard process used under other Visitor Schemes in

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*CAMA Submission* at 20-21; and Community Visitors, *CAMA Submission* at 7.

60. CSC, *CAMA Submission 1* at 46; and Community Visitors, *CAMA Submission* at 13-15. See NCOSS, *CAMA Submission* at 11.

61. Community Visitors, *CAMA Submission* at 8-10. See also CSC, *CAMA Submission 1* at 46. As discussed below at para 4.74, the CSC is currently developing a policy on occupational health and safety issues.

62. CSC, *CAMA Submission 1* at 45; Disability Safeguards Coalition, *CAMA Submission 1* at 5; Physical Disability Council of NSW Inc, *Submission* at 15; NSW Council for Intellectual Disability, *CAMA Submission* at 10; and Action for Citizens with Disabilities, *Submission* at 18. A PJC is discussed at para 3.24-3.29.

63. Autism Association of NSW, *Submission* at 12; and NCOSS, *CAMA Submission* at 11.

64. People With Disabilities (NSW) Inc, *CAMA Submission* at 20.

65. Community Visitors, *CAMA Submission* at 7 and 9-11.

NSW<sup>66</sup> and other States,<sup>67</sup> and there does not appear to be sufficient reason to justify treating Community Visitors under CAMA differently to Visitors in other contexts. Thirdly, it is likely that making Community Visitors employees of the CSC would markedly increase the cost of the Community Visitor Scheme. Unless there is a commensurate increase in funding, this may lead to a reduction in the hours available for visiting. As discussed below, the infrequency of visits is currently a major shortcoming of the Community Visitor Scheme.<sup>68</sup>

4.21 However, there are two amendments which in the Commission's view should be made to the provisions governing the appointment process for Community Visitors. First, the Act should state that the Minister appoint Community Visitors on the recommendation of the Commissioner. This would simply formalise the current practice.

4.22 Secondly, as discussed in more detail in Chapter 6, the Commission recommends abolition of the Review Council.<sup>69</sup> The requirement for the Minister to consult with the Review Council before appointing Community Visitors should therefore be removed from the Act.

4.23 It is important that Community Visitors be selected on merit and that appropriate community representatives are involved in the selection process. This issue has been discussed in Chapter 3 in relation to the appointment of the Commissioner.<sup>70</sup>

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## RECOMMENDATION 32

**Section 7(1) should be amended to require that the Minister appoint Community Visitors on the recommendation of the Community Services**

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66. *Correctional Centres Act 1952* (NSW) s 8(A)(1); *Children (Detention Centres) Act 1987* (NSW) s 8A(1); and *Mental Health Act 1990* (NSW) s 228(1).

67. *Children's Services Act 1986* (ACT) s 19A(1). But see *Children's Commissioner and Children's Services Appeals Tribunals Act 1996* (Qld) s 29.

68. See para 4.43-4.51.

69. See Recommendation 65 at para 6.29.

70. See para 3.30.

**Commissioner. The requirement for the Minister to consult with the Community Services Review Council should be removed.**

**Section 7(4) should be retained. This exempts Community Visitors from the operation of the *Public Sector Management Act 1988 (NSW)*.**

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## Terms of appointment and reappointment

4.24 A Community Visitor is appointed for a period not greater than three years (originally two years) and is eligible to be re-appointed for further terms, not exceeding a total of six years (originally four years).<sup>71</sup>

4.25 Very few submissions addressed the appropriateness of the length of Community Visitors' appointments.<sup>72</sup> Only one submission suggested that there be any change to the current term – to make the original term five years instead of three.<sup>73</sup> There are two factors to be balanced in deciding whether there are grounds for making Community Visitors' terms either longer or shorter.

4.26 On the one hand, short terms of appointment may be preferable to longer ones since service providers may become familiar with and adapt to the Community Visitors' *modus operandi*.<sup>74</sup> As has been argued in the context of another Visitor Scheme, Community Visitors can develop a "symbiotic relationship" with the staff at the institutions visited and form a set of assumptions about what investigations are necessary and practicable.<sup>75</sup> Community Visitors can also become burnt out and cynical by becoming too familiar with or even by being "captured" by "the system".<sup>76</sup>

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71. CAMA s 7(3).

72. Community Visitors, *CAMA Submission* at 12; People With Disabilities (NSW) Inc, *CAMA Submission* at 20; and NSW Council for Intellectual Disability, *CAMA Submission* at 9.

73. People With Disabilities (NSW) Inc, *CAMA Submission* at 20.

74. Community Visitors, *CAMA Submission* at 12.

75. S Bottomley and R Woellner, "Safeguarding Mental Patients' Rights" (1981) 6 *Legal Service Bulletin* 277 at 279.

76. Community Visitor Survey.

4.27 On the other hand, a longer term may be beneficial because it can often take a considerable time to develop knowledge of and rapport with service providers and consumers.<sup>77</sup> It also allows Community Visitors to complete work on projects they have started,<sup>78</sup> and provides a greater degree of job stability and security for Visitors. **The Commission does not consider that the current term of appointment of Community Visitors should be altered, given the balance that needs to be made between these competing factors.**

### Termination of appointment

4.28 There are no provisions in the current legislation outlining the circumstances in which a Community Visitor's appointment can be terminated.

4.29 Of those submissions which addressed this issue, the majority favoured inclusion of criteria in the legislation.<sup>79</sup> The CSC argued that this would strengthen the independence of Community Visitors by removing their vulnerability to "the impact of political disfavour".<sup>80</sup> A further submission favoured inclusion in the Regulation or administrative guidelines only.<sup>81</sup>

4.30 Four models were suggested in submissions as appropriate criteria for termination of appointment, namely:

- those used for members of the CS Division of the ADT, other than the President (that is, a set of very specific circumstances such as death, bankruptcy and mental incapacity, coupled with a general power for removal by the Governor-in-Council on the grounds of incapacity, incompetence, or misbehaviour);<sup>82</sup>

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77. Community Visitors, *CAMA Submission* at 12; and Community Visitor Survey.

78. Community Visitor Survey.

79. CSC, *CAMA Submission 2* at 45; NCOSS, *CAMA Submission* at 11; Disability Council of NSW, *Submission 2* at 49; and Autism Association of NSW, *Submission* at 13.

80. CSC, *CAMA Submission 2* at 45.

81. NSW Council for Intellectual Disability, *CAMA Submission* at 10.

82. ADT Act Sch 3 cl 8; CSC, *CAMA Submission 2* at 45. The CSC's recommendation refers to the now repealed s 103 of CAMA, which governed

- breach of a set of general principles modelled on those governing people who exercise functions under the *Guardianship Act 1987* (NSW);<sup>83</sup>
- a set of criteria more closely tied to specific aspects of the Community Visitor's role (for instance, failure to complete visits or fulfil their other functions);<sup>84</sup> or
- serious misbehaviour, incompetence, incapacity or dereliction of duty.<sup>85</sup>

4.31 The Commission considers that, in order to protect Community Visitors' independence, it is preferable to include some form of stringent criteria for termination in the legislation. For the sake of consistency this should be the same as that for the Commissioner, that is, incapacity, incompetence or misbehaviour.<sup>86</sup>

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### RECOMMENDATION 33

**The Minister should be given the power to terminate a Community Visitor's appointment on the grounds of incapacity, incompetence or misbehaviour.**

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## SKILLS AND QUALIFICATIONS

### Current skills and qualifications

4.32 CAMA lays down certain skills and qualifications which are required of Community Visitors. These are:

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the termination of appointment of members of the former Community Services Appeals Tribunal. However, these old criteria are essentially similar to those under the new legislation.

83. *Guardianship Act 1987* (NSW) s 4. These general principles are discussed at para 2.25 and 2.32.

84. Disability Council of NSW, *Submission 2* at 49.

85. People With Disabilities (NSW) Inc, *CAMA Submission* at 21.

86. CAMA s 78(4). See para 3.33.



- appropriate knowledge and expertise in the matters relating to the community services in which he or she would be most involved;
- a commitment to the objectives of the community welfare legislation; and
- skills in solving problems about access to, and the use of, community services.<sup>87</sup>

4.33 As with some other Visitor programs,<sup>88</sup> the Community Visitor Scheme under CAMA has placed an emphasis on recruiting Visitors from a diverse range of backgrounds. These include:

- people with a disability;
- family members of people with a disability;
- former state wards;
- people who were in care as children;
- advocates; and
- professionals.<sup>89</sup>

4.34 The CSC reports that it has always placed an emphasis on recommending for appointment individuals:

with strong consumer focus and in some instances, direct experience as consumers, rather than people with professional or service provider backgrounds.<sup>90</sup>

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87. CAMA s 7(2)(a)-(c).

88. New South Wales, Official Visitors' Advisory Committee, *Official Visitors NSW Mental Health Act 1990 Practice Manual* (2nd edition, Official Visitors' Program, Sydney, October 1997) at 9.

89. New South Wales, Community Visitors, *Annual Report 1997/98* (CSC, Sydney) at 4.

90. CSC, *CAMA Submission 2* at 47.

## Do Community Visitors require any other skills and qualifications?

4.35 No submissions objected to the current criteria laid down for appointment of Community Visitors. Some submissions argued that the current criteria are adequate,<sup>91</sup> while others favoured the inclusion of further items such as:

- cultural and linguistic competencies;<sup>92</sup>
- commitment to the human rights of consumers of community services;<sup>93</sup>
- an ability to monitor services in the best interests of consumers;<sup>94</sup> and
- a broad understanding of welfare issues and structures and skills in communicating with children and young people.<sup>95</sup>

A NSW Child Protection Council report has also suggested that young people aged between 15 and 20 years with experience in the care system and possibly nominated by SNYPIC be appointed as Community Visitors, to encourage children and young people in care to make complaints.<sup>96</sup>

4.36 The Commission agrees that the above skills and qualities are valuable for Community Visitors to possess. However, in our view they are adequately covered by the current appointment criteria. There is therefore no need for legislative amendment on this issue.

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91. CSC, *CAMA Submission 2* at 45; Disability Council of NSW, *Submission 2* at 49; and People With Disabilities (NSW) Inc, *CAMA Submission* at 21.
  92. Multicultural Disability Advocacy Association of NSW Inc, *Submission* at 9. See the Recruitment Package for the Official Visitor Program for NSW mental health facilities, which encourages “persons who represent a range of Aboriginal and ethnic viewpoints” to apply: “Recruitment Package for Official Visitors” in New South Wales, Official Visitors’ Advisory Committee, *A Report to the Minister for Health* (Official Visitors’ Program, Sydney, 1996).
  93. *CAMA Submission* at 9.
  94. P Hutten, *CAMA Submission* at 37.
  95. Burnside, *Submission* at 4.
  96. New South Wales, Child Protection Council, *Having a Say: A Report on the “Giving a Voice to Children” Project, about Children and Young People Participating in Processes and Decisions which Relate to their Care and Well-being* (1998) at 105-106.

4.37 In appointing Community Visitors, however, consideration should be given to ensuring that the pool of Visitors is as diverse as possible, in terms of factors such as race and ethnicity, language skills, gender, occupation, geographical location, and experience of service provision.

4.38 Some of the above issues identified in submissions may also be appropriate to examine further in training of Community Visitors. This is particularly true of skills in communicating with children and young people, and Aboriginal and Torres Strait Islander people or people from a non-English speaking background. The issue of training is discussed further below.<sup>97</sup>

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**RECOMMENDATION 34**

**Section 7(2)(a)-(c) should be retained. This sets out the criteria for appointment of Community Visitors.**

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**Exclusion of DOCS and ADD employees from appointment as Community Visitors**

4.39 Visitor Schemes often exclude certain persons from being appointed as Visitors due to a potential conflict of interest.<sup>98</sup> This is also true of the CAMA Community Visitor Scheme. Permanent or temporary employees of DOCS and ADD are excluded from employment as Community Visitors.<sup>99</sup> However, there are other categories of people who may also face a similar conflict of interest for example, those working for non-government service providers. The Commission agrees with submissions<sup>100</sup> which considered that the

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97. See para 4.58-4.71.

98. *Intellectually Disabled Persons' Services Act 1986* (Vic) Sch 3 cl 1(2); *Children (Detention Centres) Act 1987* (NSW) s 8A(2) and s 3 definition of "officer"; *Mental Health Act 1990* (NSW) s 241; and *Correctional Centres Act 1952* (NSW) Sch 4A cl 3A.

99. CAMA s 7(2)(d).

100. CSC, *CAMA Submission 2* at 45; and People With Disabilities (NSW) Inc, *CAMA Submission* at 21.

exclusion in the legislation should therefore be broadened to take account of this.

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**RECOMMENDATION 35**

**Section 7(2)(d) should be amended to provide that a person should not be appointed as a Community Visitor if that person is employed in a capacity which could create an actual or perceived conflict between the interests of residents and those of the Community Visitor or his or her employer.**

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## **FUNCTIONS OF COMMUNITY VISITORS**

### **Functions and powers to be outlined in CAMA**

4.40 As a preliminary matter, the Commission considers it vital that the functions and powers conferred on Community Visitors be located in the primary legislation, not the Regulation, as is currently the case.<sup>101</sup> This was strongly supported in submissions.<sup>102</sup> Accordingly, the Commission recommends that CAMA be amended to incorporate the functions of the Community Visitors as detailed in the CAMA Regulation, and clearly outline their powers.

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**RECOMMENDATION 36**

**Part 2 of the Act should be redrafted to clearly identify the functions and powers of Community Visitors.**

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101. CAMA Reg cl 4.

102. Action for Citizens with Disabilities, *Submission* at 18; NCOSS, *CAMA Submission* at 12; Carers NSW Inc, *Submission* at 14; and Disability Council of NSW, *Submission 2* at 50.

## Current functions of Community Visitors

4.41 The provision in CAMA headed “Functions of Community Visitors” actually deals more with the powers of Community Visitors.<sup>103</sup> The description of Visitors’ functions is in fact found in the Regulation rather than in the Act.<sup>104</sup> These functions are:

- to inform the Minister and Community Services Commissioner on matters affecting the welfare, interests and conditions of residents in visitable services;
- to encourage the promotion of legal and human rights of these residents, including the right to privacy, confidentiality, adequate information and consultation about their services and the right to complain;
- to consider matters raised by residents and staff of those services and people with a genuine concern for the welfare, interests and conditions of residents;
- to inform residents about advocacy services available to them to help them present a complaint and, in appropriate cases, assist them to access such services; and
- to facilitate, wherever reasonable and practicable, the early and speedy resolution of complaints affecting residents by referring those complaints to service providers or other appropriate bodies.

## Are Community Visitors’ current functions appropriate?

4.42 Submissions generally argued that the functions given to Visitors were appropriate.<sup>105</sup> They are generally comparable to those found in other Visitor Schemes.<sup>106</sup> **The Commission does not consider that the functions of Community Visitors require any amendment.**

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103. CAMA s 8.

104. CAMA Reg cl 4.

105. The Northcott Society, *Submission* at 3; CSC, *CAMA Submission 1* at 47; and People With Disabilities (NSW) Inc, *CAMA Submission* at 22.

106. *Intellectually Disabled Persons’ Services Act 1986* (Vic) s 54; *Children (Detention Centres) Act 1987* (NSW) s 8A(4); *Correctional Centres Act 1952*

## FREQUENCY OF VISITS

### How often are services currently visited?

4.43 There is no minimum requirement in CAMA concerning how often services should be visited. In practice the frequency of visits has been steadily cut back.<sup>107</sup> Although there has been a marked increase in the number of services deemed “visitable”,<sup>108</sup> the resourcing of the Community Visitor Scheme has not allowed more frequent visits.<sup>109</sup>

4.44 As a consequence, the frequency of visits to group homes in the Sydney area has been halved, with these facilities being visited only once every 12 months, instead of once every 6 months.<sup>110</sup> The current rates of visiting are as follows:

- 30% receive one visit in 12 months;
- 35% receive two visits in 12 months;
- 19% receive four visits in 12 months;
- 5% receive six visits in 12 months; and
- 8% receive more than six visits in 12 months.<sup>111</sup>

The majority of services (65%) are therefore only visited once or twice a year.

4.45 The comparative frequency of visits to institutions is determined by the CSC on the basis of a set of risk indicators,<sup>112</sup> with those services receiving

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(NSW) s 8A(4); *Prisons (General) Regulation 1995* (NSW) cl 133; *Mental Health Act 1990* (NSW) s 227 and 232; *Children’s Services Act 1986* (ACT) s 19B; and *Children’s Commissioner and Children’s Services Appeals Tribunals Act 1996* (Qld) s 35. Note that as discussed at para 4.41, “functions” are sometimes conflated with “powers” in the legislation governing some Visitor Schemes.

107. CSC, *CAMA Submission 1* at 48; and Community Visitors, *CAMA Submission* at 27.

108. The CSC reports a 30% increase in visitable services from 659 to 863 services between June 1995 and June 1998: see CSC, *CAMA Submission 1* at 48.

109. CSC, *CAMA Submission 1* at 48.

110. CSC, *CAMA Submission 1* at 49.

111. CSC, *CAMA Submission 1* at 49.

112. CSC, *CAMA Submission 1* at 48.

higher scores being allocated a higher number of Community Visitor contact hours.<sup>113</sup> These scores are calculated from a series of questions on the following topics:

- physical isolation of the service;
- potential change within the service in the future (for example, in the case of a disability service, whether a transition plan has been approved);
- secure care;
- managing challenging behaviour;
- the degree of community access;
- congregate care;
- residents of non-English speaking background or Aboriginal and Torres Strait Islander people;
- health care policies for residents;
- programming and planning for residents' individual needs;
- the age of residents;
- the disability-related needs of residents;
- the quality of life of residents;
- the rating of the service on a five-point scale; and
- the number of residents.<sup>114</sup>

### **Should services be visited more frequently?**

4.46 One of the most commonly voiced complaints about the Community Visitor Scheme, both in submissions and at the Commission's public seminars, was that it does not provide sufficiently frequent visits to enable the Community Visitors to fulfil their functions effectively. The fear was that this makes the Community Visitor Scheme rather tokenistic in nature. This view was expressed by a wide range of stakeholders, including service providers,<sup>115</sup> peak consumer groups,<sup>116</sup> consumers,<sup>117</sup> advocacy groups,<sup>118</sup>

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113. Information supplied by CSC (23 March 1999) at 1.

114. Information supplied by CSC (23 March 1999) at Appendix 1.

115. Burnside, *Submission* at 4.

family members of people with disabilities,<sup>119</sup> the CSC<sup>120</sup> and the Community Visitors themselves.<sup>121</sup>

4.47 The CSC argued that whereas the uniform coverage of services provides an invaluable opportunity for Community Visitors to identify and monitor issues across the entire sector, the current frequency of visits denies many residents in visitable services reasonable access to Community Visitors. This severely hampers the development of relationships with residents, the identification of service quality issues and the ability to provide follow-up of issues.<sup>122</sup> The CSC also considers that the infrequency of visits means that community expectations of the Community Visitor Scheme are not being met.<sup>123</sup>

4.48 Some stakeholders made suggestions as to an appropriate minimum frequency of visits. These included:

- four visits annually;<sup>124</sup>
- six visits annually;<sup>125</sup>
- 12 visits annually with a maximum of six weeks between visits;<sup>126</sup> and
- 52 visits annually for children in care.<sup>127</sup>

4.49 The CSC estimates that, based on their current list of risk factors, 87% of services would require six visits annually and 13% would require visits every fortnight. To fulfil this requirement, the allocation of hours would need to be increased from the current 10,000 to approximately 26,000 visiting

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116. People With Disabilities (NSW) Inc, *CAMA Submission* at 23.

117. RR 9 at para 3.28 and 3.33. See also RR 9 at para 3.19.

118. NCOSS, *CAMA Submission* at 12.

119. Action for Citizens with Disabilities, *Submission* at 18; H Seares, *Submission* at 6; and M Bowles, *Submission* at 9.

120. CSC, *CAMA Submission 1* at 49.

121. Community Visitors, *CAMA Submission* at 27. This was also a concern expressed by many of the respondents to the Community Visitor Survey.

122. CSC, *CAMA Submission 1* at 48.

123. CSC, *CAMA Submission 1* at 49. See also Community Visitors, *CAMA Submission* at 27.

124. NCOSS, *CAMA Submission* at 12.

125. CSC, *CAMA Submission 1* at 49; and Action for Citizens with Disabilities, *Submission* at 18.

126. People With Disabilities (NSW) Inc, *CAMA Submission* at 23.

127. M Bowles, *Submission* at 9.



hours annually. Taking into account the extra costs associated with the Community Visitor Scheme, it estimates that this model would cost \$1.1 million annually, compared to \$450,000 currently.<sup>128</sup>

4.50 As the CSC points out, comparison of the CAMA Community Visitor Scheme with the minimum frequency of visits laid down for other Visitor programs demonstrates clearly that the CAMA system provides much less frequent visits than those typical in other contexts.<sup>129</sup> These include:

- once a week in children's institutions in the ACT;<sup>130</sup>
- for services for people with intellectual disabilities in Victoria, once a month for residential institutions<sup>131</sup> and two visits per year for community residential settings;<sup>132</sup>
- once a fortnight in prisons and detention centres in NSW;<sup>133</sup>
- every two weeks for juvenile justice centres in NSW;<sup>134</sup> and
- for psychiatric services in NSW, every month for psychiatric hospitals, and every six months for health care agencies.<sup>135</sup>

Some submissions also suggested that a minimum level of visiting should be specified in the legislation.<sup>136</sup> This is the case with some other Visitor Schemes.<sup>137</sup>

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128. CSC, *CAMA Submission 1* at 48-50.

129. CSC, *CAMA Submission 1* at 49.

130. *Children's Services Act 1986* (ACT) s 19B(1)(a).

131. *Intellectually Disabled Persons' Services Act 1986* (Vic) s 56(2).

132. Information supplied by E Mushins, Community Visitor Co-ordinator, Office of Public Advocate, Melbourne (8 February 1999).

133. New South Wales, Department of Corrective Services, Director, Ministerial Liaison Unit, *Official Visitor Scheme* (June 1998) at 9.

134. New South Wales, Department of Juvenile Justice, *Official Visitor Scheme Manual* (1996) at para 2.1.

135. *Mental Health Act 1990* (NSW) s 230(1).

136. People With Disabilities (NSW) Inc, *CAMA Submission* at 23; and NCOSS, *CAMA Submission* at 12. See CSC, *CAMA Submission 1* at 49-50.

137. *Children's Services Act 1986* (ACT) s 19B(1)(a); *Intellectually Disabled Persons' Services Act 1986* (Vic) s 56(2) (rate of visiting for residential institutions but not community residential settings); *Mental Health Act 1990* (NSW) s 230(1); and *Correctional Centres Act 1952* (NSW) s 8A(4)(a). Note

4.51 In the Commission’s view, the Community Visitor Scheme can only be effective if it is adequately resourced to enable regular, frequent visits to be made to services. However, it is inappropriate to mandate a minimum level of visiting in the Act. This is an operational matter to be examined by the CSC in consultation with the Community Visitors and is dependent on resources. **However, the Commission’s view is that there is a clear need for the frequency of visits by Community Visitors to be increased.**

## JURISDICTION

### Visitors’ current jurisdiction

4.52 The jurisdiction of the Community Visitor Scheme is determined by the definition of “visitable service”. Community Visitors cannot visit any other place. A “visitable service” is provided by:

- DOCS;
- ADD;
- a funded service where the person using the service is in the full-time care of the service provider; or
- a service provided by the regulations as a visitable service.<sup>138</sup> No service has yet been prescribed.

### Should the jurisdiction be extended?

4.53 Submissions suggested a number of ways in which the jurisdiction of the Community Visitor Scheme should be extended. There was marked support in submissions for expansion to cover three areas in particular:

- people with disabilities living in:
  - licensed boarding houses;<sup>139</sup>

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that under the latter Scheme the frequency of visiting in practice (every 2 weeks) is twice that laid down in the legislation (every month).

138. CAMA s 8(4).

- some of the more flexible arrangements for supported accommodation,<sup>140</sup> such as those people living in private or rented accommodation who receive significant support,<sup>141</sup> or those living in accommodation which is provided by a service provider but leased in the name of the resident;<sup>142</sup> and
- children living in foster care.<sup>143</sup>

4.54 There was also some support for the jurisdiction of Community Visitors to extend to:

- people with disabilities using respite care services;<sup>144</sup>

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139. People With Disabilities (NSW) Inc, *CAMA Submission* at 24; NSW Council for Intellectual Disability, *CAMA Submission* at 10; Disability Council of NSW, *Submission 2* at 52; C Ferguson, *Submission* at 4; Coalition for Appropriate Supported Accommodation, *Submission* at 3; NSW Statewide Disability Coalition, *CAMA Submission* at 2; Community Visitors, *CAMA Submission* at 34; and CSC, *CAMA Submission 1* at 51-52. This was also recommended in New South Wales, Task Force on Private “For Profit” Hostels, *Report of the Task Force on Private “For Profit” Hostels December 1993* (Office on Disability, Sydney, 1993) Volume 1 at 56-57; and Coalition for Appropriate Supported Accommodation for People With Disabilities, *Room to Move: A Position Paper on Licensed Boarding Houses* (Sydney, 1998) at 11-12.
140. NSW Council for Intellectual Disability, *CAMA Submission* at 10; Disability Council of NSW, *Submission 2* at 52; NCOSS, *CAMA Submission* at 12; and Action for Citizens with Disabilities, *Submission* at 18.
141. Australian Quadriplegic Association Ltd (NSW), *Submission* at 4; and People With Disabilities (NSW) Inc, *CAMA Submission* at 24. See Community Visitors, *CAMA Submission* at 34.
142. Disability Safeguards Coalition, *CAMA Submission 1* at 6. See Community Visitors, *CAMA Submission* at 33-34.
143. Disability Safeguards Coalition, *CAMA Submission 1* at 6; People With Disabilities (NSW) Inc, *CAMA Submission* at 24; Disability Council of NSW, *Submission 2* at 52; Multicultural Disability Advocacy Association of NSW Inc, *Submission* at 9; Barnardos Australia, *Submission* at 8; Burnside, *Submission* at 4; Action for Citizens with Disabilities, *Submission* at 18; and Community Visitors, *CAMA Submission* at 34. This was also suggested by some of the young people who participated in SNYPIC’s focus groups: RR 9 at para 3.34. This issue is also currently being considered by the review of the Queensland Official Visitor Scheme for children’s residential services: Bligh paper at 20.

- people with disabilities and children using SAAP services, such as youth refuges;<sup>145</sup>
- children and adults who move from visitable services to other places;<sup>146</sup>
- children in professional care living in the homes of those carers;<sup>147</sup>
- children and young people<sup>148</sup> and people with disabilities<sup>149</sup> not living in visitable services who directly request access to a Visitor;
- HAAC services;<sup>150</sup>
- people with disabilities living in aged care facilities;<sup>151</sup>
- people with disabilities in the criminal justice system;<sup>152</sup> and
- children in the juvenile justice system.<sup>153</sup>

4.55 In Chapter 3,<sup>154</sup> the Commission sets out its reasons for not extending the jurisdiction of the CSC to cover:

- people with disabilities living in aged care facilities;
- people with disabilities in the criminal justice system; and
- children in the juvenile justice system.

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144. Disability Safeguards Coalition, *CAMA Submission 1* at 6; People With Disabilities (NSW) Inc, *CAMA Submission* at 24; NSW Council for Intellectual Disability, *CAMA Submission* at 10; and CSC, *CAMA Submission 1* at 50-51.
145. People With Disabilities (NSW) Inc, *CAMA Submission* at 24; Barnardos Australia, *Submission* at 8; NCOSS, *CAMA Submission* at 12; Community Visitors, *CAMA Submission* at 34; and CSC, *CAMA Submission 1* at 51.
146. Physical Disability Council of NSW, *Submission* at 15; Autism Association of NSW, *Submission* at 13; and Community Visitors, *CAMA Submission* at 33.
147. Community Visitors, *CAMA Submission* at 34; and CSC, *CAMA Submission 1* at 51-52.
148. Disability Council of NSW, *Submission 2* at 52.
149. People With Disabilities (NSW) Inc, *CAMA Submission* at 13.
150. Community Visitors, *CAMA Submission* at 34.
151. Disability Council of NSW, *Submission 2* at 52.
152. Disability Council of NSW, *Submission 2* at 52.
153. Disability Council of NSW, *Submission 2* at 51-52.
154. See para 3.136-3.144.

For these same reasons the Commission considers it inappropriate to extend the jurisdiction of the Community Visitor Scheme to cover these areas.

4.56 There are two further principles which the Commission adopted in examining whether the other populations discussed above should be included within the Visitors' jurisdiction. First, the focus of Visitor Schemes in other contexts is on monitoring publicly funded services.<sup>155</sup> Consistently with this, the CAMA Community Visitor Scheme should be limited to those services which are publicly funded by the NSW Government. It therefore follows that the jurisdiction of the Community Visitor Scheme should not be extended to include:

- people with disabilities living in licensed boarding houses;
- children in foster care;
- children in professional care living in the homes of those carers;
- flexible supported accommodation arrangements as discussed above;
- HACC services since they are partially funded by the Commonwealth Government;
- children and young people and people with disabilities not living in visitable services who directly request access to a Community Visitor; and
- children and adults who move from visitable services to other places.

4.57 The second principle adopted is that other Visitor Schemes focus on those in the full-time care of the institutions visited.<sup>156</sup> The CAMA Community Visitor Scheme is currently limited to those in full-time care also.<sup>157</sup> The CSC has interpreted this as excluding those living in:

- respite care; and
- SAAP services.<sup>158</sup>

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155. *Correctional Centres Act 1952* (NSW) s 8A(1); *Children (Detention Centres) Act 1987* (NSW) s 8A; *Children's Services Act 1986* (ACT) s 19B(1)(a); *Children's Commissioner and Children's Services Appeals Tribunals Act 1996* (Qld) s 35(a); and *Mental Health Act 1990* (NSW) s 230(1).

156. *Correctional Centres Act 1952* (NSW) s 8A; *Children's Commissioner and Children's Services Appeals Tribunals Act 1996* (Qld) s 35; and *Children (Detention Centres) Act 1987* (NSW) s 8A.

157. CAMA s 8(4)(a).

158. CSC, *CAMA Submission 1* at 50-51.

Both these service forms are designed to be short-term, transitory arrangements. The Commission acknowledges that in practice this may not always be the case. For example, the CSC's recent report on respite care found that people in long-term respite occupied 80% of the designated respite beds in NSW.<sup>159</sup> Nonetheless, in the Commission's view, there is not adequate reason to justify departing from the typical practice adopted for other Visitor Schemes of including other than full-time care arrangements.

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**RECOMMENDATION 37**

**The jurisdiction of the Community Visitor Scheme as defined in s 8(4) should be retained.**

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## **TRAINING**

### **Current training**

4.58 Community Visitors receive comparatively little formal training in their roles. They are required to attend training sessions and Community Visitor conferences organised by the CSC.<sup>160</sup> Currently, they undertake an initial induction training of two days when they commence their appointment, and attend an annual conference for three days.<sup>161</sup> CAMA requires the CSC to convene at least one meeting of all the Community Visitors annually.<sup>162</sup> Visitors from each of six regional groups attend Regional Meetings between three and four times annually as well. These are primarily for peer support rather than training, and to consult with Community Visitors about management and priorities for the Community Visitor Scheme.<sup>163</sup> Sometimes the CSC pays for Community Visitors to

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159. New South Wales, CSC, *Respite Care – A System in Crisis: A Review of the Respite Care System in NSW by the Community Services Commission* (1998) at vi.

160. New South Wales, *Community Visitors Manual* (CSC, Sydney, November 1997) Section 4 at 3.

161. Information supplied by CSC (24 March 1999) at 1.

162. CAMA s 9(2) and (3).

163. Information supplied by CSC (23 March 1999) at 1-2.

attend conferences or training courses run by other relevant organisations, usually at the request of the person concerned.<sup>164</sup> When first appointed, Community Visitors also usually participate in some joint visits with a more experienced Community Visitor before starting their own visits alone.<sup>165</sup>

4.59 The CSC hopes to eventually produce a regular newsletter for Community Visitors giving updates on relevant practice issues and discussing ideas for good practice, although only two of these have so far been produced.<sup>166</sup> Such issues are also discussed in the Community Visitors' Annual Reports, in particular the most recent one.<sup>167</sup>

### **Is there a need for further training?**

4.60 Some submissions and participants in the Commission's public seminars argued that there is a need for further training of Community Visitors.<sup>168</sup> In their responses to the Community Visitor Survey and in their submission to the Commission, Community Visitors expressed a strong desire for more training.<sup>169</sup> Overall, 13 or 76% of the Community Visitors who responded to the Community Visitor Survey felt that the training currently provided is inadequate. Community Visitors raised two main shortcomings:

- insufficient training; and
- the training tends by necessity to be relatively general in nature, which may not satisfy the very specific training needs of individual Visitors.

For example, one Visitor commented:

all Visitors cannot be expected to have *all* of the skills or expertise of all the other Visitors. One Visitor can't be a registered nurse,

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164. Information supplied by CSC (23 March 1999) at 2.

165. Information supplied by CSC (23 March 1999) at 2.

166. Information supplied by CSC (23 March 1999) at 2.

167. New South Wales, Community Visitors, *Annual Report 1997/98* (CSC, Sydney).

168. Kurrajong-Waratah Industries, *Submission* at 3; Citizen Advocacy NSW, *Submission* at 10; and Burnside, *Submission* at 4.

169. Community Visitors, *CAMA Submission* at 11.

psychologist, occupational therapist, policy expert, service management expert etc.<sup>170</sup>

4.61 Three suggestions were made by Community Visitors to help improve their training opportunities:

- lengthen the annual conference;
- provide more frequent conferences to enable Community Visitors to receive training and discuss issues between themselves; and
- allow Community Visitors to access training by other bodies on topics relevant to their individual needs.<sup>171</sup>

4.62 The need for further training was also identified as an issue under the Official Visitor Scheme operating prior to CAMA,<sup>172</sup> and the Visitor Schemes covering services for people with intellectual disabilities (and others) in Victoria<sup>173</sup> and mental health facilities in NSW.<sup>174</sup> The legislation governing the Official Visitor Scheme for Queensland children's residential services adopts the novel approach of providing that:

It is the [Children's] [C]ommissioner's duty to ensure official visitors are adequately and appropriately trained to carry out their functions effectively and efficiently.<sup>175</sup>

4.63 As with the issue of the frequency of visits,<sup>176</sup> the lack of opportunities for further training primarily reflects resourcing issues:

the ... [Community Visitor] budget does not allow for other additional training.<sup>177</sup>

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170. Community Visitor Survey (emphasis in original).

171. Community Visitor Survey.

172. New South Wales, DOCS, *1992 Annual Report: Official Visitor Scheme, NSW Department of Community Services Residential Care for Wards* at 20.

173. E Mushins, "Proposal for Review of Community Visitors Program" (Unpublished paper, Office of the Public Advocate, Victoria, 1996) at 4.

174. New South Wales, Official Visitors' Advisory Committee, *A Report to the Minister for Health* (Official Visitors' Program, Sydney, 1996) at 9-10, 21 and 26.

175. *Children's Commissioner and Children's Services Appeals Tribunals Act 1996* (Qld) s 34.

176. See para 4.43-4.51.

177. Community Visitor Survey.



4.64 In the Commission's view, it would be beneficial if Community Visitors had greater access to training. However, this is not an appropriate subject for legislative provision. Rather, it is an operational matter for the CSC to consider, further to its general oversight and co-ordination role of the Community Visitor Scheme<sup>178</sup> and responsibility for organising meetings of Community Visitors or taking other action in furtherance of that function.<sup>179</sup>

4.65 As discussed above,<sup>180</sup> there are two areas in particular where training for Community Visitors would be beneficial. These are to improve communications with first, Aboriginal and Torres Strait Islander people and people from a non-English speaking background, and secondly, children and young people.

#### **Training on cultural issues**

4.66 In addition to dealing with their disability, Aboriginal and Torres Strait Islander people and people from a non-English speaking background with disabilities are often confronted with an inability to access services.<sup>181</sup> This was confirmed by the Commission's focus groups with consumers<sup>182</sup> and submissions. For example, the Multicultural Disability Advocacy Association of NSW Inc reports that people from a non-English speaking background are markedly under-represented amongst disability service users, and that:

government and non-government organisations appear unable to provide services in a culturally and linguistically appropriate, and therefore accessible, manner.<sup>183</sup>

4.67 As discussed in Chapter 3,<sup>184</sup> the Commission's focus groups found that Aboriginal and Torres Strait Islander people and people from a non-English speaking background with disabilities (as with people with disabilities from other backgrounds) had very little awareness of the role of the CSC or the Community Visitor Scheme. This is consistent with the findings of a small study concerning the Official Visitors Program for

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178. CAMA s 9(1).

179. CAMA s 9(2).

180. See para 4.38.

181. L Bostock, "Meares Oration: Access and Equity for the Doubly Disadvantaged", paper presented at the *Disability Advisory Council of Australia National Conference* (Perth, 20 February 1991) at 4 and 5.

182. RR 9 at para 1.59-1.73. See RR 9 at para 2.84.

183. Multicultural Disability Advocacy Association of NSW Inc, *Submission* at 1.

184. See para 3.128.

Queensland mental health facilities which found that neither residents nor their families or carers had any awareness of the Program, the role of Visitors or how to access them.<sup>185</sup>

4.68 CAMA Community Visitors should therefore seek to raise awareness of their role amongst Aboriginal and Torres Strait Islander people and people from a non-English speaking background who reside in institutions, facilitate access by such residents to appropriate services, and encourage service providers to make their services culturally appropriate.<sup>186</sup> The importance of cultural issues has been recognised in the Official Visitors' Program for NSW mental health facilities, where the Code of Conduct for Visitors requires that in their work "the cultural needs of patients be specifically addressed".<sup>187</sup>

4.69 It could also be useful for Community Visitors to be able to liaise with Aboriginal and Torres Strait Islander mentors to ensure greater involvement with the Aboriginal and Torres Strait Islander community. These mentors have an understanding of Aboriginal and Torres Strait Islander cultural and social issues and have been used to facilitate the work of a variety of professionals such as health workers and journalists.<sup>188</sup>

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185. Queensland Transcultural Mental Health Centre, *Annual Report 1996/1997* (as at 7 January 1999) <<http://ariel.its.unimelb.edu.au/~atmhn/www/members/qtmhc-ar9697.html>>.

186. For a discussion of some of the relevant issues in communicating with Aboriginal and Torres Strait Islander peoples in a culturally appropriate manner, see L Bostock, *The Greater Perspective: Protocol Guidelines for the Media when Entering Aboriginal and Torres Strait Islander Communities* (SBS, Sydney, 1997).

187. New South Wales, Official Visitors' Advisory Committee, *Official Visitors NSW Mental Health Act 1990 Practice Manual* (2nd edition, Official Visitors' Program, Sydney, October 1997) at Appendix V. See also "Recommendations of the Bureau of Immigration Research Conference on Women in Migration" (1992) 6 *Bureau of Immigration Research Bulletin* 39 at 40; and New South Wales, Juvenile Justice Advisory Council of NSW, *Green Paper: Future Directions for Juvenile Justice in New South Wales* (1993) at 198.

188. Information supplied by L Bostok, Aboriginal Disabilities Service (24 March 1999). Lists of Aboriginal and Torres Strait Islander mentors are available through Regional Aboriginal Land Councils and Aboriginal Medical Services: Information supplied by L Bostok, Aboriginal Disabilities Service (24 March 1999).

***Training on communication with children and young people***

4.70 Another area where training would assist Community Visitors is in communicating with children and young people. Burnside argues that the Community Visitors it has seen at its services “do not appear to have the skills to effectively engage young people or interest them in their functions”.<sup>189</sup> Similar concerns were also raised by the focus groups conducted by SNYPIC for the Commission. It was found that the Community Visitor Scheme “is not working” for the young people currently or formerly in care who were consulted.<sup>190</sup> Most were unclear about the role of the Community Visitor. Four of the 12 had made complaints to Community Visitors, and all of these were dissatisfied with the outcomes of their complaints which were generally that “nothing had happened, nothing had changed”.<sup>191</sup>

4.71 This is consistent with the findings of a NSW Child Protection Council report which found that young people in care have virtually no awareness of the role of independent complaints bodies such as the CSC.<sup>192</sup> The Standing Committee on Social Issues has also argued that the Community Visitor Scheme must attempt to redress the fact that children and young people in care often feel afraid to complain.<sup>193</sup> The CSC has recognised the need to develop its work with children in care further by its appointment of a Children’s Liaison Officer.<sup>194</sup>

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**RECOMMENDATION 38**

**The CSC should ensure that all Community Visitors receive adequate and appropriate training to carry out**

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189. Burnside, *Submission* at 4.

190. RR 9 at para 3.21.

191. RR 9 at para 3.21.

192. New South Wales, Child Protection Council, *Having a Say: A Report on the “Giving a Voice to Children” Project, about Children and Young People Participating in Processes and Decisions which Relate to their Care and Well-being* (1998) at 58.

193. New South Wales, Legislative Council, Standing Committee on Social Issues, *Inquiry into Children’s Advocacy* (1996) at 180.

194. New South Wales, Legislative Council, Standing Committee on Social Issues, *Inquiry into Children’s Advocacy* (1996) at 176; and NCOSS, *CAMA Submission* at 5.

**their functions effectively and efficiently. This includes training on cultural issues and communication with children and young people.**

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## **MONITORING AND SUPERVISION OF COMMUNITY VISITORS**

### **Current monitoring**

4.72 Associated with the absence of processes for review of Community Visitors' working conditions<sup>195</sup> is the lack of procedures governing performance management issues in relation to Community Visitors' work.<sup>196</sup> This includes monitoring of work performance,<sup>197</sup> and provision of support and supervision.<sup>198</sup>

4.73 The Community Visitors Manual, produced by the CSC, governs the Community Visitor Scheme.<sup>199</sup> It is distributed to all Community Visitors upon appointment.<sup>200</sup> It covers issues such as:

- Community Visitors' roles and responsibilities;
- a code of conduct;
- reporting to the CSC and referrals; and
- policies on privacy and confidentiality issues and how to conduct and record a visit.

4.74 The Community Visitors Manual is updated as policies are developed or changed by the CSC in consultation with the Community Visitors.<sup>201</sup> The

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195. See para 4.18.

196. Community Visitors, *CAMA Submission* at 9; and CSC, *CAMA Submission 2* at 46.

197. Community Visitors, *CAMA Submission* at 9.

198. CSC, *CAMA Submission 2* at 46.

199. New South Wales, *Community Visitors Manual* (CSC, Sydney, November 1997).

200. Information supplied by CSC (23 March 1999) at 2.

201. New South Wales, *Community Visitors Manual* (CSC, Sydney, November 1997) Section 1 at 1.

need for further policies is identified by individual Community Visitors, the CSC, or external parties such as service providers.<sup>202</sup> Policies are currently being developed on a range of issues including the handling of complaints about Community Visitors, occupational health and safety issues, and reasonable adjustment for Community Visitors with a disability or other specific needs. Policies on confidentiality and referral are also being revised.<sup>203</sup>

### **Is there a need for further monitoring?**

4.75 It was suggested to the Commission in submissions and at our public seminars that there should be some form of “quality control” measures to monitor and regulate Community Visitors’ performance.<sup>204</sup> The Community Visitors also commented on the isolation they experience and the inadequate support for, and performance monitoring of, their work.<sup>205</sup> Two Community Visitors also nominated the provision of such monitoring as a way to improve the Community Visitor Scheme.<sup>206</sup>

4.76 The Commission’s consultations reveal that visiting practices vary considerably, and often seem to depend largely on the skills and views of the individual Community Visitor involved. Some service providers also wanted further feedback from Community Visitors. For example, one service provider reported that:

Feedback from Community Visitors is excellent and very useful to service development. ...

Consistency in Community Visitors’ training and assessment needs attention. We have had three different visitors who have given us vastly different feedback which seems to be based more on their personal background, experience and values, than any formalised

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202. Information supplied by CSC (23 March 1999) at 2.

203. Information supplied by CSC (23 March 1999) at 2.

204. Burnside, *Submission* at 4; Barnardos Australia, *Submission* at 8; and Kurrajong-Waratah Industries, *Submission* at 3.

205. Community Visitors, *CAMA Submission* at 28 and 29.

206. Community Visitor Survey.

assessment process. This assessment process should be more transparent, with more information provided to services.<sup>207</sup>

4.77 Evaluations of other Visitor Schemes have likewise commented on the need for Visitors to provide greater feedback to professionals employed in the institutions or systems being monitored,<sup>208</sup> and the need to improve support of Visitors in their work.<sup>209</sup>

4.78 One of the strengths of the CAMA Community Visitor Scheme is that it draws on the skills and ‘styles’ of a wide variety of individuals. Some of the operational problems of the Community Visitor Scheme also arise from the nature of the program itself: coordinating a large number of Visitors to visit a large number of services.<sup>210</sup>

4.79 Nonetheless, in the Commission’s view, the development of processes to ensure greater consistency and monitoring of performance would increase the effectiveness of the program. This enhanced accountability would benefit residents and their families and advocates, service providers and Community Visitors themselves.

4.80 The CSC reported that it is currently considering a variety of options to address these difficulties, in consultation with the Community Visitors. These include:

- having a smaller number of Community Visitors working a larger number of hours each;
- creating a position of Principal or Senior Community Visitor responsible for overall co-ordination of the Visitors and acting as a representative Visitor where required. This might in practice simply require the further development of the role of the existing Community Visitor Co-ordinator based at the CSC, who performs at least part of

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207. Kurrajong-Waratah Industries, *Submission* at 3.

208. Australian Capital Territory, Department of Education and Training and the Children’s, Youth and Family Services Bureau, *Review of the Children’s Services Act 1986: Appendix to Public Consultation Paper* (1997) at 45; K L Thomas and S McCulloch (eds) “Correctional Reform in Queensland: At the Cross Roads Post-Kennedy” (1994) 5(4) *Criminology Australia* 2 at 3; and E Mushins, “Community Visitor Discussion Paper” (Unpublished paper, Office of the Public Advocate, Victoria) at 1.

209. Victoria, Office of the Public Advocate, *Annual Report 1998* at 28.

210. CSC, *CAMA Submission 2* at 46.

this role. A similar position exists for some other Visitor Schemes;<sup>211</sup>  
or

- appointing Community Visitors as CSC employees.<sup>212</sup>

As discussed above,<sup>213</sup> the Commission has rejected the last option. Nor are the first two options appropriate issues for legislative amendment. We would encourage the CSC to continue its consultation with Community Visitors, as well as consumers and service providers,<sup>214</sup> to establish which of these options (or some other) is most satisfactory.

4.81 The CSC has in fact adopted a three-stage plan to review all aspects of the Community Visitor Scheme between November 1998 and June 2000, including:

- identification of any limitations of the Community Visitor Scheme (including those discussed in this Report);
- development of proposals for reform, following consultation with a reference group of Community Visitors and external stakeholders, to be submitted to the Minister for approval; and
- implementation of any proposed changes.

4.82 In the Commission's view, it is also appropriate that three further measures be implemented. First, further development of policies in the Community Visitor Manual would be beneficial, such as the code of

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211. There is a Principal Official Visitor for the Scheme for NSW mental health facilities: *Mental Health Act 1990* (NSW) s 226 and 227. For a detailed description of the nature of this Visitor's role, see "Recruitment Package for Official Visitors" in New South Wales, Official Visitors' Advisory Committee, *A Report to the Minister for Health* (Official Visitors' Program, Sydney, 1996) at Pt 4. A similar role is performed by the Community Visitors Co-ordinator for the Victorian Official Visitor Scheme, which, for example, covers services for people with intellectual disabilities: Victoria, Community Visitors, *Annual Report of Community Visitors 1998: Intellectually Disabled Persons' Services Act 1986* (Office of the Public Advocate, Melbourne) at 10. There is also a Senior Visitor and a Coordinator for the Visitor Scheme covering NSW juvenile justice centres: New South Wales, Department of Juvenile Justice, *Official Visitor Scheme Manual* (1996) at para 3.2 and 3.5.

212. CSC, *CAMA Submission 1* at 46.

213. See para 4.20.

214. CSC, *CAMA Submission 1* at 47.

conduct.<sup>215</sup> Secondly, a more detailed list of duties should be provided in the instrument appointing Community Visitors.<sup>216</sup> These first two options do not require legislative amendment.

4.83 Thirdly, the Commissioner should take on an enhanced role in monitoring and supervising the performance of Community Visitors. Community Visitors should enter into performance agreements with the CSC. This is the current practice for staff of the CSC, and is a common process for staff in government departments generally. Although the Commissioner has a general oversight and co-ordination role in relation to the Community Visitor Scheme already,<sup>217</sup> the suggested measure would be facilitated by an explicit statement in CAMA that the Commissioner has responsibility for monitoring and supervision of Community Visitors.

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215. New South Wales, *Community Visitors Manual* (CSC, Sydney, November 1997) Section 5.

216. The Official Visitors' Program for NSW mental health facilities developed a job description to be included in recruitment packages with the aim of encouraging high-quality applicants: New South Wales, Official Visitors' Advisory Committee, *A Report to the Minister for Health* (Official Visitors' Program, Sydney, 1996) at 10-11 and 22.

217. CAMA s 9(1).



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**RECOMMENDATION 39**

**Section 9 should be amended to provide that the Community Services Commissioner is also responsible for the monitoring and supervision of Community Visitors.**

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**POWERS OF COMMUNITY VISITORS**

4.84 The powers provided to Community Visitors to carry out their role are to:

- enter and inspect a place at which a visitable service is provided (at any reasonable time);
- confer alone with any person who is a resident or employee of such a place; and
- inspect any document held at such a place which concerns the operation of a visitable service.<sup>218</sup>

Community Visitors must exercise their powers in a way that, as far as possible, preserves the privacy of residents at the service.<sup>219</sup>

4.85 Most submissions agreed that the powers given to Community Visitors are sufficient and appropriate.<sup>220</sup> These powers are generally comparable to those given to Visitors under other programs.<sup>221</sup> As has been observed in relation to another Visitor Scheme, if Visitors are to adequately protect

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218. CAMA s 8(1)(a)-(c).

219. CAMA s 8(3).

220. NSW Government, *CAMA Submission* at 6; Disability Council of NSW, *Submission 2* at 52-53; and Physical Disability Council of NSW Inc, *Submission* at 15.

221. *Children's Commissioner and Children's Services Appeals Tribunals Act 1996* (Qld) s 36; *Intellectually Disabled Persons' Services Act 1986* (Vic) s 57; *Community Welfare Act 1987* (NSW) s 3B(4) (now repealed); *Correctional Centres Act 1952* (NSW) s 8A(4); *Children (Detention Centres) Act 1987* (NSW) s 8A(4); *Mental Health Act 1990* (NSW) s 230; and *Children's Services Act 1986* (ACT) s 19B.

residents' rights it is important for them to have the necessary "teeth" to undertake this task.<sup>222</sup>

### **Power of entry without notice**

4.86 The only power on which there was some division of opinion in submissions was the power permitting Community Visitors to enter services without notice at any reasonable time. The peak group representing service providers, ACROD, expressed concern that Community Visitors had sometimes demanded entry to a community home at a time considered inappropriate for the residents. This included occasions when the residents have not been at home or have been stopped from leaving in order to talk to the Community Visitor. ACROD also reports that:

many of the support staff in group homes have been placed in the unenviable position of allowing someone entry to the house without knowing fully who they are, or what they want.<sup>223</sup>

It favoured development of protocols on this issue.<sup>224</sup>

4.87 However, other submissions argued that it was vital to allow a Community Visitor access without notification, because otherwise the service provider is able to prepare for the visit. The Community Visitor will therefore not necessarily get an accurate picture of what is happening at a service.<sup>225</sup> The Commission agrees with this view. Access without notice is central to Community Visitors' monitoring role. This is also a standard hallmark of other Visitor Schemes.<sup>226</sup>

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222. A Knowsley, "NZ's New, Progressive Mental Health Act" (1993) 2(1) *Australian Health Law Bulletin* 3 at 5.

223. ACROD Ltd NSW Division, *Submission* at 6.

224. ACROD Ltd NSW Division, *Submission* at 6.

225. Disability Council of NSW, *Submission 2* at 53; L Moffit, *Submission* at 2. See also Carers NSW Inc, *Submission* at 14.

226. *Children's Commissioner and Children's Services Appeals Tribunals Act 1996* (Qld) s 36(1)(a); *Intellectually Disabled Persons' Services Act 1986* (Vic) s 57(1)(a); *Community Welfare Act 1987* (NSW) s 3B(4)(a) (now repealed); *Correctional Centres Act 1952* (NSW) s 8A(4)(a) and (b); *Children (Detention Centres) Act 1987* (NSW) s 8A(4)(a); *Mental Health Act 1990* (NSW) s 230(1); and *Children's Services Act 1986* (ACT) s 19B(1)(a).

4.88 The Community Visitors favoured broadening the entry power to remove the requirement that the time of access be “reasonable”. They argued that the requirement could potentially be used as a basis for time-consuming and expensive appeals by service providers to the CS Division of the ADT or criminal charges of trespass.<sup>227</sup> They do not, however, report any instances where this has actually occurred. In the absence of evidence that this has led to problems in practice, the Commission considers that the requirement of “reasonableness” should remain in the legislation. It would however be useful for the policy guidelines in the Community Visitors Manual on the exercise of this power to be further developed.<sup>228</sup>

4.89 The Commission also considers that it is the responsibility of service providers to train their staff about the existence, functions and powers of Community Visitors so that the problems identified by ACROD are less likely to occur. Community Visitors are currently required to produce their signed authority from the Minister or identification card when entering a service.<sup>229</sup> If this is not happening in practice, this requirement could be reinforced in further training of Visitors.

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227. Community Visitors, *CAMA Submission* at 35-36.

228. New South Wales, *Community Visitors Manual* (CSC, Sydney, November 1997) Section 10 at 5-6.

229. New South Wales, *Community Visitors Manual* (CSC, Sydney, November 1997) Section 10 at 6.

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**RECOMMENDATION 40**

**The power in s 8(1)(a)-(c) should be retained. This gives Community Visitors the right to enter and inspect visitable services at any reasonable time, confer alone with residents or staff there, and inspect documents on the premises.**

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## **A RIGHT FOR RESIDENTS TO SEE A COMMUNITY VISITOR**

4.90 CAMA currently only states that a Visitor *may* confer alone with residents,<sup>230</sup> rather than more proactively stating that each resident has the right to confer with a Visitor. Inclusion of the latter was recommended in one submission.<sup>231</sup> The absence of such a provision in the Queensland Official Visitor legislation attracted criticism from the National Children’s and Youth Law Centre.<sup>232</sup> The legislation governing the Victorian Community Visitor Scheme does contain such a proactive statement:

(1) Any resident ... [in services covered by the Scheme] may request the designated officer or senior officer to arrange for the resident to be seen by a community visitor.

(2) The designated officer or senior officer must within 7 days of receiving a request under sub-section (1) advise one of the community visitors for the region that a request has been made.<sup>233</sup>

Some other Schemes have similar provisions.<sup>234</sup>

4.91 The Commission believes that a legislative amendment of this nature could improve the awareness of and use of the Community Visitor Scheme,

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230. CAMA s 8(1)(b).

231. NCOSS, *CAMA Submission* at 13.

232. National Children’s and Youth Law Centre, “A Children’s Commissioner for Queensland: the Cutting Edge Proves Blunt” (1997) 22(1) *Alternative Law Journal* 38 at 39.

233. *Intellectually Disabled Persons’ Services Act 1986* (Vic) s 58(1) and (2).

234. *Mental Health Act 1990* (NSW) s 234; and *Children’s Services Act 1986* (ACT) s 19B(2) and (3).

with the minor modification that the consumer has the right to confer with the Community Visitor *alone*. This is the case under the ACT Official Visitor Scheme for children in residential institutions.<sup>235</sup> It is also consistent with the current right of Community Visitors to confer with residents alone under CAMA. The inability to meet with a Community Visitor alone was one of the complaints made by the young people in care or formerly in care who participated in the SNYPIC focus groups.<sup>236</sup> Such a provision would also be consistent with CAMA's philosophy of upholding consumers' rights.

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#### **RECOMMENDATION 41**

**Any person resident in a visitable service should have the right to confer alone with a Community Visitor.**

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## **RESOURCES**

4.92 In the Commission's view, the Community Visitor Scheme is a valuable program whose effectiveness has been limited by the inadequate resources currently allocated to it. Many submissions supported this view.<sup>237</sup> Lack of resources is a problem commonly reported by other Visitor Schemes.<sup>238</sup>

4.93 Some of the changes recommended in this chapter have resource implications, particularly the need to increase the frequency of visits. This should be considered by the NSW Government. As discussed in Chapter 3,<sup>239</sup> the 1996 Premier's Department review recommended that the CSC be given

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235. *Children's Services Act 1986* (ACT) s 19B(3).

236. RR 9 at para 3.33.

237. Disability Safeguards Coalition, *CAMA Submission 1* at 5; People With Disabilities (NSW) Inc, *CAMA Submission* at 23; and CSC, *CAMA Submission 1* at 48.

238. K L Thomas and S McCulloch (ed) "Correctional Reform in Queensland: At the Cross Roads Post-Kennedy" (1994) 5(4) *Criminology Australia* 2 at 3; and Victoria, Community Visitors, *Annual Report of Community Visitors 1998. Intellectually Disabled Persons' Services Act 1986* (Office of the Public Advocate, Melbourne) at 7.

239. See para 3.179.

extra funding for both its own operations and the Community Visitor Scheme, but most of this funding was not provided.



# 5. Community Services Division of the ADT

- Effect of the new ADT
- Independence of the CS Division
- Constitution of the Tribunal
- Principles for the review of decisions
- Current jurisdiction of the CS Division
- Standing
- Procedure
- Review structure
- Government policy



5.1 The CSAT was an integral part of the legislative scheme established by CAMA. It was established by Part 7 of the Act which also dealt with the appointment of members, the jurisdiction of the CSAT, its composition and some procedural matters. Part 5 of CAMA dealt with proceedings before the CSAT. It replaced the Community Welfare Appeals Tribunal, established under the *Community Welfare Act 1987* (NSW).

5.2 On 1 January 1999, the CSAT was abolished and reconstituted as the CS Division of the ADT. The *Administrative Decisions Legislation Amendment Act 1997* (NSW) replaces Part 7 of CAMA and substantially amends Part 5. The provisions governing the powers and the procedures of the CS Division are now divided between both CAMA and the ADT Act. References in this Chapter are to the provisions in force of both statutes, although sections of the now repealed or amended parts of CAMA are referred to where relevant.

5.3 This Chapter considers the major issues affecting the CS Division of the ADT including its independence, jurisdiction, the issue of standing and procedural matters. In particular, the Commission examines the impact on community services appeals of the reconstitution of the CSAT as a Division of the ADT.

## EFFECT OF THE NEW ADT

### Merits review

5.4 Merits review of an administrative decision is the process whereby the facts, law and policy aspects of the original decision are considered afresh and a new decision is made which either affirms, varies or sets aside the original decision.<sup>1</sup> An administrative review tribunal is said to “stand in the shoes” of the person whose decision is being reviewed.<sup>2</sup> A defining characteristic of merits review is the ability of the review tribunal to substitute the original decision with what it considers to be the correct and

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1. M Allars, *Introduction to Australian Administrative Law* (Butterworths, Sydney, 1990) Ch 7 generally; and Better Decisions Report at para 2.2-2.3.
  2. *Minister for Immigration v Pochi* (1980) 31 ALR 666 at 671 per Smithers J.

preferable decision.<sup>3</sup> This is in contrast to judicial review of administrative decisions, the object of which is to ensure that public power is exercised lawfully.<sup>4</sup>

5.5 A comprehensive system of merits review of administrative decisions has existed at the Commonwealth level since 1975<sup>5</sup> and in Victoria since 1984.<sup>6</sup> Although there have been several attempts over the last 20 years to initiate a similar program in NSW, a mechanism for broad-ranging merits review of administrative decisions has only just been introduced with the establishment of the ADT.<sup>7</sup> Reflecting the trend towards large multi-division tribunal structures in other jurisdictions across Australia,<sup>8</sup> the ADT is also the

3. *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589 per Bowen CJ and Deane J. See also Better Decisions Report at para 2.9.
4. The legality of an administrative decision is generally determined by the application of two broad common law doctrines, the first is whether the decision-maker acted beyond his or her powers or jurisdiction and the second relates to whether the process of decision-making was fair: M Allars, *Introduction to Australian Administrative Law* (Butterworths, Sydney, 1990) at 161 and Ch 5 and 6 generally on the principles of judicial review. A court exercising judicial review may not generally consider the merits of the decision and cannot, like a merits review tribunal, substitute its own decision for the decision under review. It may, instead, quash the original decision or refer it back to the decision-maker for reconsideration. However, the line between the legality and the merits of a decision is not always distinct: see Allars at 162-163.
5. *Administrative Appeals Tribunal Act 1975* (Cth) commenced operation in 1976.
6. *Administrative Appeals Tribunal Act 1984* (Vic).
7. The creation of the ADT is the culmination of a number of reports and recommendations over the last 20 years, beginning in 1973 with the New South Wales Law Reform Commission, *Appeals in Administration* (Report 16, 1972) suggesting the development of a centralised system of tribunals and administrative appeals: New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 27 June 1997, the Hon J W Shaw, Attorney General, Second Reading Speech at 11278. See also L Katz, "ADT-ABC: An Introduction to the New South Wales Administrative Decisions Tribunal", paper presented at the *Government Lawyers CLE Convention* (Sydney, 31 July 1997) at 1.
8. See, for example, Victorian Civil and Administrative Tribunal, which commenced operation in July 1998, replacing the Victorian Administrative Appeals Tribunal. See also: Better Decisions Report at Ch 8 where the Administrative Review Council recommends the amalgamation of various specialist review tribunals and the Administrative Appeals Tribunal (AAT)

first step in a government program to rationalise and consolidate tribunals across NSW. It was established to promote better and consistent decision-making and to achieve greater accessibility and cost-effective use of resources.<sup>9</sup> Several tribunals are intended to be merged into the ADT.<sup>10</sup>

## Structure of the Tribunal

5.6 The ADT has two distinct areas of jurisdiction. The first is to review the merits of decisions made by government officials and public bodies and the second is to make original decisions in the areas in which jurisdiction of existing tribunals has been transferred to the ADT.<sup>11</sup> In both cases, jurisdiction must be conferred by another piece of legislation.<sup>12</sup>

5.7 While the ADT Act provides for a core administrative body, the Tribunal itself will operate through a number of separate divisions, each of which has its own distinctive character and procedural rules. Each division is intended to operate in a discrete and autonomous manner.<sup>13</sup> At the time of writing, the ADT comprised four divisions: the General Division, the Equal Opportunity Division, the Legal Services Division and the

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into a new Administrative Review Tribunal; and K O'Connor, "Administrative Decisions Tribunal: An Early Report", paper presented at the PIAC Open Government Conference (Sydney 10 February 1999) at 8.

9. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 27 June 1997, the Hon J W Shaw, Attorney General, Second Reading Speech at 11281.
10. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 27 June 1997, the Hon J W Shaw, Attorney General, Second Reading Speech at 11281.
11. ADT Act s 36-38. See also ADT Act Ch 4 and 5.
12. ADT Act s 42 and 55.
13. ADT Act s 19, 20 and Sch 2. In the Second Reading Speech introducing the Bill to Parliament, the Attorney General stated: "The Tribunal will operate in different divisions and it will be possible for the divisions to operate relatively autonomously, with different rules and procedures which are appropriate to the functions exercised by each division. Even within divisions, the rules and procedures may vary depending on the nature of the particular matter before the Tribunal." (New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 27 June 1997, the Hon J W Shaw, Attorney General, Second Reading Speech at 11280-11281.)

CS Division. Two new Divisions have been added by recent amendments: the Occupational Regulation Division and the Retail Leases Division.<sup>14</sup>

5.8 The CS Division began operation on 1 January 1999. It retains the jurisdiction conferred on the former CSAT by s 40 of CAMA. While its procedures have remained largely unchanged, some aspects of the ADT Act will have an impact on the community services area.<sup>15</sup> In general, the Commission considers it important to maintain administrative and procedural consistency between the various divisions of the ADT, unless there are good reasons for distinctions to be drawn.

## INDEPENDENCE OF THE CS DIVISION

5.9 The unfettered independence of the CSAT is critical if it is to review decisions relating to the provision of community services effectively. This independence is considered vital to safeguard the interests of vulnerable persons against incorrect or improper decisions by government and non-government service providers.<sup>16</sup>

5.10 Review tribunals play a significant role in making government more open and accountable by providing persons affected by government decisions with a fair and open process to challenge those decisions. They are not courts. Although review tribunals may appear to have some of the “trappings” of a court, such as holding hearings in public and taking evidence on oath or affirmation, they do not exercise judicial power.<sup>17</sup> As they stand in the shoes of an administrative decision-maker, review tribunals are often seen

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14. The Occupational Regulation Division was added by the *Administrative Decisions Tribunal Legislation Further Amendment Act 1998* (NSW), although the schedule introducing this Division has not yet commenced. The Retail Leases Division was added by the *Retail Leases Amendment Act 1998* (NSW).

15. These issues are discussed at para 5.156-5.203.

16. CSAT, *Submission* at 4; Physical Disability Council of NSW Inc, *Submission* at 16; NCOSS, *CAMA Submission* at 13; Disability Assistance for Shoalhaven Inc, *Submission* at 3; K and J Clifton, *Submission* at 3; The Northcott Society, *Submission* at 3.

17. *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 584-585; and *Re Lavery and Registrar of the Supreme Court of Queensland (No. 2)* (1996) 43 ALD 13 at 17-18.

to be an extension of the administrative process and therefore part of the executive arm of Government, not the judiciary.<sup>18</sup>

5.11 To ensure the credibility and effectiveness of review tribunals, tribunals need to be, and be seen to be, completely independent of the government agencies whose decisions they review.<sup>19</sup> Many factors can affect this actual or perceived independence including arrangements for the appointment of tribunal members, reporting requirements and the funding and administration of tribunals.<sup>20</sup>

### **Impact of the new ADT on the independence of the CS Division**

5.12 The process of rationalising tribunals brings certain advantages including promoting consistent decision-making, providing a one-stop shop for users, allowing cross-fertilisation of ideas among members allocated to different divisions and of course, considerable cost-efficiencies. However, as one commentator notes, the creation of multi-division tribunals also poses potential problems:

The process of generalisation could reduce expertise rather than enhance it. Further there has been a fear that the process of amalgamation could see the loss of distinctive culture and practices, as well as financial resources, that are very important to some tribunals, such as the Community Services Appeals Tribunal.<sup>21</sup>

5.13 In the Commission's view there are sound reasons for maintaining a specialist CS Division and ensuring that its integrity and functions are maintained. The CSAT has been constituted by members who are selected on account of their experience and understanding of the special needs of the

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18. F Cameron, "NSW ADT: Scope for Inquisitorial Procedures in New Administrative Decisions Tribunal" (1997) 35 (7) *Law Society Journal* 41 at 43.

19. Better Decisions Report at para 4.5.

20. Better Decisions Report at para 2.31. See also Action for Citizens with Disabilities, *Submission* at 17.

21. J Anderson, "Something Old, Something New, Something Borrowed ... The New South Wales Administrative Appeals Tribunal" (1998) 5 *Australian Journal of Administrative Law* 97 at 112.

people the legislation was designed to serve.<sup>22</sup> It has developed specialist expertise in community services legislation which should continue under the CS Division.

5.14 There has also been some concern that the transfer of the jurisdiction of the former CSAT to the new ADT will have the effect of reducing its independence. In particular, it has been suggested that the independence of the CSAT may be diminished by the fact that it will no longer report separately to Parliament.<sup>23</sup> Under the ADT Act, the President of the ADT must furnish an annual report on all the Tribunal's functions to Parliament.<sup>24</sup> In its submission to the Commission, the CSAT argued that, provided the activities of the CS Division are reported adequately, this is unlikely to compromise its independence.<sup>25</sup> **The Commission agrees that the fact that there is no longer a separate report to the Minister by the CS Division does not in itself raise any concerns for its continued independence.**

## CONSTITUTION OF THE TRIBUNAL

5.15 Section 92 of CAMA provided that the CSAT was to consist of a President and at least four part-time members, one of whom was to be appointed as the Deputy President. At least one member had to be a legal practitioner. This section is now repealed and replaced by Schedule 2 of the ADT Act.<sup>26</sup>

5.16 There are four classes of members under the ADT Act: a President; Deputy Presidents; non-presidential judicial members; and non-judicial members.<sup>27</sup> The President and Deputy Presidents (referred to as "presidential judicial members") are appointed by the Governor while the non-presidential judicial and non-judicial members are appointed by the Minister.<sup>28</sup> Although the ADT Act does not expressly define "Minister", the Minister currently responsible for the ADT Act is the Attorney General.

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22. See para 5.26.

23. See IP 15 at para 5.3.

24. ADT Act s 26.

25. CSAT, *Submission* at 4.

26. ADT Act Sch 2 cl 1.

27. ADT Act s 12.

28. ADT Act s 13.

5.17 To be appointed President, a person must be a judge of the District Court. In order to qualify to be appointed as a Deputy President or a non-presidential judicial member, a person must either be qualified to be appointed President, be a Magistrate or be a legal practitioner of at least 7 years standing. Finally, in order to be appointed as a non-judicial member, one must have, in the opinion of the Minister, special knowledge or skill in relation to any class of matters in respect of which the ADT has jurisdiction.<sup>29</sup>

5.18 The President is appointed on a full-time basis. Other members may be appointed on a part or full-time basis. The President or a Deputy President may be appointed as the Divisional Head of one or more of the Divisions.

## CS Division

5.19 The CS Division consists of a Divisional Head and at least four other members appointed by the Minister but only upon the recommendation of the Minister for Community Services who is responsible for administering CAMA.<sup>30</sup> Previously, appointments to the CSAT were made by the Minister for Community Services after consultation with the Review Council. All reference to the Review Council has been dropped under the ADT Act. Specific qualifications for appointment to the CS Division are contained in Schedule 3 of the ADT Act, and are detailed below.<sup>31</sup>

5.20 The President of the former CSAT is now a Deputy President of the ADT and the Divisional Head of the CS Division. Under transitional arrangements, all the current members of the CSAT have been assigned to the CS Division.<sup>32</sup> In its last annual report, the CSAT reports it consisted of a full-time President and 11 part-time members.<sup>33</sup>

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29. ADT Act s 17.

30. ADT Act Sch 2 cl 1.

31. See para 5.26.

32. ADT Act Sch 5 cl 4(2).

33. New South Wales, Community Services Appeals Tribunal, *Annual Report 1997-98* at 17-19.

## Selection for appointment

5.21 According to the Administrative Review Council, confidence in the decisions of tribunals is inextricably linked to satisfaction with the quality of the members of the tribunals. It is, therefore:

crucial that members of the community feel confident that tribunal members are of the highest standard of competence and integrity, and that they perform their duties free from undue government or other influence.<sup>34</sup>

5.22 The normal convention for appointments to tribunals is for the head of the relevant tribunal to make recommendations to the Minister for the appointment of persons as new members. The ADT would appear to follow this practice. The Commission understands that the previous practice of the CSAT was to advertise vacant positions. Existing members and independent representatives would then select applicants on merit and recommend their appointment by the Minister. The CSAT submitted that this process ensured that members were drawn from a wide pool of qualified applicants, that they were selected on merit and were suitably qualified. It further submitted that the requirement under CAMA, since repealed, that the Minister consult with the Review Council before appointing members provided a valuable safeguard to ensure that members are appointed on merit.<sup>35</sup>

5.23 In order to ensure community confidence in the quality of Tribunal members, there have been several calls for the establishment of transparent administrative procedures to apply in relation to the appointment, reappointment and termination of members.<sup>36</sup> Specifically, it has been suggested that the selection of new members be conducted by a bipartisan committee and that consultation with appropriate groups occurs before an appointment is made.<sup>37</sup>

### **5.24 The Commission agrees that community confidence in the quality of Tribunal members is important. However, it is not persuaded that the**

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34. Better Decisions Report at para 4.5. See also S Kenny, “Review of Commonwealth Merits Review Tribunals” (1996) 7(2) *Public Law Review* 69 at 71.

35. CSAT, *Submission* at 6.

36. Autism Association of NSW, *Submission* at 14.

37. Autism Association of NSW, *Submission* at 14; The Northcott Society, *Submission* at 3; Action for Citizens with Disabilities, *Submission* at 17; and Burnside, *Submission* at 5. See also para 3.24.



**current practice of selection is so manifestly flawed that a significant departure from it is warranted. The Commission does, on the other hand, believe there may be some value in calling for expressions of interest from time to time, and developing a register of suitably qualified applicants from which new members may be recommended to the Minister for appointment.** The Commission notes that this practice has been adopted by the Chief Magistrate in relation to the appointment of magistrates. It was also used at one stage by the federal Administrative Appeals Tribunal (the “AAT”).

### **Qualifications for assignment to the CS Division**

5.25 The ADT Act provides that members, including the Divisional Head, should only be assigned to the CS Division by the Minister if the relevant Minister has approved the assignment and the President (or Governor) has been informed of the recommendation.<sup>38</sup> The “relevant Minister” is defined to be the Minister administering CAMA.<sup>39</sup>

5.26 The Minister for Community Services may only make recommendations in respect of a person who, in his or her opinion:

- (a) has knowledge of and experience in administration, child care, community services, education, law, medicine, psychology and social work, or
- (b) who has other suitable qualifications which warrants their assignment to the Division.<sup>40</sup>

### ***Knowledge of disability issues***

5.27 The failure to expressly mention disability issues in this list is a notable omission. Given that the CS Division deals with a number of disability matters, it has been strongly argued that understanding of and expertise in disability issues are vital to ensure that the Tribunal is able to

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38. ADT Act Sch 2.

39. ADT Act Sch 2 cl 1(4).

40. ADT Act Sch 2 cl 3. This replaces the now repealed CAMA s 92(4).

determine issues concerning people with disabilities in a skilful and informed manner.<sup>41</sup>

5.28 The categories in which applicants are required to show knowledge and experience are arguably sufficiently broad to capture persons with skills in disability-related matters. Even if they are not capable of being so interpreted, subsection (b) is a catch-all provision which empowers the Minister to appoint persons he or she thinks are suitably qualified notwithstanding the categories of subject areas listed under subsection (a).

5.29 While the current membership includes members with expertise in disability issues, the Commission agrees that the ADT Act should expressly mention disability issues. This will make it clear that knowledge of and expertise in disability issues is as important as the other areas specified. However, it is not necessary nor indeed desirable given the diversity of matters dealt with by the CS Division, for every applicant to show specific skills in disability issues.

***Knowledge of issues affecting children and young persons***

5.30 Similarly, it has been suggested that members should also have some knowledge and experience of issues affecting children and young people in substitute care.<sup>42</sup> The requirement that the Minister be satisfied that applicants have knowledge of and experience in “child care” arguably covers children in non-residential and permanent or temporary substitute care arrangements. Alternatively, as previously argued, experience or knowledge of child welfare matters would certainly come within the purview of subsection (b).

5.31 Although the ADT Act can be interpreted to allow the appointment of persons with experience and knowledge of child welfare issues, this review presents an opportunity to clarify potential ambiguities and to use language which is consistent with other relevant legislation, such as the recently enacted *Children and Young Persons (Care and Protection) Act 1998* (NSW). In view of this, and in recognition of the number of cases relating to child welfare matters that are brought, the Commission proposes that the

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41. NCOSS, *CAMA Submission* at 13; Disability Council of NSW, *Submission 2* at 54-55; Citizen Advocacy NSW, *Submission* at 8; *Consultation* (Advocacy Groups and Carers, Sydney), *Consultation* (Consumers, Sydney); NSW Council for Intellectual Disability, *CAMA Submission* at 11; and K and J Clifton, *Submission* at 3.

42. Barnardos Australia, *Submission* at 9.

qualifications for appointment specifically include knowledge and experience of issues concerning the care and welfare of children and young people.

***Membership should be more diverse***

5.32 It has also been suggested that people with disabilities should be appointed as members to ensure greater sensitivity by the Tribunal to issues affecting people with disabilities.<sup>43</sup> Indeed, until her appointment expired in 1997, one of the part-time members of the CSAT was a person with a disability. Similarly, it has been argued that Aboriginal and Torres Strait Islander people and people from a variety of ethnic backgrounds should be recruited to ensure that the Tribunal is sensitive to cross-cultural issues.<sup>44</sup> Currently, one member of the CS Division is Aboriginal and two members are from a non-English speaking background.<sup>45</sup>

5.33 It is now widely accepted that Australian legal and social systems need to better represent the diversity of the Australian community. **Accordingly, the Commission believes that the pool from which Tribunal members are usually drawn needs to be broadened. Strategies should be devised to encourage people with disabilities, people from non-English speaking backgrounds and Aboriginal and Torres Strait Islander people to apply to be appointed as part-time members of the Tribunal.** These may include placing advertisements calling for expressions of interest to be submitted to the President and developing a register from which new members are drawn.

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**RECOMMENDATION 42**

**Schedule 2 cl 1(3) of the *Administrative Decisions Tribunal Act 1997* (NSW) should be amended to include disability issues and issues relating to the care or welfare of children and young people in the list of subject matters of which applicants should have knowledge and experience.**

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43. *Consultation* (Consumers, Sydney).

44. Multicultural Disability Advocacy Association of NSW Inc, *Submission* at 9; *Consultation* (Advocacy Groups and Carers, Sydney).

45. New South Wales, Community Services Appeals Tribunal, *Annual Report 1997-98* at 17-19.

## Conflict of interest

5.34 In any appeal under CAMA, the CS Division must be constituted by three members, at least one of whom is to have specific knowledge of and experience in the subject matter of the proceedings under review.<sup>46</sup> Inevitably, this very expertise may expose the member to claims of an appearance of bias.<sup>47</sup> This is by no means an issue unique to the CS Division. It is a concern in every tribunal where provision is made for multi-member panels in which at least one member is required to have expertise in the subject matter of proceedings.<sup>48</sup> In light of this concern, there has been some suggestion that it may not be necessary nor desirable to continue to require that members with specific expertise hear particular cases. It is argued that the Tribunal must, in any case, reach its determination impartially and based on the evidence presented.<sup>49</sup>

**5.35 While this is correct, the Commission believes there is value in the practice of appointing members with specific expertise in the subject matter of the case to the Tribunal.** It assists the Tribunal to gain a better understanding of the issues before it and thus enhances the quality of the Tribunal's decision. This, in turn, increases confidence in the review process by government agencies and private individuals.<sup>50</sup> Any perception of bias resulting from a member's specialist knowledge is, in the Commission's view, addressed by adherence to the rules of procedural fairness. Members chosen to constitute the Tribunal for the purpose of particular matters should certainly not be "representative" of any of the parties to the appeal.<sup>51</sup>

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46. ADT Act Sch 2 cl 3(2).

47. *Consultation* (Service Providers, Sydney); *Consultation* (Advocacy Groups and Carers, Sydney).

48. See P Dawson, "Tenure and Tribunal Membership" (1997) 4 *Australian Journal of Administrative Law* 140 at 147. See also M Allars, *Introduction to Australian Administrative Law* (Butterworths, Sydney, 1990) at 272-273.

49. NSW Government, *CAMA Submission* at 6.

50. H Katzen, "Procedural Fairness and Specialist Members of the Administrative Appeals Tribunal" (1995) 2 *Australian Journal of Administrative Law* 169 at 169.

51. CSAT, *Submission* at 6; and Disability Safeguards Coalition, *CAMA Submission 1* at 6-7.

## Terms of appointment

5.36 Members of the former CSAT could be appointed for a maximum of five years and were eligible for reappointment.<sup>52</sup> Terms of appointment for members of the CS Division are now governed by the ADT Act which provides that members are appointed for a maximum of three years but are eligible for reappointment.<sup>53</sup>

5.37 Short terms of appointment raise concerns that the appointment process may become politicised and thus threaten the independence of the Tribunal. One commentator has expressed the view that the “three year maximum rule” in relation to the appointment of judicial members who do not already hold judicial positions, does not appear “to be calculated to promote the desirable independence of tribunal members”.<sup>54</sup> There are also concerns that short terms of appointment do not permit the development of specialised knowledge in the subject matter of the decisions under review. As one submission noted:

We believe that specialised knowledge of child welfare is essential to assess issues in this area. It is of concern to us that knowledge of child welfare practice issues will be diluted by the new arrangements because of the shorter tenure of membership.<sup>55</sup>

### ***The practice in other jurisdictions***

5.38 Terms of appointment vary substantially between similar tribunals in other jurisdictions. They can even vary within the same tribunal depending on the category of membership to which the member belongs. For example, presidential members and senior members of the federal AAT may be appointed until retirement age (although the practice is changing) whilst other members are appointed for fixed terms of up to seven years.<sup>56</sup> Members of

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52. CAMA s101 repealed by the *Administrative Decisions Legislation Amendment Act 1997* (NSW) Sch 1.6[8] which commenced 1 January 1999.

53. ADT Act Sch 3.

54. See L Katz, “ADT-ABC: An Introduction to the New South Wales Administrative Decisions Tribunal”, paper presented at the *Government Lawyers CLE Convention* (Sydney, 31 July 1997) at 18.

55. Barnardos Australia, *Submission* at 8.

56. *Administrative Appeals Tribunal Act 1975* (Cth) s 8. Compare the Immigration Review Tribunal where members are appointed for periods not exceeding five years and the Social Security Appeals Tribunal where members are appointed for a maximum of three years. For a commentary, see

the new maxi-tribunal in Victoria, the Victorian Civil and Administrative Tribunal, on the other hand, are eligible to be appointed for a maximum of five years regardless of the category of membership.<sup>57</sup>

5.39 The practice in review tribunals in New South Wales also varies. Members are appointed for up to seven years in the Government and Related Employees Appeal Tribunal<sup>58</sup> and up to five years in the Residential Tenancies Tribunal<sup>59</sup> and in the former Commercial Tribunal.<sup>60</sup> Part of the jurisdiction of the Commercial Tribunal, relating to retail leases, has since been transferred to the Retail Leases Division of the ADT, where members are appointed for three years. Even before becoming Divisions of the ADT, members of the Equal Opportunity Tribunal and the Legal Services Tribunal were appointed for up to three years.<sup>61</sup>

***Should members be appointed until retirement age?***

5.40 Appointing members until retirement age, as has been suggested by some submissions,<sup>62</sup> is not an option that is applicable to part-time members. In any case, tenure is not considered a viable solution to the concerns about independence. The Administrative Review Council, for example, has found that appointing tribunal members until retirement age is undesirable as:

The needs of the users of review tribunals change over time, and no selection process can guarantee that a person considered suitable for appointment will remain so indefinitely in the light of changing

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P Dawson, "Tenure and Tribunal Membership" (1997) 4 *Australian Journal of Administrative Law* 140.

57. *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 10-14.

58. *Government and Related Employees Appeal Tribunal Act 1980* (NSW) s 8 and s 11.

59. *Residential Tenancies Act 1987* (NSW) Sch 1.

60. *Commercial Tribunal Act 1984* (NSW) s 9 now repealed. The Commercial Tribunal has been replaced by the Fair Trading Tribunal established under Part 2 of the *Fair Trading Tribunal Act 1998* (NSW). Members of the Fair Trading Tribunal may be appointed for periods of up to five years: *Fair Trading Tribunal Act 1998* (NSW) Sch 1 cl 2.

61. *Anti-Discrimination Act 1977* (NSW) s 69D; and *Legal Profession Act 1987* (NSW) s 4. Both these provisions have been repealed and replaced by *Administrative Decisions Tribunal Act 1997* (NSW) Sch 3.

62. Barnardos Australia, *Submission* at 8; People With Disabilities (NSW) Inc, *CAMA Submission* at 25 (which argues that the Divisional Head should have tenure). But compare Disability Safeguards Coalition, *CAMA Submission 1* at 14 which argues that members should not be appointed to retirement age.

circumstances and demands. Tenured appointments reduce the flexibility of tribunals to ensure that their pool of members remains appropriate to the current set of tasks. This is particularly the case because review tribunals may review decisions on their merits rather than on legal grounds alone.<sup>63</sup>

***What is an appropriate fixed term?***

5.41 The Administrative Review Council recommends that members of review tribunals be appointed for terms of between three and five years. It argues that shorter terms are not advisable as they provide little job security, implying that such unfavourable terms will not attract the best candidates or may affect members' performance of their duties in an adverse way. It also suggests that it may be appropriate in some cases to appoint senior members for longer terms "to assist with continuity and to attract and retain the best qualified and able members".<sup>64</sup>

5.42 In its submission, the CSAT suggested that the terms of the Divisional Heads of the Tribunal be increased to a maximum of five years, claiming that the current maximum of three years fails to:

promote continuity in the management and administration of the Tribunal and gives government the opportunity to discard members after a fairly short time if they do not agree with their decisions. Finally, ... a longer term tends to attract and retain the "best qualified and able members."<sup>65</sup>

It also suggested that other members of the ADT be appointed for five years in order to promote independence and avoid the significant cost and time expended selecting suitable members every three years.<sup>66</sup> These suggestions were supported by a number of other submissions.<sup>67</sup>

***The Commission's view***

5.43 The Commission believes that the independence of the Tribunal can be preserved and maintained by the appointment of members for reasonable

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63. Better Decisions Report at para 4.55.

64. Better Decisions Report at para 4.61.

65. CSAT, *Submission* at 5. See also Autism Association of NSW, *Submission* at 14.

66. CSAT, *Submission* at 5.

67. The Northcott Society, *Submission* at 3; Citizen Advocacy NSW, *Submission* at 10; NSW Council for Intellectual Disability, *CAMA Submission* at 10; and Disability Safeguards Coalition, *CAMA Submission 1* at 14.

fixed terms. The period of time needs to be sufficiently long in order to allow the development of expertise and provide a realistic level of job security. **In light of the practice in other New South Wales tribunals and in the ADT generally, the Commission is of the view that the current three year renewable term is not unreasonable.**

### **Termination of appointment**

5.44 In order to promote and maintain the independence of the Tribunal, it is essential that the procedure for the termination of the President and other members of the Tribunal be transparent. Generally, legislation should prescribe what circumstances would justify the termination of an appointment of a tribunal member so as to prevent arbitrary terminations by the executive for capricious or unjustifiable reasons.

5.45 The termination procedures in respect of the President of the ADT are far more onerous than was previously the case under CAMA.<sup>68</sup> The President may only be removed from office by the Governor following an address from both Houses of Parliament in the same parliamentary session seeking removal on the ground of “proved misbehaviour or incapacity” and in accordance with the applicable provisions of Parts 7 and 8 of the *Judicial Officers Act 1986* (NSW).<sup>69</sup>

5.46 Similarly, the termination procedures in relation to members other than the President are also more stringent than was previously the case under CAMA. Under the ADT Act, a member (excluding the President) may be removed from office by the Governor only on the grounds of “incapacity, incompetence or misbehaviour”.<sup>70</sup> Previously, under CAMA, part-time members could be terminated by the Governor at any time.<sup>71</sup> **In view of the new and more onerous termination procedures, the Commission makes no recommendations in this regard.**

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68. See CAMA s 103(3) now repealed.

69. ADT Act Sch 3 cl 7(1).

70. ADT Act Sch 3 cl 8(2).

71. See CAMA s 103(2) now repealed.



## PRINCIPLES FOR THE REVIEW OF DECISIONS

5.47 The ADT Act gives the Tribunal the power to review reviewable decisions.<sup>72</sup> The Act defines a reviewable decision as a “decision of an administrator that the Tribunal has jurisdiction under an enactment to review.”<sup>73</sup> To come within the Tribunal’s jurisdiction, a decision must be made by an administrator in the exercise of functions conferred or imposed by the enactment and must be identified in the enactment as one that may be reviewed by the ADT.<sup>74</sup> A decision under the ADT Act includes:

- (a) making, suspending, revoking or refusing to make an order or determination,
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission,
- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument,
- (d) imposing a condition or restriction,
- (e) making a declaration, demand or requirement,

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72. ADT Act s 36(1)(b).

73. ADT Act s 8.

74. ADT Act s 38.

- (f) retaining, or refusing to deliver up, an article,
- (g) doing or refusing to do any other act or thing.<sup>75</sup>

5.48 The CS Division takes over the jurisdiction previously conferred on the CSAT.<sup>76</sup> This jurisdiction appears to have developed in a piecemeal fashion, resulting in a number of gaps and anomalies, some of which are examined in more detail below.<sup>77</sup> A number of submissions to the Commission argued for the formulation and adoption of a set of guiding principles to determine what decisions ought to be reviewable.<sup>78</sup>

### **What decisions should be reviewable?**

5.49 The Administrative Review Council has consistently advocated that any decision which affects or is likely to affect the interests of a person should be able to be reviewed on its merits. It argues that “interests” should be interpreted broadly so that it includes, in the case of organisations, intellectual or spiritual interests and not merely property, financial or physical interests.<sup>79</sup> This general principle was supported by submissions received by the Commission.<sup>80</sup>

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75. ADT Act s 6.

76. See para 5.73.

77. See para 5.76-5.124.

78. CSAT, *Submission* at 6-7, People With Disabilities (NSW) Inc, *CAMA Submission* at 26; NSW Council for Intellectual Disability, *CAMA Submission* at 11, Disability Safeguards Coalition, *CAMA Submission 1* at 7; Disability Council of NSW, *Submission 2* at 56; and CSC, *CAMA Submission 2* at 1-2.

79. Australia, Administrative Review Council, *Twenty-second Annual Report 1997-98* at para 4.10 and 4.12.

80. People With Disabilities (NSW) Inc, *CAMA Submission* at 26; Disability Council of NSW, *Submission 2* at 55; Disability Safeguards Coalition, *CAMA Submission 1* at 7; and NSW Government, *CAMA Submission* at 1.

5.50 It has also clearly formed the basis of guidelines issued by the Attorney General's Department to assist in the establishment of the general jurisdiction of the new ADT. The guidelines provide that the following decisions should be reviewable by the Tribunal:

- decisions made, proposed to be made or required to be made under a statute (including regulations);
- decisions made by a delegate or a contractor as long as the primary decision is reviewable; and
- decisions which are of an administrative character.<sup>81</sup>

It identifies categories of decisions which may fall within the jurisdiction of the ADT. They include:

- decisions to grant or refuse to grant a licence, authority or approval;
- decisions to suspend, terminate, revoke or cancel a licence, authority or approval;
- determinations of an entitlement; and
- decisions relating to the protection of vulnerable persons.<sup>82</sup>

**5.51 The Commission believes that decisions should be prima facie reviewable by the Tribunal if they are decisions made under an enactment, including subordinate legislation, which are administrative in nature and which affect or are likely to affect the interests of a person.**

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81. New South Wales, Attorney General's Department, *Guidelines to Assist in the Establishment of the General Jurisdiction of the Administrative Decisions Tribunal* at 1.

82. New South Wales, Attorney General's Department, *Guidelines to Assist in the Establishment of the General Jurisdiction of the Administrative Decisions Tribunal* at 1-2. See also decisions listed in Second Reading Speech: New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 27 June 1997, the Hon J W Shaw, Attorney General, Second Reading Speech at 11279.

## What decisions should not be reviewable?

5.52 There are some decisions that the Administrative Review Council has concluded should not be reviewable notwithstanding the fact that they may affect an individual's rights and interests to a significant extent. This is usually because the decision is either not appropriate for merits review or because no appropriate remedy is available to the reviewing body.<sup>83</sup> Among those decisions which it considers should not be reviewable are decisions that are not final (including recommendations), law enforcement decisions, decisions involving extensive inquiry processes and "polycentric"<sup>84</sup> decisions which relate to the allocation of a finite source of funds.<sup>85</sup>

5.53 Similarly, the Attorney General's Department believes that tendering decisions, decisions in relation to the allocation of funds, decisions in relation to adult and juvenile offenders, public health decisions, decisions relating to disputes between government agencies and decisions which are not final are inappropriate for merits review.<sup>86</sup> The Commission agrees that such decisions are generally inappropriate for merits review.

### **Funding decisions**

5.54 Whether funding decisions are appropriate for external merits review appears to depend on the nature of the decision. Funding decisions include:

- decisions to allocate a certain amount of funding to particular programs as a whole;
- decisions to allocate a certain amount of funding to individuals or organisations from a limited source of funding which may be insufficient to meet the demand for funding;

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83. Australia, Administrative Review Council, *Eleventh Annual Report 1986-87* at para 2.46.

84. "Polycentric" refers to decisions which are multi-centred. As one commentator explains: "a pull at any one point changes the entire set of interlocking relationships": M Allars, *Introduction to Australian Administrative Law* (Butterworths, Sydney, 1990) at 27. See also para 5.56.

85. Australia, Administrative Review Council, *Seventeenth Annual Report 1992-93* at para 7.25-7.37.

86. New South Wales, Attorney General's Department, *Guidelines to Assist in the Establishment of the General Jurisdiction of the Administrative Decisions Tribunal* at 2.

- decisions not to allocate funds to an organisation for a funding year where that organisation has been funded in the past; and
- decisions to defund an organisation for non-compliance with the terms and conditions of funding.

***Decisions to grant funding to particular programs***

5.55 Decisions allocating funding to programs as a whole are budgetary decisions rather than decisions which affect or are likely to affect the interests of any particular individual. These decisions are essentially political decisions and are subject to scrutiny by Parliament. The Minister who makes these decisions is usually held politically accountable for them. For these reasons, the Commission believes that they are inappropriate for merits review.<sup>87</sup>

***Decisions to grant funding to specific individuals or organisations***

5.56 Decisions to allocate funding to service providers from a finite source of funds are said to have significant “polycentric” elements which makes them inappropriate for merits review.<sup>88</sup> Polycentric decisions refer to decisions made in a specific area that affect other decisions in that same area so that if one decision is varied, the others will also have to be altered. Decisions to allocate funds from a limited pool to service providers fall within this category.

5.57 The Administrative Review Council has consistently argued that these decisions are inappropriate for merits review because a successful challenge by one funding applicant may (unfairly) affect the allocation to another applicant.<sup>89</sup> The Commission agrees in principle that decisions relating to the allocation of limited funds to service providers should not be subject to merits review as any decision to vary such decisions may have an effect on the allocation to another claimant. Nonetheless, it is important that such

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87. See Australia, Administrative Review Council, *Administrative Review and Funding Programs (A Case Study of Community Services Programs)* (Report No 37, 1994) at para 2.7.

88. See for example, Australia, Administrative Review Council, *Administrative Review of Health, Housing and Community Services Programs* (Issues Paper, AGPS, Canberra, 1993) at para 1.11 and 3.19. See also Australia, Administrative Review Council, *The Contracting Out of Government Services* (Report No 42, 1998) at para 6.53.

89. Australia, Administrative Review Council, *Twenty-second Annual Report 1997-98* at para 4.62-4.63.

decisions be made fairly and objectively according to a set of publicly available criteria.<sup>90</sup>

***Decisions not to renew funding***

5.58 Whether a decision not to grant funding to an organisation which has received funding in the past is suitable for merits review is debatable. Even if the funding agreement specifies that future funding is not guaranteed, the previous grant of funds to a particular organisation may create a reasonable expectation by the organisation that it will continue to receive funding in successive years provided it complies with the terms and conditions of the funding agreement. Where a reasonable expectation exists, it can be argued that decisions not to allocate funding in a particular year may be appropriate for merits review.

5.59 On the other hand, if funds are limited and circumstances have changed, for example, if government priorities have altered or there is no longer an identifiable need for services in the geographical area in which the organisation operates, merits review will be inappropriate. The Commission believes that these decisions are inappropriate for merits review because they contain significant polycentric elements and are likely to relate to planning and equity issues which are more properly scrutinised through Parliamentary processes.

***Decisions to withdraw funding***

5.60 Funding agreements between government and service providers generally contain terms and conditions with which the recipient of the funds must comply in order to remain eligible to receive funding. Commonly, the funder reserves the right to withdraw funding from the service provider where the service provider does not comply with those terms and conditions. The administrative decision that a service no longer meets the eligibility criteria to continue to receive funding is a decision which the Commission believes is appropriate for merits review. However, decisions relating to the actual allocation or, in this case, the withdrawal of funding, are not appropriate for merits review for the reasons already outlined.

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90. Australia, Administrative Review Council, *Twenty-second Annual Report 1997-98* at para 4.66.

## Decisions by non-government agencies

5.61 As discussed in Chapter 3,<sup>91</sup> governments across Australia are increasingly moving towards privatising, or contracting out, services and functions previously the responsibility of the public sector, including the provision of community services.<sup>92</sup> The contracting out or “outsourcing” of government services has major implications for consumers, particularly in relation to quality and accountability issues.<sup>93</sup> There is a danger, for example, that commercial contract arrangements will diminish public and legal accountability through “commercial in confidence” declarations and restrictions on freedom of information.<sup>94</sup> There are also major concerns in relation to whether privacy laws will apply to protect consumers using contracted services and whether those consumers have access to administrative law remedies available to users of services provided directly by a government agency.<sup>95</sup>

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91. See para 3.133.

92. See generally, Australia, Industry Commission, *Competitive Tendering and Contracting Out by Public Sector Agencies* (Report 48, AGPS, Melbourne, 1996); Australia, Administrative Review Council, *Administrative Review and Funding Programs* (Report No 40, AGPS, 1994); and A Tang, “The Changing Role of Government in Community Services: Issues of Access and Equity to Administrative Review” (1997) 56(2) *Australian Journal of Public Administration* 95.

93. See A Tang, “The Changing Role of Government in Community Services: Issues of Access and Equity to Administrative Review” (1997) 56(2) *Australian Journal of Public Administration* 95; Australia, Administrative Review Council, *The Contracting Out of Government Services* (Report No 42, 1998); and P Ranald, *The Contracting Commonwealth: Serving Citizens or Customers? Public Accountability, Service Quality and Equity Issues in the Contracting and Competitive Tendering of Government Services* (Public Sector Research Centre Paper No 47, University of NSW, Sydney, 1997).

94. Confidential, *Submission 5*.

95. M Hogan and G Rogers, “Contracting of Community Services: Can it be Done in the Public Interest?” in L Pearson (ed) *Administrative Law: Setting the Pace or Being Left Behind?* (Australian Institute of Administrative Law, 1996 Administrative Law Forum) at 348-356. See also D O’Brien, “Administrative Law: Can it come to grips with tendering and contracting by public sector agencies?” in L Pearson (ed) *Administrative Law: Setting the Pace or Being Left Behind?* (Australian Institute of Administrative Law, 1996 Administrative Law Forum) at 420-432.

***Ensuring accountability of decisions made by contractors***

5.62 In its 1998 report, *The Contracting Out of Government Services*, the Administrative Review Council laid down a fundamental premise, namely that:

the contracting out of government services should not result in a loss or diminution of government accountability or the ability of members of the public to seek redress where they have been affected by the actions of a contractor delivering a government service.

5.63 Several strategies can be implemented by government to ensure that consumers are not adversely affected by the contracting out of services. These include regular monitoring of contracts, making information about the contract publicly available and ensuring that service users have access to a range of complaint mechanisms. Further, in cases where contractors exercise decision-making powers, the government should ensure that service users continue to have access to merits review of decisions and may require, in the contract, that the contractor must abide by the decision of a review tribunal.<sup>96</sup>

5.64 Notably, only New South Wales has passed legislation, in the form of CAMA, which establishes an independent body to handle complaints about services provided by government and (funded) non-government organisations, a community visitor scheme, and a tribunal to which appeals can be brought against administrative decisions in relation to the provision of community services.<sup>97</sup>

***Submissions***

5.65 Submissions from consumers, service providers, government, advocates and carers argued that decisions of non-government service providers should be reviewable by the ADT.<sup>98</sup> The Disability Council of New South Wales submitted that, from a consumer perspective, the interests of the service user are likely to be the same whether the provider is a government or non-government agency.<sup>99</sup> An advocacy group claimed that such appeal

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96. Australia, Administrative Review Council, *The Contracting Out of Government Services* (Report No 42, 1998) at para 6.30 and Recommendation 21.

97. See para 3.2.

98. Institute for Family Advocacy and Leadership Development Association Inc, *Submission* at 16; Autism Association of NSW, *Submission* at 14; Burnside, *Submission* at 5; NSW Government, *CAMA Submission* at 6; and NCOSS, *CAMA Submission* at 14.

99. Disability Council of NSW, *Submission 2* at 57.



rights should exist especially where the non-government organisation performs functions that would otherwise be performed by government.<sup>100</sup> Other compelling reasons to extend external merits review to decisions of non-government service providers include that the non-government sector receives a substantial amount of public funding for which it should be accountable. In addition, because of the chronic undersupply of some types of community services, consumers often exercise little or no choice about what services they are placed in or are able to access.<sup>101</sup>

***The Commission's view***

5.66 The Commission is firmly of the view that the rights of consumers should not in any way be diminished as a result of the move towards the contracting out of government services. **The Commission believes that decisions of non-government service providers should be equally subject to merits review where those decisions would be reviewable if they were made by a government department or agency.**

**Should decisions which are not based on statute be reviewable?**

5.67 Generally speaking, administrative review refers to the external review of decisions made pursuant to an enactment, be it primary or subordinate legislation. The jurisdiction of the AAT is, accordingly, limited to statutory decisions, as is the jurisdiction of other federal merits review tribunals, such as the Social Security Appeals Tribunal<sup>102</sup> and State tribunals, for example, the Government and Related Employees Appeal Tribunal.<sup>103</sup>

5.68 It has been suggested that decisions which affect the interests of a person, whether made pursuant to an Act or not, should be subject to merits review. In its submission, the CSC provided examples of decisions which, though they have the potential to affect a person significantly, are not able to be reviewed because they are not made under any law. They include: decisions about where people will live; how often and under what conditions children in care can see their natural parents and other family members; how

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100. Western Sydney Intellectual Disability Support Group Inc, *CAMA Submission* at 3.

101. People With Disabilities (NSW) Inc, *CAMA Submission* at 28.

102. *Social Security Act 1991* (Cth) s 1245.

103. *Government and Related Employees Appeal Tribunal Act 1980* (NSW) s 20.

many hours of in-home support people with disabilities or aged people will receive; decisions to withdraw a service from a person, or evict people with disabilities or children and young persons from accommodation support services; and decisions to use restraint, seclusion or psychotropic medication as a way of dealing with a person's challenging behaviour.<sup>104</sup> The CSC noted that:

a decision of the type described above can have a significant negative impact on those subject to the decisions. Our experience also indicates that these decisions are made with wide discretion, little guidance and little accountability.<sup>105</sup>

5.69 Although these are decisions for which reasons must be given,<sup>106</sup> it is argued that consumers will only benefit from the requirement to receive reasons if they are able to request a review of the decision.<sup>107</sup>

***The Commission's view***

5.70 Undoubtedly, a large number of decisions that can be taken by service providers may have a significant impact on the daily lives of service users. There is clearly a need for some accountability on decision-makers in respect of these decisions. However, the appropriateness of extending the jurisdiction of the ADT to allow merits review of non-statutory based decisions by government and non-government service providers is arguable. Allowing external review from these decisions may have undesirable consequences. It may, for example, reduce the ability of the decision-maker to respond flexibly to individual service users' needs and may well frustrate the operation of the system. In addition, identifying which decisions should be capable of merits review would be a highly complex and ultimately unsatisfactory process.

5.71 The Commission notes that formal complaint mechanisms are available for consumers to bring complaints about discretionary decisions of government and non-government service providers. Under CAMA, a person may bring a complaint to the CSC if he or she thinks the service provider has behaved unreasonably by providing or not providing a community service to a person; in the way in which a community service was provided; by withdrawing or changing the service to a person; or in the administration of a

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104. CSC, *CAMA Submission 2* at 2.

105. CSC, *CAMA Submission 2* at 2.

106. CAMA Reg cl 10(c).

107. CSC, *CAMA Submission 2* at 2.

community service.<sup>108</sup> The CSC may make recommendations following an investigation into the complaint. Failure by the service provider to take action that is recommended by the CSC in these circumstances gives the complainant a right of appeal to the Tribunal.<sup>109</sup>

**5.72 The Commission is of the view that non-statutory based decisions of service providers are not appropriate for merits review by the Tribunal. They should continue to be reviewed through local complaints mechanisms and through the formal complaints process created under CAMA.**

## **CURRENT JURISDICTION OF THE CS DIVISION**

5.73 The appellate jurisdiction previously conferred on the CSAT by s 40 of CAMA has been transferred to the ADT. The Tribunal also takes over some of the merits review work previously performed by the District Court in relation to licensing decisions of boarding houses made under the *Youth and Community Services Act 1973* (NSW). The functions of the Tribunal in relation to CAMA and the *Youth and Community Services Act 1973* (NSW) are to be performed by the CS Division.<sup>110</sup> Currently, decisions reviewable by the CS Division fall into the following five categories:

- decisions relating to the custody and guardianship of children and the licensing of child care services and employers who employ children, made under the *Children (Care and Protection) Act 1987* (NSW);
- decisions made under other community welfare legislation such as the *Adoption Information Act 1990* (NSW) and the *Adoption of Children Act 1965* (NSW);
- decisions of the CSC to investigate a complaint being an investigation that is beyond its powers, decisions of the CSC generally that are beyond its powers, and decisions of a service provider not to implement recommendations of the CSC arising out of a complaint investigation;
- decisions made under the DSA; and

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108. CAMA s 12.

109. CAMA Reg cl 6(1).

110. ADT Act Sch 2 cl 2.

- decisions relating to boarding houses made under the *Youth and Community Services Act 1973* (NSW).

5.74 Several gaps and anomalies have been identified in the jurisdiction of the ADT in relation to community services matters. The Commission discusses and makes recommendations in respect of some of these specific matters below. However, it is not within the terms of reference of this review for the Commission to undertake a comprehensive review of community services legislation to identify which decisions should be reviewable.

5.75 In this regard, the Commission notes that the Attorney General intends to undertake a review of all New South Wales legislation with a view to determining which decisions are appropriate for external merits review by the ADT.<sup>111</sup> One anomaly that has been brought to the attention of the Commission and which should be examined in the Attorney General's review is the failure to provide a right of appeal against a decision to remove a person from the register of carers under the *Family Day Care and Home Based Child Care Services Regulation 1996* (NSW).<sup>112</sup> A carer who is a licensee of a home-based child care service, on the other hand, has a right to appeal a decision to suspend or revoke a licence to operate a child care service.<sup>113</sup>

## Decisions under child protection legislation

### ***Custody and guardianship decisions***

5.76 The majority of matters brought to the CSAT are matters brought under child protection legislation.<sup>114</sup> The *Children (Care and Protection) Act 1987* (NSW) provides a right of appeal from several decisions including:

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111. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 27 June 1997, the Hon J W Shaw, Attorney General, Second Reading Speech at 11279.
  112. *Family Day Care and Home Based Child Care Services Regulation 1996* (NSW) cl 31.
  113. *Children (Care and Protection) Act 1987* (NSW) s 112. See discussion at para 5.80-5.81.
  114. Of 32 appeals lodged in the 1997-98 financial year, 22 (or almost 70%) were matters relating to the custody or guardianship of children: New South Wales, Community Services Appeals Tribunal, *Annual Report 1997-98* at 20.

- a decision of the Minister to refuse to terminate the Minister's guardianship of a ward under s 90(2), and thus restore the child to his or her natural parent;<sup>115</sup> and
- a decision of the Minister to remove a ward or protected person from the custody of a foster carer or foster agency under s 91(1)(e).<sup>116</sup>

However, there is no right of appeal from identical decisions made by the Director General of DOCS in respect of children who are placed in his or her care but who are not wards or protected persons within the definition of the Act.

5.77 It is argued that the *Children (Care and Protection) Act 1987* (NSW) also fails to provide for external review in respect of other decisions made under the Act which clearly affect the interests of the persons concerned. For example, a decision to move a ward or protected person from one place to another or to restore a ward to the custody of a parent or other person is not reviewable.<sup>117</sup>

5.78 Some of these concerns appear to have been addressed by the new *Children and Young Persons (Care and Protection) Act 1998* (NSW) which will replace the 1987 Act when it comes into operation.<sup>118</sup> The notion of "wardship" is abolished under the new Act, as recommended in the report of the *Review of the Children (Care and Protection) Act 1987*.<sup>119</sup> Under the 1998 Act, removal of a child from the care of his or her parents is a last resort. If, on the application of the Director General, the Children's Court finds that a child is in need of care and protection, the Court can allocate parental responsibility for that child to one parent exclusively, to one or both parents and another suitable person jointly or to a suitable person. Alternatively, the Court can make an order for the guardianship of the child or young person to the Minister.<sup>120</sup>

5.79 The parental responsibilities of the Minister are to be exercised by the newly created Children's Guardian, albeit subject to any direction of the

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115. *Children (Care and Protection) Act 1987* (NSW) s 112(1)(g).

116. *Children (Care and Protection) Act 1987* (NSW) s 112(1)(h).

117. *Children (Care and Protection) Act 1987* (NSW) s 91(1)(c) and s 91(1)(f) respectively. See CSAT, *Submission* at 9.

118. This will not be before 1 January 2000: see para 3.112.

119. New South Wales, DOCS, Legislative Review Unit, *Review of the Children (Care and Protection) Act 1987* (1997) at 72.

120. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 79.

Minister.<sup>121</sup> The Guardian has the power to remove the parental responsibility of a child or young person from an authorised carer.<sup>122</sup> This decision may be appealed to the ADT.<sup>123</sup> The Guardian is given a host of other powers. These include the power to resolve, in an informal manner, any dispute that arises “in the administration of the Act and the regulations” between the child or young person, the parent(s), authorised carer or designated agency.<sup>124</sup> It has been suggested that if the dispute arises because of an administrative decision taken under the Act, and the Guardian’s attempts to resolve the matter are unsuccessful, the aggrieved party should be able to seek external merits review of the original decision.<sup>125</sup> The Commission considers that this is an issue which should be examined in the Attorney General’s review of New South Wales legislation.<sup>126</sup>

***Licensing of child care services, residential services and fostering authorities***

5.80 Under the 1987 Act, decisions to grant, suspend, revoke or impose a condition on a licence or authority for a child care service, residential child care centre or a fostering agency are reviewable by the CS Division.<sup>127</sup>

5.81 The new *Children and Young Persons (Care and Protection) Act 1998* (NSW) provides a right of appeal from decisions to authorise or not authorise a person as (an authorised) carer.<sup>128</sup> It does not provide any right of appeal in respect of a decision to grant a licence to operate a children’s service. The Commission understands that there are plans to rectify this omission before the new Act comes into operation. In order to remove any ambiguity, the Commission recommends that a right of appeal should attach clearly to both the decision to grant a licence and a decision not to grant a licence.<sup>129</sup>

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121. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 181. See also New South Wales, Legislative Review Unit, *Review of the Children (Care and Protection) Act 1987* (1997) at 102-104.

122. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 182.

123. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 245(c).

124. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 183.

125. CSAT, *Submission* at 10.

126. See para 5.75.

127. *Children (Care and Protection) Act 1987* (NSW) s 112.

128. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 245(1)(a).

129. CSAT, *Submission* at 11; and CSC, *CAMA Submission 2* at 4.

***Decisions to exclude a person from a children's service***

5.82 The new Act provides that the Director General may exclude a person from the premises of a children's service if that person is considered to present an unacceptable risk to the safety, welfare or well-being of a child enrolled in the service.<sup>130</sup> This provision was recommended by the *Review of the Children (Care and Protection) Act 1987* in response to issues concerning allegations of abuse of children by staff. It was considered appropriate to allow the immediate exclusion of an alleged perpetrator of abuse from a service for a period of 28 days while the allegations are investigated.<sup>131</sup> The Review recommended that there be a right of appeal against the decision.<sup>132</sup> However, the Act makes no provision for a right of appeal.

5.83 The Commission believes that this decision should be reviewable. It is a decision made under statute which has a potentially significant impact on the person who is the subject of the allegation. The right to lodge an appeal does not necessarily mean the person can return to work. That person can still be required to be absent until the investigation is completed.

***Decisions to impose conditions on an authorised carer***

5.84 The decision to impose, revoke or vary any conditions imposed on the authorisation of a person as an authorised carer<sup>133</sup> is not reviewable under the 1998 Act. It merely provides that a decision to authorise or not to authorise a person as an authorised carer or to cancel or suspend a person's authorisation is reviewable.<sup>134</sup> While it may be argued that conditions imposed at the time of the initial authorisation may be reviewable under s 245(1), any subsequent decision to impose other conditions or revoke or vary existing conditions may not be reviewable. To remove any doubt, it has been suggested that the new legislation should be amended to provide expressly that a decision of the relevant decision-maker to impose, revoke or vary any conditions on the authorisation be reviewable by the ADT.<sup>135</sup>

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130. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 216.

131. New South Wales, Department of Community Services, Legislative Review Unit, *Review of the Children (Care and Protection) Act 1987* (1997) at 232.

132. New South Wales, Department of Community Services, Legislative Review Unit, *Review of the Children (Care and Protection) Act 1987* (1997) at 233.

133. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 137(2).

134. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 245(1).

135. CSAT, *Submission* at 12.

5.85 A decision to impose conditions on an authority or to revoke or vary existing conditions satisfies the three elements contained in the general principles. The decision is made under an enactment, is administrative in nature and affects the interests of the person seeking to be an “authorised carer” under the Act. It does not appear that such decisions have been omitted intentionally. Accordingly, the Commission believes the 1998 Act should be amended to make it clear that decisions to impose, vary or revoke conditions on the authorisation of a person as an authorised carer are reviewable by the ADT.

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#### **RECOMMENDATION 43**

**The following decisions relating to the licensing of child care services, residential services and fostering authorities made under the *Children and Young Persons (Care and Protection) Act 1998 (NSW)* should be reviewable by the Community Services Division of the Administrative Decisions Tribunal:**

- **a decision to grant or refuse to grant a licence to operate a children’s service;**
  - **a decision to exclude a person from a children’s service; and**
  - **a decision to impose, revoke or vary a condition on the authorisation of a person as an authorised carer.**
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#### ***Decisions relating to the employment of children***

5.86 The *Children and Young Persons (Care and Protection) Act 1998 (NSW)* prohibits the employment of children unless a person holds an employer’s authority to employ a child.<sup>136</sup> The Act provides a list of circumstances in which a person who employs a child is exempted from the requirement to hold an employer’s authority.<sup>137</sup> For example, a person is

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136. *Children and Young Persons (Care and Protection) Act 1998 (NSW)* s 223.

137. *Children and Young Persons (Care and Protection) Act 1998 (NSW)* s 224(1).



exempted from the requirement to hold an employer's authority if the child is employed for the purpose of a fundraising appeal.<sup>138</sup> An exemption may be revoked by the Minister provided that:

- the exempted person is given written notice of the intention to revoke the exemption and the reasons for intending to revoke it; and
- the Minister has taken into consideration any representation made by the exempted person within 28 days of receiving the notice of intention to revoke.<sup>139</sup>

5.87 Certain decisions relating to the employment of children are reviewable under the *Children and Young Persons (Care and Protection) Act 1998* (NSW). These are decisions to:

- grant, impose a condition on, revoke or vary any condition of an employer's authority;
- declare a person to be the employer of a child;
- grant an exemption from the requirement to hold an employer's authority, limit the extent of any such exemption or impose conditions on the exemption.<sup>140</sup>

5.88 A decision by the Minister to revoke an exemption is currently not reviewable. However, it has been suggested that it should be.<sup>141</sup> The Commission agrees that a decision to revoke an exemption is appropriate for merits review as it is a statutory decision of an administrative nature which affects the interests of the person concerned.

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#### **RECOMMENDATION 44**

#### **A decision to revoke an exemption under s 224(3) of the *Children and Young Persons (Care and Protection)***

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138. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 224(1)(a).

139. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 224(3).

140. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 245(1)(d)-(f).

141. CSAT, *Submission* at 12.

**Act 1998 (NSW) should be reviewable by the  
Community Services Division of the Administrative  
Decisions Tribunal.**

## **Decisions made under the Adoption of Children Act 1965**

### ***Decisions to grant approvals***

5.89 There appears to be some duplication in the appeal provisions of the *Adoption of Children Act 1965* (NSW) relating to the grant of approvals. Section 67A provides that the following decisions are reviewable decisions:

- a decision to refuse approval of an adoption agency;
- a decision to revoke or suspend the approval of an adoption agency; and
- a decision within a class of decisions prescribed by the Regulations for the purpose of this section.

5.90 Section 14 of the *Adoption of Children Act 1965* (NSW) allows a charitable organisation which has applied for approval as a private adoption agency to appeal to the General Division of the ADT against decisions by the Director General to:

- refuse the application for approval as a private adoption agency;
- approve the application subject to additional conditions or requirements; or
- revoke or suspend the approval of the organisation as a private adoption agency.

5.91 It has been submitted that s 14 should be repealed and s 67A should be amended so that it includes decisions to grant or refuse to grant an approval; decisions to impose, remove or vary conditions on approvals; decisions to revoke or suspend approvals; and any failure to make a decision within a reasonable time.<sup>142</sup> These provisions are essentially the same. To avoid any confusion that may arise because of this duplication, the Commission considers that the Act should be amended as suggested. The terminology should be made consistent with similar reviewable decisions in other Acts.

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142. CSAT, *Submission* at 14.

***Decisions relating to the approval of applicants as suitable to adopt***

5.92 Decisions by the Director General or a Principal Officer of a private adoption agency declining to approve applicants as suitable to adopt may only be reviewed internally.<sup>143</sup> It has been submitted that these decisions should be able to be reviewed by the ADT because they are of an administrative nature, taken under an enactment, and are decisions which affect the interests of the persons concerned.<sup>144</sup>

5.93 Two distinct decisions are made under the Act in relation to the selection of adoptive parents. The first is a decision that certain applicants are eligible to adopt. These applicants then join a pool of other suitable applicants. The second decision is deciding who, among this pool of eligible adoptive parents, is the most suitable to adopt a particular child. This decision is based on the best interests of the child. For this reason, the Commission considers that the second decision is not appropriate for merits review. The first decision relating to whether a person meets prescribed eligibility criteria should be reviewable.

***Assignment to the CS Division***

5.94 Presently, decisions made under the *Adoption of Children Act 1965* (NSW) are dealt with by the General Division of the ADT. This may not cause too many difficulties in practice, given that the President may assign the Divisional Head of the CS Division to the panel hearing such matters. However, the Commission believes it is more appropriate and entirely consistent with the CS Division's areas of responsibility for these matters to be assigned to the CS Division.

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**RECOMMENDATION 45**

**Section 14 of the *Adoption of Children Act 1965* (NSW) should be repealed and s 67A should be amended to allow appeals against the following decisions:**

- **a decision to grant or refuse an application for approval of an adoption agency;**
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143. *Adoption of Children Regulation 1995* (NSW) cl 14.

144. CSAT, *Submission* at 14.

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- a decision to impose conditions or remove or vary conditions on an approval;
  - a decision to revoke or suspend the approval of an adoption agency; and
  - a decision which is within a class of decisions prescribed by the Regulation for the purposes of this section.

A decision by the Director General or a Principal Officer of a private adoption agency to approve applicants as eligible to adopt under clause 14 of the *Adoption of Children Regulation 1995 (NSW)* should be reviewable.

Decisions which are reviewable decisions under the *Adoption of Children Act 1965 (NSW)* and the *Adoption of Children Regulation 1995 (NSW)* should be assigned to the Community Services Division of the Administrative Decisions Tribunal.

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## Decisions made by the CSC

### *Decisions beyond its powers*

5.95 CAMA provides that the following decisions of the CSC are reviewable:

- a decision to investigate a complaint where that investigation is beyond its powers; and
- a decision that was beyond its powers.<sup>145</sup>

These provisions are unusual in two ways. First, they identify a specific ground for setting aside decisions of the CSC, namely for want of power. Yet this is traditionally a ground for judicial review, not merits review. Most

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145. CAMA s 40(1)(b) and (c).

merits review provisions in other legislation merely identify a decision that can be reviewed, not the ground upon which it can be challenged.<sup>146</sup>

5.96 The second decision also differs from other merits provisions in another way. It does not identify the kinds of decisions that it covers. It is framed so broadly that it appears that any decision of the CSC, which an applicant alleges is beyond the CSC's powers, may be reviewed on its merits.<sup>147</sup> This is completely inconsistent with other legislation which generally identifies particular decisions as reviewable decisions. For example, s 112(a)(i) of the *Children (Care and Protection) Act 1987* (NSW) provides that the Tribunal may review a decision to grant a licence under that Act. While the CSC does make some specific decisions which the Commission considers should be subject to external merits review,<sup>148</sup> the decisions outlined in s 40(1)(b) and s 40(1)(c) of CAMA are not appropriate for merits review. Accordingly, the Commission recommends their repeal.

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#### **RECOMMENDATION 46**

#### **Section 40(1)(b) and (c) of CAMA should be repealed.**

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#### ***Decisions of the CSC when dealing with a complaint***

5.97 The CSC makes other decisions which the Commission considers are appropriate for external merits review. These are decisions by the CSC to:

- decline to entertain a complaint;<sup>149</sup>
- dismiss a complaint;<sup>150</sup> and
- terminate the matter.<sup>151</sup>

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146. This is different from s 6(3) of the ADT Act which provides that a decision is reviewable *even if* it was beyond the power of the decision-maker to make it: see also *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs* (1979) 41 FLR 338.

147. To come within the Tribunal's jurisdiction, a decision must be made by an administrator under an enactment and must be identified as a decision in respect of which an application for review may be brought: ADT Act s 38. See also para 5.47.

148. See para 5.97.

149. CAMA s 21.

150. CAMA s 39(1).

These decisions fall within the principles governing what decisions should be reviewable by the ADT.<sup>152</sup> They are administrative in nature, are made pursuant to an enactment and are decisions that affect or are likely to affect the interests of the persons concerned. They are “end of line” decisions which, it has been submitted, should be reviewable.<sup>153</sup> In the Commission’s view, they are clearly decisions made “in the exercise of functions conferred or imposed by or under the enactment”,<sup>154</sup> are not procedural and an appropriate remedy is available.<sup>155</sup> The Commission notes that similar decisions made by other complaints-handling agencies, such as the Anti-Discrimination Board, are reviewable on their merits.<sup>156</sup>

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#### **RECOMMENDATION 47**

**Decisions by the Community Services Commission, under CAMA, to decline to entertain a complaint, dismiss a complaint or terminate a complaint should be reviewable by the Community Services Division of the Administrative Decisions Tribunal.**

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#### ***Decisions not to implement CSC recommendations following a complaint***

5.98 An appeal may be brought to the ADT if a service provider has not implemented, or only partially implemented, action recommended by the CSC following an investigation into a complaint.<sup>157</sup> However, only the complainant may bring the appeal.<sup>158</sup> This limitation on standing is considered to be a major shortcoming in the legislation.<sup>159</sup>

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151. CAMA s 39(2).

152. CSAT, *Submission* at 15; CSC, *CAMA Submission 2* at 5.

153. Disability Safeguards Coalition, *CAMA Submission 1* at 7; *Confidential Submission 3* at 15.

154. ADT Act s 38.

155. See *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337 per Mason CJ.

156. *Anti-Discrimination Act 1977* (NSW) s 90(3).

157. CAMA Reg cl 6(1)(a).

158. CAMA Reg cl 6(2).

159. Citizen Advocacy NSW, *Submission* at 9; Physical Disability Council of NSW Inc, *Submission* at 13; Institute for Family Advocacy and Leadership

5.99 In view of the vulnerability of persons who use services covered under CAMA, many complaints about service providers are brought on consumers' behalf by their families, concerned friends or neighbours, members of staff or other professional persons who come into contact with the service user. Relying on these persons to lodge an appeal to the Tribunal in the case of non-compliance with CSC recommendations may, as the CSC submitted, place "an unreasonable burden on individuals who are relatively poorly resourced, and facing many personal stresses (particularly families of people with disabilities or children in care)".<sup>160</sup> Also, members of staff or other persons involved in the care of the service user who may have been prompted to lodge the original complaint may no longer play any role in the care of the consumer concerned when the service provider makes the decision not to implement action recommended by the CSC.<sup>161</sup>

5.100 For these reasons, many submissions have argued that other persons should be able to bring an appeal on behalf of the service user to whom the complaint related.<sup>162</sup> The CSC has suggested that any person "with a genuine concern in the subject matter" be able to lodge an application for review.<sup>163</sup> The suggestion that the CSC itself be able to initiate action in the Tribunal to ensure its recommendations are implemented was also popular.<sup>164</sup>

### ***The Commission's view***

5.101 The Commission considers that the decision not to implement a CSC recommendation should continue to be reviewable but recommends first, that

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Development Association Inc, *Submission* at 12; Action for Citizens with Disabilities, *Submission* at 15; H Seares, *Submission* at 9; People With Disabilities (NSW) Inc, *CAMA Submission* at 15-16; NCOSS, *CAMA Submission* at 14; and Disability Safeguards Coalition, *CAMA Submission 1* at 7 and 9.

160. CSC, *CAMA Submission 1* at 28.

161. CSC, *CAMA Submission 1* at 28.

162. NCOSS, *CAMA Submission* at 8; NSW Council for Intellectual Disability, *CAMA Submission* at 6; Disability Safeguards Coalition, *CAMA Submission 1* at 9; People With Disabilities (NSW) Inc, *CAMA Submission* at 15-16; and CSC, *CAMA Submission 1* at 21.

163. CSC, *CAMA Submission 1* at 28.

164. CSC, *CAMA Submission* at 28; Citizen Advocacy NSW, *Submission* at 9; Physical Disability Council of NSW Inc, *Submission* at 13; NSW Council for Intellectual Disability, *CAMA Submission* at 6 and 11; H Seares, *Submission* at 9; Institute for Family Advocacy and Leadership Development Association Inc, *Submission* at 12; and People With Disabilities (NSW) Inc, *CAMA Submission* at 15-16.

the power to review should be located in CAMA itself, rather than the Regulation. In this way, all reviewable decisions relating to the CSC will be together in the one place and thus be more accessible to those whom the Act seeks to protect.<sup>165</sup>

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165. Other jurisdiction is provided in the CAMA Regulation: see cl 6(1)(b) and (c). The Commission recommends their repeal: see Recommendation 49 at para 5.120.



5.102 Secondly, in relation to who may bring the appeal, the Commission agrees that the current limitation is unsatisfactory. It hinders the object of ensuring that action is taken to remedy the situation which has given rise to the complaint. Provided the action recommended by the CSC is reasonable and the service provider is given a reasonable period of time to comply with the recommendations, the Commission believes the general standing provision under CAMA should apply.<sup>166</sup> This will permit an appeal to be brought by a next friend on behalf of the person to whom the service relates or by any person with a genuine concern in the subject matter of the appeal. Accordingly, the Commission recommends that the relevant provision of the CAMA Regulation be repealed.

5.103 In view of the CSC's role in complaints-handling and investigation, the Commission does not consider it appropriate to allow the CSC to bring the appeal on its own initiative.

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**RECOMMENDATION 48**

**Clause 6(1)(a) and cl 6(2) of the CAMA Regulation should be repealed.**

**CAMA should be amended to provide that a decision of a service provider not to implement, or only partially implement, recommendations of the Community Services Commission arising out of the investigation of a complaint may be reviewed by the Community Services Division of the Administrative Decisions Tribunal.**

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***Appeals from CSC recommendations arising out of a review or inquiry***

5.104 The CSC may make recommendations for change following a review of a person or child in care under s 11 of CAMA or as a result of an inquiry it has undertaken under s 83(d) of CAMA, either on its own initiative or at the request of the Minister. The lack of enforceability of these recommendations is a

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166. CAMA s 41. See discussion at para 5.137-5.155.

source of considerable frustration among many consumers and key interest groups.<sup>167</sup>

5.105 It has been suggested that decisions of service providers not to implement recommendations arising out of the CSC's review or inquiry functions are appropriate for merits review as they are decisions which affect or are likely to affect the interests of a person.<sup>168</sup> Also, they are fundamentally the same as decisions not to implement recommendations arising out of a complaint investigation, particularly in terms of the impact on the service user, which are reviewable.<sup>169</sup>

5.106 The CAMA Regulation enables the Tribunal to review decisions of service providers not to implement action recommended by the CSC arising out of a complaint investigation.<sup>170</sup> In its submission, the New South Wales Government argued that the Tribunal's jurisdiction in this respect is much wider than was originally intended:

While it is important that service providers comply with conditions required by the Minister (possibly on the recommendation of the Commission) this jurisdiction appears to provide Commission recommendations with a stature not originally contemplated when the legislation was enacted.<sup>171</sup>

Recommendations of other watchdog agencies, such as the New South Wales Ombudsman, are not generally enforceable.

### ***The Commission's view***

5.107 The recommendations of the CSC are not determinations of a judicial body, and none of the usual safeguards that are appropriate when determining

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167. *Confidential Submission 3*; People With Disabilities (NSW) Inc, *CAMA Submission* at 10; Barnardos Australia, *Submission* at 6 and 9; NCOSS, *CAMA Submission* at 14; Intellectual Disability Rights Service, *Submission* at 10; and NSW Council for Intellectual Disability, *DSA Submission* at 9.

168. See People With Disabilities (NSW) Inc, *CAMA Submission* at 11 and 16; *Confidential Submission 4* at 12; Barnardos Australia, *Submission* at 6 and 9; Intellectual Disability Rights Service, *Submission* at 10; NSW Council for Intellectual Disability, *DSA Submission* at 9; and NCOSS, *CAMA Submission* at 14.

169. CSC, *CAMA Submission 1* at 27.

170. CAMA Reg cl 6(1)(a).

171. NSW Government, *CAMA Submission* at 6.

issues in dispute between parties applies. **The Commission therefore considers that it is inappropriate to allow the ADT to review decisions of service providers not to implement recommendations made by the CSC arising from its review or inquiry functions.** However, recommendations arising out of the CSC's *complaint* function can be distinguished because they relate to a complaint in which the unreasonable behaviour of a specific service provider is being challenged by an identified service user or by a complainant on behalf of that person. The recommendations which follow from the investigation into the complaint must address the specific incident or behaviour which is central to the complaint.

5.108 The Commission acknowledges the frustration caused by the lack of enforceability of CSC recommendations and has suggested other ways of enforcing those recommendations earlier in this Report.<sup>172</sup>

## **Decisions under the Disability Services Act 1993 (NSW)**

### ***Current law***

5.109 The following decisions of the Minister made under the DSA may be reviewed by the CS Division of the ADT:

- a decision to approve the provision of financial assistance to a service provider where that approval should not have been given because the grant will not conform with the objects, principles and applications of principles under the DSA;
- a decision to provide financial assistance to an eligible service provider on terms and conditions which do not comply with s 12;
- a decision to provide financial assistance to an approved research or development activity on terms and conditions which do not comply with s 13;
- a decision not to conduct a review under s 15 or to conduct a review that does not accord with the requirements of s 15;
- a decision to terminate future payments of approved financial assistance in a manner inconsistent with the procedural requirements under s 16; and

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172. See para 3.177.

- a decision belonging to such class of decisions as may be prescribed by the regulations.<sup>173</sup>

By regulation in 1996, the following decisions were also made reviewable:

- a decision of the Minister to provide or continue to provide a service which does not conform with the objects, principles and applications of principles under the DSA; and
- a decision of the Minister to adopt or amend a transition plan, or to refuse to adopt or amend a transition plan within the meaning of s 7 of the DSA.<sup>174</sup>

As a matter of principle, the Commission recommends that all reviewable decisions be located in the primary legislation, rather than, as present, in the CAMA Regulation.

### **Major issues**

5.110 The capacity to review, on their merits, funding decisions and decisions to approve transition plans where there is no transition funding allocated, is a matter of some controversy. The NSW Government has submitted that s 20 appeals are not appropriate for merits review as they relate to funding decisions with significant polycentric elements. It was argued that these are decisions which are properly a function of the executive and as such, are subject to Parliamentary scrutiny.<sup>175</sup> It submitted:

the Government wants to ensure that there is confidence in the decisions made in relation to services and transition plans, and that these decisions are well-founded, and are seen to be so. Accordingly, the Government is in favour of the concept of merits review of the way in which services have been provided (within funding limitations) but not of the underlying funding and allocation decisions.<sup>176</sup>

5.111 Other submissions, on the other hand, argued that s 20 appeals and appeals against decisions to approve transition plans should continue to be available as they are essentially the only means to ensure that the legislative

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173. DSA s 20.

174. CAMA Reg cl 6(1)(b) and (c).

175. NSW Government, *DSA Submission* at 1-2; and NSW Government, *CAMA Submission* at 1.

176. NSW Government, *DSA Submission* at 2.

requirements of the DSA are being met.<sup>177</sup> The decisions which may be reviewed under s 20 are sought to be distinguished from funding decisions, which are generally considered inappropriate for merits review.<sup>178</sup> As one peak consumer and advocacy group argued:

While we do not object in principle to the suggestion that Government budgetary decisions affecting, or likely to affect, the interests of individuals ought not to be reviewable, it is important that such decisions be clearly distinguished from the current DSA appeal rights. While these appeal rights concern funding decisions, the basis of the appeal is in relation to the “conformity” of the recipient of the funds to the requirements of the DSA. These appeal rights do not concern the appropriation per se, or the distribution of the appropriation among competing priorities. Rather, they require that the recipients of the distribution conform with legislative requirements.<sup>179</sup>

5.112 Another major issue is the practicality of allowing such appeals in the absence of appropriate remedies. In its submission, the Government argued:

it is not in anyone’s interest for the Community Services Appeals Tribunal to decide that a service does not comply with the Act’s requirements when there is realistically nothing the service can do to bring itself into conformity or to provide better alternative arrangements.<sup>180</sup>

According to the Administrative Review Council, an administrative decision that should be prima facie reviewable may nevertheless be inappropriate for merits review if there is no suitable remedy available to the review body.<sup>181</sup> In the case of appeals under s 20 and appeals against transition plans, a successful challenge to the Minister’s decision may result in the withdrawal of funding, thus forcing the closure of the particular service. This is an extreme measure which is likely to be wholly inappropriate in the vast majority of cases. Closure would significantly disrupt the lives of those persons who use the service and a worse outcome may result if there are no alternative services available for them. Consequently, the Tribunal will rarely

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177. CSAT, *Submission* at 16-17; People With Disabilities (NSW) Inc, *CAMA Submission* at 27; Disability Safeguards Coalition, *DSA Submission* at 11; and Burnside, *Submission* at 5.

178. See para 5.52-5.60.

179. People With Disabilities (NSW) Inc, *CAMA Submission* at 27.

180. NSW Government, *DSA Submission* at 1.

181. See para 5.52.

make a decision the effect of which is to remove authority to provide funding to a service.

***Decisions made by the Disability Services Quality Assurance Council (DisQAC)***

5.113 These issues, namely whether s 20 appeals and appeals against the Minister's decision to adopt transition plans are appropriate, may become moot if the Commission's recommendations in its Report on the DSA are implemented. In that Report, the Commission recommends that an independent quality assurance process be established.<sup>182</sup> Under the proposed arrangements, all services will be assessed against a set of revised Disability Services Standards<sup>183</sup> by an independent panel of service providers and consumers. Services which meet the requisite level of quality service provision will be certified by the Disability Services Quality Assurance Council (DisQAC) for periods of one, two or three years. Under the new arrangements, the Minister will be empowered to fund only those services that are certified by DisQAC.

5.114 New services will have to conform fully with the objects, principles and applications of principles under the DSA in order to qualify for certification by DisQAC. Those non-conforming services which were in existence at the time the DSA came into force will continue to be in transition. However, the Commission recommends the adoption of a two-stage process to replace the current transition process.<sup>184</sup> Under this new system, the Minister will be required to give each service notice of when it will receive transition funding and when it is expected to reach full conformity.

5.115 Stage 1 services, that is, those whose transition funding is not imminent, will be required to prepare a plan demonstrating how the service is meeting identified basic criteria. Stage 2 services are those services whose transition funding is scheduled to be received within 12 months. These will be required to prepare a final transition plan outlining how and when they will achieve full conformity with the DSA.<sup>185</sup> Both Stage 1 and Stage 2 transition plans must be lodged and assessed by DisQAC. If satisfied that a Stage 1 transition plan meets the identified minimum standards, DisQAC

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182. See Report 91 at para 7.17-7.27 and Recommendations 26-28.

183. See Report 91 at para 7.23 and Recommendation 28. The current Disability Services Standards are described and critiqued at para 7.3-7.16.

184. See Report 91 at para 6.14-6.16 and Recommendation 20.

185. See Report 91 at para 6.17-6.18 and Recommendation 21-22.

may certify a Stage 1 service. A Stage 2 service will be certified if DisQAC is satisfied that the final transition plan will assist the service to reach full conformity and that, until fully implemented, the Stage 2 service is complying as closely as possible with the requirements of the DSA.<sup>186</sup> Certification means the service is eligible to receive funding.<sup>187</sup> All services would be required to undergo annual self-assessments measuring their performance against key quality indicators which DisQAC is to develop in consultation with key stakeholders.

5.116 The effect of these recommendations is to transfer responsibility for determining a service's eligibility to receive funding from the Minister to an independent body. This has several advantages. It protects the Minister from any potential claim of political interference in decisions relating to eligibility. As the establishment of the accreditation process depends on extensive consultations with all major players in the disability sector and because a key feature of DisQAC will be its independence, the sector will have a sense of ownership of the process. This will maximise credibility in the assessment process from all sections of the disability community. Significantly, it also separates the eligibility decision from the actual funding decision and thus resolves the confusion between the legality/merits of the current appeal provisions.

5.117 A decision to certify or refuse to certify a service is an administrative decision made pursuant to the Act which is likely to affect the interests of persons involved in the service, given the direct link to funding. Consequently, if these recommendations are implemented, the Commission believes that a decision of the DisQAC to certify or refuse to certify a new service or a Stage 1 or Stage 2 transition service should be reviewable by the ADT.

A decision that a service has or has not complied with the requirements of the quality assurance process should also be reviewable given the implications that such a decision may have on the funding of a service. This right of review would replace appeals under s 20 and under the CAMA Regulation. Should the Minister decide to fund a service that has not been certified by DisQAC, an application for judicial review may be made to the Supreme Court on the grounds that the Minister acted beyond his or her powers.

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186. See Report 91 at para 6.19-6.21 and Recommendation 23.

187. The Commission recommends that the DSA be amended to provide that the Minister be empowered to fund only those services that have been certified by DisQAC. See Report 91 at para 6.20 and Recommendation 24.

***Decisions to impose sanctions***

5.118 At present, the only sanction available to the Minister is to remove authority to fund a service. This can effectively force the closure of the service to the much greater detriment of service users particularly if there are no alternative services available. It has been submitted that less drastic action needs to be available to the Minister to deal with services that do not comply with the objects, principles and applications of principles under the DSA.<sup>188</sup>

5.119 The Commission has considered this issue in its Report on the DSA. In that Report, the Commission recommends that the Minister should be given power to impose a broader range of sanctions against non-conforming services.<sup>189</sup> Where a service does not comply with the legislative requirements of the DSA, the Minister should be able to:

- vary the terms and conditions of funding;
- appoint an administrator;
- stop a service from admitting any more clients;
- name a service in Parliament;
- conduct more frequent monitoring; and/or
- require a person in receipt of an individual funding package to seek help from a service to administer the funds.<sup>190</sup>

5.120 If these recommendations are implemented, the Minister will be empowered to make decisions which appear to be appropriate for merits review. A decision to impose a sanction is administrative in nature, made under an enactment and is likely to affect the interests of persons concerned with the service. Subject to two exceptions, the Commission believes that the Minister's decision to impose any of the sanctions recommended should be reviewable by the ADT. A decision to name a service in Parliament or a decision to order more frequent monitoring of a service are, in the Commission's view, inappropriate for merits review. These are less severe sanctions which are likely to be imposed as interim measures on those services which are not in major breach of the DSA. Persistent non-compliance or more serious breaches of the Act will in all probability attract

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188. CSAT, *Submission* at 17.

189. See Report 91 at para 9.6-9.8 and Recommendation 36.

190. See Report 91 at para 9.6-9.8 and Recommendation 36.



a sanction which will have a greater impact on the service and on the interests of persons involved with the service.

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**RECOMMENDATION 49**

**Section 20 of the DSA and cl 6(1)(b) and (c) and cl 6(2) of the CAMA Regulation should be repealed and replaced by the following.**

**The DSA should be amended to provide that the following decisions are reviewable by the Administrative Decisions Tribunal:**

- **a decision by the Disability Services Quality Assurance Council:**
  - **to certify or refuse to certify a Stage 1 or Stage 2 transition service;**
  - **to certify or refuse to certify a new service as conforming with the objects, principles and applications of principles under the DSA; and**
  - **that a service has or has not complied with the requirements of the quality assurance process.**
- **a decision by the Minister to:**
  - **vary the terms or conditions of funding;**
  - **appoint an administrator for a service;**
  - **stop a service from admitting any more clients; and**
  - **require a person receiving individual funding to seek help from a service to administer the funds.**

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***Other suggestions***

5.121 A number of submissions suggested that the jurisdiction of the ADT be extended to cover a range of other matters pertaining to the DSA including:

- providing a direct right of appeal to the ADT where a service provider's conduct in breach of principles and applications of principles under the DSA gives rise to a threat of imminent harm to a person;<sup>191</sup>
- allowing actions to be brought for breaches of objects, principles and applications of principles under the DSA generally;<sup>192</sup>
- providing a right of appeal in respect of s 9 plans where they are not formulated by the relevant agencies or are not implemented;<sup>193</sup> and
- providing a cause of action for breach of duty of care or negligence resulting in damage or injury to a person.<sup>194</sup>

These suggestions represent a significant departure from the jurisdiction of the CS Division of the ADT which is essentially of an appellate nature. While it is true that other Divisions of the ADT exercise original jurisdiction,<sup>195</sup> the Commission is not persuaded that an extension of the Tribunal's jurisdiction is warranted in the ways suggested.

5.122 Some of these proposals are borne out of serious concerns for the welfare of people who, because of their disability or because they are children in need of care and protection, are a particularly vulnerable group and susceptible to abuse and neglect. Some of these issues have been canvassed in detail in the Commission's Report on the Review of the DSA.<sup>196</sup> Other proposals are a response to community concerns that the DSA, although it represents a milestone for people with disabilities, needs to be made more enforceable. In its Report on the DSA, the Commission acknowledges these concerns and makes recommendations designed to increase accountability for both specialist government and non-government

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191. Institute for Family Advocacy and Leadership Development Association Inc, *Submission* at 10 (see also Appendix); Carers NSW Inc, *Submission* at 7; Intellectual Disability Rights Service, *Submission* at 10; and NSW Council for Intellectual Disability, *DSA Submission* at 9.

192. Action for Citizens with Disabilities, *Submission* at 15; and Disability Council of NSW, *Submission 2* at 25.

193. See for example, NCOSS, *DSA Submission* at 19; and Disability Safeguards Coalition, *DSA Submission* at 19.

194. *Confidential Submission 4*.

195. See para 5.6.

196. See Report 91 at para 9.9-9.13 and Recommendation 37.

service providers and government agencies which provide mainstream services.<sup>197</sup>

### **Decisions made pursuant to the Youth and Community Services Act 1973**

5.123 Schedule 5 of the *Administrative Decisions Legislation Amendment Act 1997* (NSW) transfers jurisdiction under the *Youth and Community Services Act 1973* (NSW) from the District Court to the ADT. Under s 3A(2) of the *Youth and Community Services Act 1973* (NSW) an owner, occupier or a lessee of premises declared as a residential centre for handicapped persons may apply to the CS Division for a review of that declaration on the ground that:

- a declaration that the premises to which the declaration relates are not being used as a place of residence for two or more handicapped persons; or
- that all handicapped persons residing at those premises reside there with a relative who is of or above the age of 18 but who is not a handicapped person.

In addition, a person who has a licence to enable premises to be used as a residential centre for handicapped persons may appeal to the ADT against a decision to suspend or revoke the licence.<sup>198</sup> The Act makes no provision for the review of decisions to refuse to grant a licence or to impose conditions, or revoke or vary existing conditions, on the licence. As argued above in relation to other licensing decisions,<sup>199</sup> these decisions are clearly appropriate for merits review.<sup>200</sup> They are also included in the list of decisions

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197. See Report 91 at para 4.24-4.37 and Recommendations 13-15.

198. *Youth and Community Services Act 1973* (NSW) s 24.

199. See para 5.80-5.81.

200. This was also recommended by the Report of the Task Force on Private “For Profit” Hostels: New South Wales, Task Force on Private “For Profit” Hostels, *Report of the Task Force on Private “For Profit” Hostels December 1993* (Office on Disability, Sydney, 1993) Volume 1 at 57. It recommended also that decisions to suspend admissions, appoint an administrator, approve a transition plan and a decision to refuse or fail to make any of these decisions be reviewable.

contemplated by the Attorney General to be amenable to merits review.<sup>201</sup> Accordingly, the Commission recommends that they be reviewable by the ADT.

5.124 Another concern is that appeals against licensing decisions may only be brought by a licensee. It has been argued that consumers or other people with a genuine concern in the issue of whether a particular person should be licensed to operate a boarding house also should be able to challenge licensing decisions.<sup>202</sup> As community welfare legislation is intended to be consumer-focused, and in view of the standing provision which applies in relation to other community service appeals under CAMA, the Commission agrees that appeals should be able to be brought by any persons affected by the decision or any person or body with a genuine concern in the decision under review.

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#### **RECOMMENDATION 50**

**The following decisions under the *Youth and Community Services Act 1973 (NSW)* should be reviewable by the Community Services Division of the Administrative Decisions Tribunal:**

- **a decision to refuse to grant a licence to operate a boarding house;**
- **a decision to impose additional conditions, or revoke or vary existing conditions, on a licence.**

**Applications for a review of a decision under the *Youth and Community Services Act 1973 (NSW)* should be able to be brought by any person whose interests are affected by the decision or any person or body with a genuine concern in the decision.**

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201. See para 5.50.

202. CSAT, *Submission* at 18.

## Reasons for decisions

5.125 The requirement to give reasons for administrative decisions is a key element of an administrative review package and a well-established principle of open government. In his Second Reading Speech on the ADT Bill, the Minister said,

An essential element of good administration is the need to ensure that reasons are given for administrative decisions. The supply of reasons with decisions will give people dealing with government departments and agencies an assurance that decisions are made rationally, taking into account only the relevant considerations. This will ensure that decisions can be seen to have been lawfully made and also reduce the likelihood of appeals on the merits of the decision.

The obligation to provide reasons for decisions reached in the exercise of public powers is essential to ensuring accountability. It is likely to cause a decision-maker to consider carefully the grounds upon which a decision is made and ensure that proper process and policies are applied. However, the most important result of requiring reasons to be given for decisions is that it allows an individual affected by a decision to understand the reasons for that decision and therefore arms the individual with the information necessary to seek review and remedies to ensure administrative justice.<sup>203</sup>

### **Requirements under CAMA**

5.126 Reasons for certain decisions were required by CAMA, long before the ADT Act came into operation. Under CAMA, a relevant decision-maker must record reasons for his or her decision and give a copy of those reasons to each person directly affected by the decision.<sup>204</sup> A “relevant decision-maker” includes the Minister for Community Services, Aged Services and Disability Services, the Directors General of ADD and DOCS, the CSC and a service provider.<sup>205</sup> A “decision” is defined to include action taken, and recommendations made, by the CSC.<sup>206</sup> Decisions by the CSC to decline to

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203. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 27 June 1997, the Hon J W Shaw, Attorney General, Second Reading Speech at 11280.

204. CAMA s 114(1).

205. CAMA s 114(4).

206. CAMA s 114(2).

entertain a complaint, dismiss a complaint or terminate a complaint would therefore appear to be covered under these provisions.<sup>207</sup>

5.127 Decisions in respect of which reasons must be given are prescribed in the CAMA Regulation, being:

- all decisions which are reviewable by the ADT, with the exception of decisions of the CSC which are claimed to exceed its powers; decisions of service providers not to implement CSC recommendations following an investigation into a complaint and decisions of the Minister to provide a service or adopt a transition plan which does not comply with the legislative requirements of the DSA;
- any decision of a service provider which is the subject of a complaint to the CSC and in respect of which the CSC has requested reasons; and
- any decision of a service provider which is likely to have a significant impact on the quality or availability of a community service and that directly affects one or more users of the service provided reasons have been requested by or on behalf of an affected person within 28 days of being notified of the decision.<sup>208</sup>

**Requirements under the ADT Act**

5.128 The ADT Act requires reasons to be given in respect of all decisions which are reviewable by the Tribunal, with no exception.<sup>209</sup> Significantly, the other major difference between the two Acts is that CAMA requires reasons to be given to persons directly affected by a reviewable decision automatically when notice of the decision is given. There is no need for a separate request to be made in respect of reviewable decisions. The ADT Act, on the other hand, requires a request to be made by “an interested person” within 28 days of the notification of a decision.

5.129 Reasons must be given within 28 days of the request<sup>210</sup> and must set out:

- the findings on material questions of fact, referring to the evidence or other material on which those findings were based;

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207. The CSC submitted this should be the case: CSC, *CAMA Submission 2* at 6. See also para 3.90.

208. CAMA Reg cl 10.

209. ADT Act s 49.

210. ADT Act s 49(2).

- the administrator’s understanding of the applicable law; and
- the reasoning processes that led the administrator to the conclusions he or she made.<sup>211</sup>

An administrator may only refuse to give reasons if he or she is of the opinion that the person is not entitled to be given a written statement of reasons (that is, if the person is not an “interested person”) or a request is made outside the time limitation.<sup>212</sup>

***Information about rights and obligations inadequate***

5.130 While the benefits of requiring administrators to provide reasons for their decisions is not in question, the CSC has submitted that these benefits have not flowed through to the community services area for a number of reasons.<sup>213</sup> In part, it is due to the fact that persons affected by the decision are not informed of their rights of appeal or have a limited capacity to exercise those rights if they are informed. Also, the CSC argued that many service providers may not be aware of their obligations under the Act.<sup>214</sup>

5.131 With the enactment of the ADT Act, it is hoped that administrative practices will change and that administrators will, as a matter of good administration, record reasons for all decisions as each is made. In order to ensure that administrators and service providers comply with the requirements of both CAMA and the ADT Act, there should be a campaign to publicise the obligations on decision-makers and educate them about how to provide adequate statements of reasons. In the absence of a body such as the federal Administrative Review Council, the campaign should be co-ordinated by a central government agency. In the Commission’s view, the preferred agency is the Premier’s Department which has overall responsibility for ensuring good administration across the whole public sector.

5.132 The task of ensuring that relevant persons and organisations are aware of their obligations would be made easier if the legislative provisions were together in the primary legislation. The Commission therefore recommends that clause 10 of the CAMA Regulation be repealed and the decisions prescribed therein be included in CAMA.

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211. ADT Act s 49(3).

212. ADT Act s 50.

213. CSC, *CAMA Submission 1* at 54.

214. CSC, *CAMA Submission 1* at 54.

**Exceptions under CAMA**

5.133 Currently, service providers who decide not to implement recommendations of the CSC or to take only part of the action recommended do not have to provide reasons for their decision.<sup>215</sup> The CSC has submitted that service providers ought to be required to provide reasons for such decisions in order to make them more accountable for their responses to recommendations of the CSC. The CSC submitted:

As a matter of principle, any decision which can be reviewed by the Tribunal should be one which warrants explanation to the parties concerned ... The inclusion of such decisions in the class of decisions which require the giving of reasons would promote a more coherent administrative review framework.<sup>216</sup>

5.134 The exceptions in the CAMA Regulation relate to decisions in respect of which it may not be possible to require reasons to be given automatically. For example, a service provider's decision not to implement CSC recommendations, may not, in practice, be the result of an actual decision. It may, instead, reflect a failure of the service provider to take the action recommended over a period of time.

5.135 Even though CAMA does not oblige service providers and administrators to give reasons for certain decisions prescribed in clause 10 of the CAMA Regulation, reasons for such decisions may be requested under the ADT Act, as these are decisions which are reviewable by the Tribunal.<sup>217</sup> A request may either be made by the applicant or by the Tribunal upon receiving an application for a review of the decision. Given that the purpose of requiring a written statement of reasons is to improve the decision-making process by making it more consistent, open and accountable, it is important that the right to be given reasons covers all decisions which are reviewable by the ADT. The Commission considers that, as a matter of principle, any decision which is reviewable by the ADT should be a decision in respect of which reasons must be given, on request.

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**RECOMMENDATION 51**

**Clause 10 of the CAMA Regulation should be repealed.**

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215. CAMA Reg cl 10(a)(ii).

216. CSC, *CAMA Submission 1* at 29-30.

217. ADT Act s 49.



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**CAMA should expressly indicate what are the decisions in respect of which reasons should be given, either automatically, or upon request.**

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## **Mandatory notification of appeal rights**

5.136 Another key element of an administrative law framework is to ensure that persons affected by an administrative decision are aware of their right to have the decision reviewed by a tribunal. The ADT Act achieves this by requiring the decision-maker to give notice of the decision to interested persons and inform them of their right to have the decision reviewed.<sup>218</sup> This requirement is now reflected in CAMA.<sup>219</sup>

## **STANDING**

5.137 Standing is a legal term which refers to who is entitled to commence legal proceedings. It has been a highly contested issue in the community services area recently, particularly in relation to challenges against the Minister's decision to adopt transition plans.<sup>220</sup>

5.138 At common law, the test for standing has been interpreted narrowly. A person must either have a private right to commence legal proceedings or have a "special interest" in the subject matter of the action. This interest must be more than a "mere intellectual or emotional concern" and must be an

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218. ADT Act s 48(1).

219. CAMA s 114(3).

220. In 1996, People With Disabilities (NSW) Inc and NSW Council for Intellectual Disability lodged appeals under clause 6(1)(c) of the CAMA Regulation against the Minister's decisions to adopt transition plans for 189 disability services. Two of these matters were heard as test cases by the CSAT. In March 1998, the Minister asked the Community Services Commissioner to convene a "Transition Plan Appeals Working Group" to devise a strategy to resolve the outstanding appeals. A large number were sought to be resolved through mediation: New South Wales, CSAT, *Annual Report 1996-1997* at 12 and New South Wales, CSAT, *Annual Report 1997-1998* at 12-13. See also discussion at para 5.142-5.147 in relation to the two test cases.

interest beyond that which an ordinary member of the public would have. The person must also stand to win some advantage if the action succeeds “other than righting a wrong”, or risk suffering some detriment, beyond an adverse costs order, if the action fails.<sup>221</sup> Generally speaking, financial interests have been given greater weight than non-financial interests.<sup>222</sup>

5.139 In addition, there are various standing provisions under statute. Under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (“ADJR Act”), a “person aggrieved” by a decision, conduct or a failure to decide may apply for judicial review.<sup>223</sup> A “person aggrieved” is defined to include a person whose interests are affected by the decision.<sup>224</sup> While courts have had regard to the “special interest” test when interpreting the standing provision under the ADJR Act, a more liberal approach has been taken in view of the nature of such actions, namely to ensure that government decisions comply with the law.<sup>225</sup>

5.140 Under the *Administrative Appeals Tribunal Act 1975* (Cth) (“AAT Act”), a person whose interests are affected may seek merits review of an administrative decision.<sup>226</sup> The Act does not define “interests” but it is clearly intended to be a wider provision than the negatively framed “person aggrieved” test under the ADJR Act. Most significant, however, is the AAT Act’s treatment of organisations, which paves the way for groups to bring actions in the public interest. It provides that:

an organisation or association of persons whether incorporated or not, shall be taken to have interests that are affected by a decision if the

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221. *Australian Conservation Foundation v Commonwealth* (1980) 28 ALR 257 at 270 per Gibbs J. See also *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27; and *Fraser Island Defenders Organisation Ltd v Hervey Bay Town Council* [1983] 2 QdR 72.

222. *Australian Conservation Foundation v Commonwealth* (1980) 28 ALR 257.

223. ADJR Act s 5-7.

224. ADJR Act s 3(4).

225. *Tooheys Ltd v Minister for Business and Consumer Affairs* (1982) 42 ALR 260; *Ogle v Strickland* (1987) 71 ALR 41; and *Right to Life Association v Secretary, Department of Human Services and Health* (1995) 56 FCR 50.

226. AAT Act s 27(1).

decision relates to a matter included in the objects or purposes of the organisation or association.<sup>227</sup>

This provision was specifically cited by the Working Party on Appeals and Complaints Mechanisms for Community Services in its discussion of what would be an appropriate standing provision under CAMA.<sup>228</sup> In its Report, the Working Party recommended that a broader standing provision be included to allow proceedings with a public interest element.<sup>229</sup>

## The standing provision under CAMA

5.141 Under CAMA, applications for a review of a decision may be made by:

- any person with a “genuine concern in the subject matter of the decision concerned” unless the Tribunal finds that the person or body is “unjustifiably interfering”<sup>230</sup> in the matter; and
- any person who is responsible for, or is a next friend of, or is appointed by the Tribunal to represent the person to whom the appeal relates.<sup>231</sup>

This standing provision has been preserved in the transfer of jurisdiction to the ADT. It differs from the standing test which applies under the ADT Act, which effectively defers to standing provisions in originating legislation.<sup>232</sup> The ADT Act provides that “an interested person” may apply for a review of

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227. AAT Act s 27(2).

228. CAMA Working Party Report at 45-47 and Appendix 7.

229. CAMA Working Party Report at 45.

230. This concept appears to draw on the notion of the “mere busybody” penned by Lord Denning in *Inland Revenue Commissioners v National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617. In that case, it was found that a person need not have a direct legal or financial interest but a “mere busybody” will not have a sufficient interest.

231. CAMA s 41.

232. In his Second Reading Speech, the Attorney General stated: “The issue of who will be eligible to apply for the review of an administrative decision will also be reviewed flexibly, with standing provisions contained in the relevant enactments that confer jurisdiction on the ADT adapted to the nature of the particular matter before the tribunal”: New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 27 June 1997, the Hon J W Shaw, Attorney General, Second Reading Speech at 11280.

an original decision or a reviewable decision.<sup>233</sup> An interested person is defined to mean “a person who is entitled under an enactment to make an application to the Tribunal for an original decision or a review of a reviewable decision.”<sup>234</sup> The Tribunal may, however, be called upon to decide whether the interests of a person are affected by a decision or not for the purposes of making that person a party to the proceedings.<sup>235</sup> The standing provision under CAMA is arguably much broader than the “interests” test under this provision.

### **Genuine concern**

5.142 The CSAT considered the standing provision under CAMA in two test cases brought by two peak disability groups: People With Disabilities (NSW) Inc (“PWD”) and the New South Wales Council for Intellectual Disability (“CID”).<sup>236</sup> They sought orders to set aside the decision of the Minister to adopt the transition plans for the *Dunrossil Challenge Foundation Ltd* and the *Greystanes Children’s Home* on the grounds that the transition plans should not have been approved because they did not comply with the objects, principles and applications of principles in the DSA. At the time of writing, one of these cases is on appeal to the Supreme Court.

5.143 The CSAT made a number of findings. First, it found that there is only one standing provision in the Act. Therefore, the test of “genuine concern” applies to all potential applicants whether they are consumers who are directly affected by the decision or third parties wishing to bring proceedings in the public interest.<sup>237</sup> The CSAT also found that the words “genuine concern” have their ordinary meaning in the context of the legislation and the scope and objects of CAMA. It found that the ordinary

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233. ADT Act s 42 and 55.

234. ADT Act s 4.

235. ADT Act s 67.

236. *People with Disabilities (NSW) Inc and the NSW Council on Intellectual Disability v Minister’s decision to adopt the transition plan for Dunrossil Challenge Foundation Ltd* (New South Wales, Community Services Appeals Tribunal, Appeal No 061 and 195, 12 February 1998, unreported) (“*Dunrossil*”); and *People with Disabilities (NSW) Inc and the NSW Council on Intellectual Disability v Minister’s decision to adopt the transition plan for Disability Enterprises Leura, trading as Greystanes Children’s Home* (New South Wales, Community Services Appeals Tribunal, Appeal No 067 and 194, 17 March 1998, unreported) (“*Greystanes*”).

237. *Dunrossil* at 28; and *Greystanes* at 18.

meaning is broad, and would cover any matter “which sincerely engages one’s attention or that affects one’s welfare or happiness”. However, the concern must be greater than one which an ordinary member of the public would have.

5.144 Thirdly, the CSAT found that the standing provisions should be given a wide interpretation given the beneficial nature of CAMA (and the DSA under which the decisions under review were made) and the express objects of the legislation. These are framed in terms of providing avenues of appeal and encouraging compliance with community welfare legislation. The CSAT further found that it is not necessary for the applicant to be directly affected by the circumstances complained of. Finally, it found that although they did not represent the views of the service users or their families, PWD and CID represented the interests of the wider disability community to ensure that the requirements of the DSA were being met.

5.145 Drawing on common law principles in relation to public interest litigation, the CSAT concluded that PWD and CID did have a genuine concern in the subject matter of the decisions under review. It found that they had a genuine social justice concern, namely to improve the outcomes for current and prospective users of the services, which was closely related to the Minister’s decision to adopt the transition plans. The objects and activities of PWD and CID demonstrated that they were organisations with a long-standing interest in the welfare of people with an intellectual disability. Also significant was the fact that they receive substantial government funding, are represented on a number of government committees and are clearly capable of representing the public interest.<sup>238</sup>

***Unjustifiably interfering***

5.146 Even where a person or body has been found to have a “genuine concern”, the Tribunal could still find the person or body to be “unjustifiably interfering” and therefore not be entitled to lodge the appeal. In order to determine whether a person or organisation is unjustifiably interfering, the Tribunal must consider the wishes and interests of any other persons who have an interest in the matter.<sup>239</sup>

5.147 There was strong opposition to the appeal from the service itself and from parents and service users in *Dunrossil*. Parents and other family members also opposed the appeal in *Greystanes*. Clearly a balance needs to

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238. *Dunrossil* at 35; and *Greystanes* at 25.

239. CAMA s 41(5).

be found between the interests and wishes of persons directly affected by the decision and the importance of the public interest in pursuing the matter. To strike the appropriate balance, the CSAT held that when determining whether a person or body is unjustifiably interfering, the following factors need to be taken into account:

- the wishes and interests of persons with an interest in the matter, including the strength and unanimity of the views expressed, the extent to which those views are based on informed choice, and the capacity of those people to bring proceedings themselves; and
- the importance of the public interest in comparison with other interests and wishes.<sup>240</sup>

In both cases, the CSAT found that PWD and CID were not “unjustifiably interfering” despite the contrary wishes of consumers and therefore had standing to appeal. In reaching this decision, the CSAT held that the best interests of service users as a whole and the importance of the public interest outweighed the interests and wishes of other stakeholders.<sup>241</sup>

### ***Next friend***

5.148 Given the relative powerlessness and vulnerability of many consumers of community services, they are unlikely to challenge decisions of government agencies or their service providers themselves. Indeed, many are unlikely to be aware of their rights, let alone be in a position to exercise them. As PWD stated, the community services area is one where:

many consumers ... are unable to make complaints for themselves due to their age, level of disability, fear of a particular provider, restrictive environment, destitution (where survival does not permit the luxury [of] pursuing a complaint) or lack of knowledge about complaint procedures.<sup>242</sup>

5.149 It is therefore vital that the legislation allows appeals to be brought by other persons or organisations on behalf of consumers of services. This point is made in the submission by the NSW Government:

Because the people who may wish to bring matters before the Tribunal are among the most vulnerable in our society, their interests should be

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240. *Dunrossil* at 32; and *Greystanes* at 21-22.

241. *Dunrossil* at 37; and *Greystanes* at 26-27.

242. People with Disabilities (NSW) Inc, *CAMA Submission* at 12.

able to be represented before the Tribunal by their family, guardian or a person or organisation who has a direct knowledge of their circumstances or has been asked by the person to act on his or her behalf.<sup>243</sup>

This is the clear intent of s 41(2) which provides that appeals may be brought by any person who is responsible for, or is a next friend of, or is appointed by the Tribunal to represent the person to whom the appeal relates. Significantly, the Act expressly provides that the generality of the first limb of the standing provision in subsection (1) is not in any way limited by subsection (2).

## Submissions

5.150 A number of submissions to the Commission stressed the importance of a broad standing provision to allow any person or organisation with a genuine concern in the subject matter of the decision to bring an appeal.<sup>244</sup> A broad standing provision is essential, it is argued, to:

- allow appeals to be brought by persons and organisations on behalf of people who are directly affected by the decision but who are unable to bring such appeals themselves;
- bring issues to public attention which may not otherwise be brought if the system relied only on individual complaints by persons directly affected by a decision;
- deal with broad systemic issues which may arise from a decision which affects or is likely to affect large numbers of people;<sup>245</sup> and
- deal with matters in which there is an important element of public interest.

5.151 Although there was some dissatisfaction with the “bulk appeals” approach of consumer advocacy groups in relation to transition plans,<sup>246</sup> the

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243. NSW Government, *CAMA Submission* at 2.

244. NCOSS, *CAMA Submission* at 6 and 14; Physical Disability Council of NSW Inc, *Submission* at 17; Multicultural Disability Advocacy Association of NSW Inc, *Submission* at 9; Australian Quadriplegic Association Ltd (NSW), *Submission* at 5; Institute for Family Advocacy and Leadership Development Association Inc, *Submission* at 16; Citizen Advocacy NSW, *Submission* at 9.

245. Physical Disability Council of NSW Inc, *Submission* at 17.

broad interpretation of the standing provision by the CSAT in *Dunrossil* and *Greystanes* was largely supported in submissions and consultations held by the Commission. Most submissions acknowledged the importance of allowing advocacy groups to bring appeals to ensure compliance with community welfare legislation.<sup>247</sup>

5.152 However, where an appeal by an organisation is opposed by persons directly affected by the decision sought to be reviewed, some submissions argued that the rights of those persons should have primacy over the public interest.<sup>248</sup> Accordingly, it has been suggested that, before allowing a peak consumer or advocacy group to lodge an appeal, the Tribunal should require the group to consult the consumers directly affected by the decision and respect the consumers' wishes. In its submission, the New South Wales Government proposes that advocacy groups may only lodge appeals at the request of persons directly affected by the decision.<sup>249</sup>

5.153 In order to remove any ambiguity in the interpretation of the standing provision and thus avoid further litigation on this issue, some submissions favoured amending the legislation to incorporate the CSAT's decisions in *Dunrossil* and *Greystanes*.<sup>250</sup>

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246. People With Disabilities (NSW) Inc and NSW Council for Intellectual Disability lodged appeals in the CSAT against more than 800 transition plans under cl 6(1)(c) of the CAMA Reg.

247. Physical Disability Council of NSW Inc, *Submission* at 17; Disability Council of NSW, *Submission 2* at 58; L Moffit, *Submission* at 2; Carers NSW Inc, *Submission* at 13; Western Sydney Intellectual Disability Support Group Inc, *CAMA Submission* at 3; Multicultural Disability Advocacy Association of NSW Inc, *Submission* at 9; Australian Quadriplegic Association Ltd (NSW), *Submission* at 5; Institute for Family Advocacy and Leadership Development Association Inc, *Submission* at 16; Citizen Advocacy NSW, *Submission* at 9; NCOSS, *CAMA Submission* at 6; and People With Disabilities (NSW) Inc, *CAMA Submission* at 29.

248. New Horizons Enterprises Ltd, *Submission* at 3; Crossroads Christian Fellowship with Disabled Persons in NSW Inc, *Submission* at 4; Dunrossil Challenge Foundation Ltd, *Submission* at 4; MS Society of NSW; *Submission* at 4; and The Spastic Centre of NSW, *CAMA Submission* at 2.

249. NSW Government, *CAMA Submission* at 2.

250. Western Sydney Intellectual Disability Support Group Inc, *CAMA Submission* at 3; NSW Council for Intellectual Disability, *CAMA Submission* at 11-12; People With Disabilities (NSW) Inc, *CAMA Submission* at 30; and NCOSS, *CAMA Submission* at 14. But compare Paraquod NSW, *Submission* at 4 which



It was suggested that the legislation could be amended to state expressly that when assessing “genuine concern”, the Tribunal should consider the best interests of consumers and the public interest nature of the case.<sup>251</sup>

### The Commission’s view

5.154 There is no question that, in light of the limited capacity of many consumers of community services to initiate action, appeals should be able to be brought on their behalf by others with a genuine concern for their welfare. It is also apparent that, in the context of community services, a broad standing provision is appropriate to enable persons or groups to commence legal proceedings in their own right to ensure compliance with the terms of the DSA and other community welfare legislation. The major issue, however, is whether public interest litigation should override private rights. In its most recent report on this issue, the Australian Law Reform Commission states:

in cases involving public and private rights the court must balance the public interest in allowing a person who has no personal stake to commence proceedings against the public interest in avoiding litigation that constitutes an unreasonable interference with the ability of a person having a private interest in the matter to deal with it differently or not at all.<sup>252</sup>

5.155 In trying to find this balance, the CSAT said, in *Dunrossil*:

The fact that other people whose private rights are affected by the decision, oppose the appeal is relevant to the question of unjustifiable interference but does not override the “genuine concerns” of others.<sup>253</sup>

While the views and interests of persons directly affected by a decision are of the utmost importance, and must be taken into account by the Tribunal,<sup>254</sup> other persons or organisations may nevertheless have a genuine concern in the matter. There can be no definitive rule for balancing the public interest in

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argued that CAMA should define “interested parties” as service users and advocates who have a direct involvement in or knowledge of the service.

251. Physical Disability Council of NSW Inc, *Submission* at 17.

252. Australian Law Reform Commission, *Beyond the Door-keeper: Standing to Sue for Public Remedies* (Report 78, 1996) at para 4.22.

253. *Dunrossil* at 27.

254. CAMA s 41(5).

bringing the appeal and the private rights of an affected individual who opposes it. In each case, the Tribunal must consider several factors including the nature and objects of the legislation, the wishes and interests of persons with an interest in the matter, their capacity to bring proceedings themselves and the importance of the public interest in comparison with other interests and wishes. The Commission therefore believes the current standing provision is appropriate and should remain unchanged.

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**RECOMMENDATION 52**

**Section 41 relating to standing should remain unchanged.**

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## **PROCEDURE**

5.156 The procedure of the CSAT was governed by Part 5 of CAMA. This Part has been substantially repealed since the transfer of jurisdiction from the CSAT to the CS Division of the ADT. However, some procedural provisions remain. These continue to apply specifically to the CS Division together with the procedural provisions of the ADT Act which apply generally across each of the Divisions.

5.157 In the Commission's view, having provisions relating to the powers and procedures of the Tribunal in two separate pieces of legislation is unduly confusing. It also involves unnecessary duplication and can give rise to inconsistency. The Commission, therefore, recommends that all provisions of CAMA relating to the powers and procedures of the CS Division be transferred to a Schedule to the ADT Act.<sup>255</sup> Recommendations relating to specific provisions are made below.

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**RECOMMENDATION 53**

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255. Such provisions could easily be included in Sch 2 Pt 1 of the ADT Act which relates specifically to the CS Division.

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**All provisions in CAMA relating to the powers and procedures of the Community Services Division of the Administrative Decisions Tribunal should be transferred to a Schedule to the *Administrative Decisions Tribunal Act 1997 (NSW)*.**

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## Procedure of the CSAT

5.158 A primary object of CAMA is to provide an independent and accessible mechanism for the review of administrative decisions. When first established, a hallmark of the CSAT was to be its informality.<sup>256</sup> The intention was to make it accessible, particularly to consumers of community services, who are generally alienated and intimidated by the formal and legalistic processes of courts. This continues to be a vital goal.<sup>257</sup>

5.159 The CSAT had, under Part 5, a broad discretion to develop its own procedures appropriate to its client group and the nature of the cases it would be reviewing.<sup>258</sup> Mindful of this, the CSAT developed a set of procedures designed to be informal and to encourage maximum participation without compromising fairness and justice to the parties.<sup>259</sup> One submission to the Commission expressed its satisfaction with the strategies used by the CSAT to ensure access:

Burnside's experiences with the [CSAT], mainly through our foster care service, have been positive. The Tribunal staff have made every effort to work with the agency and young people to keep them fully informed and involved in the decision making process.<sup>260</sup>

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256. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 11 March 1993, the Hon J Longley, Minister for Community Services, Second Reading Speech at 769.

257. Physical Disability Council of NSW Inc, *Submission* at 17; Disability Safeguards Coalition, *CAMA Submission 1* at 14; Disability Council of NSW, *Submission 2* at 60-61.

258. CAMA s 52 (now repealed).

259. See generally, J Simpson, "Procedures for a Tribunal's Purpose" (1996) 21 *Alternative Law Journal* 118.

260. Burnside, *Submission* at 5.

Other submissions, however, complained that proceedings at the CSAT were “highly court-like”, adversarial, legalistic and costly, contrary to legislative intention. The New South Wales Division of the peak service provider group, ACROD Ltd, submitted:

Those services affected by [appeals against transition plans] noted the legalistic aspects of the process and commented on the enormous costs for them to have to hire lawyers, find “expert” witnesses and divert attention away from service delivery.<sup>261</sup>

## Procedure under the ADT Act

5.160 There has been some concern that the transfer of jurisdiction from the CSAT to the ADT may lead to the adoption of more formal adversarial procedures.<sup>262</sup> This concern has some basis given the criticisms made of the federal AAT, that despite legislative prescription for informality and flexibility, its hearings are claimed to have become formal and adversarial.<sup>263</sup> Indeed, in her last annual report, the President of the CSAT said that one of the challenges facing her was to ensure that the informal atmosphere and non-legalistic manner, which characterised proceedings before the former CSAT, continue under the ADT.<sup>264</sup>

### ***Commitment to flexibility and informality***

5.161 Although the ADT Act does not dispense with traditional formal adversarial procedures altogether, it does emphasise the importance of giving

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261. ACROD Ltd NSW Division, *Submission* at 6. See also Dunrossil, *Submission* at 4; Paraquad NSW, *Submission* at 4; and MS Society of NSW, *Submission* at 3.

262. NSW Council for Intellectual Disability, *CAMA Submission* at 10.

263. See generally M Allars, “Administrative Law: Neutrality, the Judicial Paradigm and Tribunal Procedure” (1991) 13 *Sydney Law Review* 377; J Dwyer, “Overcoming the Adversarial Bias in Tribunal Procedures” (1991) 20 *Federal Law Review* 252; and M Aronson, “An AAT for New South Wales: Expensive Legalism or Overdue Reform” (1993) 52 *Australian Journal of Public Administration* 208. Noted by the Attorney General in his Second Reading Speech: New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 27 June 1997, the Hon J W Shaw, Attorney General, Second Reading Speech at 11280.

264. New South Wales, Community Services Appeals Tribunal, *Annual Report 1997-98* at 1.

the Tribunal flexibility and a range of procedural options so that it may operate in a manner appropriate to the particular matters that come before it. The Tribunal is intended to proceed with as little formality and technicality and as much expedition as is appropriate for each matter before it.<sup>265</sup> To facilitate this, the ADT Act gives the Tribunal a wide discretion to determine its own procedure and to inform itself as it thinks fit, subject to the rules of natural justice. It is not bound by rules of evidence.<sup>266</sup>

***Procedures may differ between Divisions***

5.162 Significantly, the ADT Act acknowledges that procedures may justifiably differ between Divisions and even within Divisions depending on the nature of matters before it. In his Second Reading Speech, the Attorney General stated:

The range of matters which may arise before the [ADT], both in subject matter and degree of difficulty, requires that the tribunal has considerable flexibility in its composition and procedures. The tribunal will have a discretion to adapt its procedures to the circumstances of the application before it. It is important that the [ADT] be both accessible and flexible.<sup>267</sup>

***Rule Committee***

5.163 The ADT Act provides for the establishment of a Rule Committee composed of the President, each Divisional Head and other Tribunal members, and other persons as appointed by the Minister.<sup>268</sup> The function of the Committee is to make rules “as flexible and informal as possible”.<sup>269</sup> It may make different rules for each of the Divisions and for different classes of matters.<sup>270</sup> Rules for each of the Divisions can only be made on the recommendation of Sub-committees to be established within each of the Divisions.<sup>271</sup>

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265. ADT Act s 73.

266. ADT Act s 73(1) and (2).

267. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 27 June 1997, the Hon J W Shaw, Attorney General, Second Reading Speech at 11280.

268. ADT Act s 94(1).

269. ADT Act s 92-94.

270. ADT Act s 90(3) allows for different rules to be prescribed for each of the Divisions and for different classes of matters.

271. ADT Act s 97.

5.164 Uniquely, the Act provides for community representation on Sub-committees<sup>272</sup> and requires public consultation on draft rules prior to approval<sup>273</sup> in order to ensure that “the procedures do not become stultified.”<sup>274</sup> This approach is supported by People With Disabilities (NSW) Inc which advocated that:

It is crucial that in establishing procedures for its operation, the Tribunal consults widely with consumers of community services, and their representative groups, so as to ensure that they are appropriate and adapted to the needs of its constituency.<sup>275</sup>

5.165 The Act also makes exceptions for certain classes of reviewable decisions from some of its general provisions. For example, application fees do not apply to applications made under CAMA.<sup>276</sup>

### **Conduct of proceedings**

5.166 The ADT is encouraged to take an active and interventionist approach in the conduct of proceedings.<sup>277</sup> For example, the Tribunal can of its own motion require the government agency to produce relevant documents.<sup>278</sup> It can also summons witnesses to give evidence and produce documents.<sup>279</sup> The Tribunal is not confined to the material that lay before the original decision-maker. It may also take into consideration all new relevant information that becomes available.<sup>280</sup>

5.167 In some instances, the ADT Act requires, rather than merely permits, the Tribunal to take a more interventionist approach. For instance, the Tribunal must act as quickly as possible and ensure that all relevant material

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272. ADT Act s 97(2).

273. ADT Act s 98.

274. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 27 June 1997, the Hon J W Shaw, Attorney General, Second Reading Speech at 11280.

275. People With Disabilities (NSW) Inc, *CAMA Submission* at 32.

276. ADT Act s 56(3).

277. For more discussion of adversarial and inquisitorial procedures and their application in Australian tribunals, see Better Decisions Report at para 3.33-3.46. See also generally Australian Law Reform Commission, *Review of the Adversarial System of Litigation* (Issues Paper 24, 1998).

278. ADT Act s 58(4).

279. ADT Act s 83 and 84.

280. ADT Act s 63(1).

is disclosed so that it can determine all the relevant facts.<sup>281</sup> To achieve this, the Act gives the Tribunal power to call, examine and cross-examine witnesses itself.<sup>282</sup>

5.168 The ADT Act also places an express obligation on the ADT to take such steps as are reasonably practicable to ensure that the parties understand the legal implications of the assertions made in the proceedings, explain any aspect of the procedure if requested, and to ensure that the parties have the fullest opportunity to have their submissions heard.<sup>283</sup> It has been suggested that the introduction of these mandatory obligations will mean that the ADT will be more inquisitorial than previous tribunals and that this will reduce delays and assist unrepresented litigants.<sup>284</sup>

5.169 This approach is consistent with the practice of the CSAT, which among other things, often commissioned its own expert evidence, called its own witnesses and adopted strategies to ensure that those with a direct interest in proceedings were consulted.<sup>285</sup> This approach is also supported in submissions received by the Commission.<sup>286</sup> The Multiple Sclerosis Society, for example, submitted:

Rather than following the traditional model of judicial hearings, appeals and complaints should be shaped around the European model in which the Tribunal would play a more active role in seeking evidence and resolving the substance of the issue at hand.<sup>287</sup>

### ***Pre-hearing procedures***

5.170 The Tribunal is also encouraged to take a more active approach in the early stages of a matter. For example, preliminary conferences are to be held

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281. ADT Act s 73(5)(b).

282. ADT Act s 83.

283. ADT Act s 73(4). These obligations apply throughout the proceedings, not simply at the hearing.

284. F Cameron, "NSW ADT: Scope for Inquisitorial Procedures in New Administrative Decisions Tribunal" (1997) 35(7) *Law Society Journal* 41 at 43-44; and J Anderson, "Something Old, Something New, Something Borrowed ... The New South Wales Administrative Decisions Tribunal" (1998) 5 *Australian Journal of Administrative Law* 97 at 103.

285. See generally, J Simpson, "Procedures for a Tribunal's Purpose" (1996) 21 *Alternative Law Journal* 118.

286. MS Society of NSW, *Submission* at 4; NCOSS, *CAMA Submission* at 15; and Autism Association of NSW, *Submission* at 14.

287. MS Society of NSW, *Submission* at 4.

with the parties to narrow the issues in dispute and to identify what documents or information is required.<sup>288</sup> Members and assessors who conduct the preliminary conferences are able to make determinations by agreement.<sup>289</sup> Where proceedings are pending, assessors may be appointed to conduct an inquiry into an issue raised in proceedings, with the consent of the parties.<sup>290</sup> The intention of these procedures is, as one commentator notes:

to permit incremental decision-making, with as many issues as possible being resolved along the way, whether or not this avoids a final determination by the Tribunal.<sup>291</sup>

5.171 In order to limit the number and length of hearings, the Tribunal may require evidence to be presented in writing, determine on which matters it will hear oral argument and impose reasonable time limits on the presentation of parties' cases.<sup>292</sup> In appropriate cases, the Tribunal may make a decision on the papers thus dispensing with holding a hearing altogether.<sup>293</sup> It may also, at any stage, refer a matter to alternative dispute resolution with the consent of the parties.<sup>294</sup>

***Should procedural issues be determined by a legal member sitting alone?***

5.172 It is not clear whether the ADT Act permits a member sitting alone to determine procedural matters. The Act provides that “the Tribunal” may determine issues such as whether to grant leave to allow a party to lodge a late application and may appoint a separate representative for a person.<sup>295</sup> Under the ADT Act, applications under s 40 of CAMA must be determined by three Division members, one of whom must be legally qualified.<sup>296</sup> This presumably applies to any preliminary matters that may arise in the application.

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288. ADT Act s 74.

289. ADT Act s 74(1).

290. ADT Act s 33.

291. F Cameron, “NSW ADT: Scope for Inquisitorial Procedures in New Administrative Decisions Tribunal” (1997) 35(7) *Law Society Journal* 41 at 43.

292. ADT Act s 73(5)(c) and (d).

293. ADT Act s 76.

294. ADT Act s 102 and 103.

295. ADT Act s 57(1) and s 71(4) respectively.

296. ADT Act Sch 2 cl 3(1).



5.173 In practice, however, it is likely that a number of procedural matters will be resolved on the basis of written submissions prior to any substantive hearing either at a directions hearing or a preliminary conference. Directions hearings may be held by a judicial member sitting alone or, with authority, by the Registrar or Deputy Registrar.<sup>297</sup> Preliminary conferences are also generally conducted by one member (or an assessor).<sup>298</sup> In the Commission's view, it is unnecessary, costly and time-consuming to convene a three-member panel to determine preliminary issues.<sup>299</sup> In order to promote efficient practice, the Commission believes such matters should be decided early in proceedings and prior to the actual hearing and should be able to be determined by a legally qualified member sitting alone.

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#### **RECOMMENDATION 54**

**The ADT Act should be amended to allow a legally qualified member sitting alone to determine procedural matters prior to the actual hearing.**

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#### ***Late applications***

5.174 Applications for a review of a decision under the ADT Act must be brought within 28 days of the day on which an internal review is taken to have been finalised.<sup>300</sup> Late applications may be accepted if the Tribunal is satisfied that the person wishing to make an application for a review of a decision has provided a reasonable explanation for the delay.<sup>301</sup> This provision gives the Tribunal a wide discretion to allow a late application after consideration of all the relevant circumstances. This flexibility is highly

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297. ADT Act s 73(6).

298. ADT Act s 74(1).

299. This was supported in some submissions: see CSAT, *Submission* at 21; Autism Association of NSW, *Submission* at 15; and Disability Council of NSW, *Submission 2* at 61. But compare Disability Safeguards Coalition, *CAMA Submission 1* at 7; NCOSS, *CAMA Submission* at 16; People With Disabilities (NSW) Inc, *CAMA Submission* at 33; and M Bowles, *Submission* at 10.

300. *Administrative Decisions Tribunal (Interim) Rules 1998* (NSW) cl 15(2). See also ADT Act s 55(1)(d). These provisions replace the repealed CAMA s 44.

301. ADT Act s 57(1).

desirable in view of the nature of appeals under CAMA and the barriers faced by persons likely to be affected by such decisions, including ill-health, lack of awareness of their appeal rights<sup>302</sup> and intimidation.<sup>303</sup> As the CSAT stated in a preliminary decision in the *Greystanes* matter:

CAMA is beneficial legislation. A discretion to grant leave to lodge out of time should be exercised liberally with the object of allowing the Tribunal to do justice between the parties.<sup>304</sup>

**5.175 The Commission considers it appropriate that the Tribunal adopt a benign approach when considering whether to accept an application out of time. Unless the Tribunal is of the view that substantial prejudice or hardship will be caused to a person by reason of the delay, the Tribunal should exercise its discretion liberally.**

## Parties to proceedings

5.176 The issue of who are appropriate parties to proceedings was previously governed by s 42 of CAMA. Apart from the applicant and the decision-maker, CAMA provided that parties to proceedings may also include any person with a genuine concern in the subject matter of the decision under review and any person who would be entitled to appeal if the decision were reversed or varied by the Tribunal.<sup>305</sup> There was no need for

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302. This was one of the findings of the Disability Council's consultations. The problem was particularly acute for people from non-English speaking backgrounds and Aboriginal and Torres Strait Islander people: Disability Council of NSW, *Submission 1* at 10.

303. This was supported by submissions received by the Commission: People With Disabilities (NSW) Inc, *CAMA Submission* at 33; NCOSS, *CAMA Submission* at 16; M Bowles, *Submission* at 10; Disability Safeguards Coalition, *CAMA Submission 1* at 8; and NSW Council for Intellectual Disability, *CAMA Submission* at 12.

304. *People with Disabilities (NSW) Inc and the NSW Council on Intellectual Disability v Minister's decision to adopt the transition plan for Disability Enterprises Leura, trading as Greystanes Children's Home* (New South Wales, Community Services Appeals Tribunal, Appeal No 067 and 194, preliminary determination, unreported): Issues of leave out of time and two appeals to be heard together.

305. CAMA s 42(1)(d). This provision was discussed by the CSAT in its preliminary determination in the Dunrossil matter: *People with Disabilities*

the CSAT to make orders to this effect. The purpose of s 42(1)(d) was evidently to ensure that any person who was entitled to bring proceedings under CAMA could appeal to the Supreme Court against the CSAT's decision. Effectively, it allowed a person who did not participate in the original proceedings to bring an appeal against the CSAT's decision.

5.177 The difficulties posed by this wide definition of parties has been addressed by s 67 of the ADT Act which replaces s 42 of CAMA. Under the ADT Act, parties to proceedings for a review of a reviewable decision are:

- the applicant (provided he or she is entitled to make an application for review of a reviewable decision);
- the administrator who made the original decision;
- the Attorney General, if he or she decides to intervene under s 69;
- any other person whose interests are affected or are likely to be affected by the decision under review and who is made a party by the Tribunal on this basis;<sup>306</sup> and
- any other person specified under any enactment as a party.<sup>307</sup>

The effect of these provisions is that a person must be joined as a party to proceedings before they have any right to bring an appeal against a decision of the Tribunal either to the Appeal Panel of the ADT or to the Supreme Court on questions of law. This requirement is, in the Commission's view, appropriate and fair.

## Representative actions

5.178 Representative actions are a recognised tool for improving access to the legal system. They allow one person from a group of persons with a

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*(NSW) Inc and the NSW Council on Intellectual Disability v Minister's decision to adopt the transition plan for Dunrossil Challenge Foundation Ltd* (New South Wales, Community Services Appeals Tribunal, Appeal No 061 and 195, preliminary determination, unreported).

306. CAMA s 67(4). The Tribunal may determine whether a person's interests are affected by a decision. There is a right of appeal to the Appeal Panel against a decision of the Tribunal that a person's interests are not affected by the decision under review: ADT Act s 68.

307. CAMA s 67(2).

common interest to lodge an action which, if the group were required to act as individuals, might not be feasible or as effective. They can also significantly redress power imbalances between individual applicants and government agencies.<sup>308</sup> Representative actions, in varying forms, have been provided for in the rules of all superior Australian courts.<sup>309</sup> Interestingly, however, the ADT Act makes no provision for representative actions. Notwithstanding this significant omission, the representative action procedure in CAMA has been retained. In line with the recommendations made above, the representative action procedure should be removed from CAMA and transferred to the ADT Act.

***Representative action procedure under CAMA***

5.179 CAMA allows the Tribunal to deal with an application as a representative application where:

- three or more persons are entitled to apply for a review of a decision arising from the same, similar or related circumstances as those to which the application relates;
- the applicant is one of those persons and the others consent to a representative application;
- the application is made in good faith;
- the applicant is capable of adequately advocating the interests of persons entitled to apply for a review;
- a representative application would be to the advantage of persons entitled to apply for a review; and
- a representative application would be an efficient and effective means of dealing with the claims of the persons entitled to apply for a review.<sup>310</sup>

The Act gives the Tribunal powers to make orders in relation to representative actions including notification, conduct and determination of a representative application.<sup>311</sup>

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308. Australia, Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (AGPS, Canberra, 1994) at para 2.104. See also Coalition for Class Actions, *Representative Proceedings in NSW: A Review of the Law and a Proposal for Reform* (Public Interest Advocacy Centre, Sydney, 1995).

309. See, for example, *Supreme Court Rules 1970* (NSW) Pt 8 r 13.

310. CAMA s 42(1).

***The Commission's report on the Anti-Discrimination Act 1977***

5.180 The time frame for this review has not permitted a detailed examination of the representative action procedure under CAMA. However, the issue of representative actions is discussed comprehensively in the Commission's forthcoming report on the Review of the *Anti-Discrimination Act 1977* (NSW). In that report, the Commission discusses the model representative procedure under Part IV of the *Federal Court Act 1976* (Cth) and recommends, among other things, that a new procedure modelled upon that which applies in the Federal Court replace the current representative action procedure in the Equal Opportunity Division of the ADT. Those recommendations may also be relevant to the representative procedure which applies to the CS Division.

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311. CAMA s 42(2).

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**RECOMMENDATION 55**

**Section 42 of CAMA should be repealed and incorporated in a Schedule to the *Administrative Decisions Tribunal Act 1997 (NSW)* which deals with the powers and procedures of the Community Services Division.**

**Consideration should be given to the recommendations of the Commission in its forthcoming Report on the *Review of the Anti-Discrimination Act 1977 (NSW)* for the adoption of the representative procedure as contained in Part IV of the *Federal Court Act 1976 (Cth)*.**

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## **Alternative dispute resolution**

5.181 The ADT Act places a focus on resolving disputes by alternative dispute resolution methods. This is consistent with one of the objects of CAMA, namely, to encourage the resolution of complaints through alternative dispute resolution.<sup>312</sup> If the Tribunal considers the circumstances appropriate, and the parties agree, the Tribunal may refer a matter to mediation or neutral evaluation.<sup>313</sup> Participation is voluntary and the parties may withdraw at any time.<sup>314</sup> The Tribunal may make orders to give effect to any agreement reached between the parties but only if it is satisfied that the agreement is in the best interests of the person whose interests the Tribunal considers paramount.<sup>315</sup> The power to refer a matter to mediation or neutral evaluation is additional to the powers of the Tribunal, under CAMA, to take whatever steps are appropriate to encourage parties to reach an amicable settlement.<sup>316</sup> It may refer the matter to the service provider (for resolution at

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312. CAMA s 3(1)(d).

313. ADT Act s 99.

314. ADT Act s 103.

315. ADT Act s 105.

316. CAMA s 43(1).

the local level), to the CSC for investigation or to another appropriate body.<sup>317</sup>

5.182 The focus on alternative dispute resolution is part of an increasing trend across several jurisdictions.<sup>318</sup> However, its use in child welfare matters, which constitute the majority of appeals brought to the CS Division, has been quite limited. Alternative dispute resolution methods are not always appropriate, particularly where there is a significant power imbalance between the parties or where there are allegations of child abuse.<sup>319</sup> This tends to be the case in administrative law. Proceedings are generally brought by an individual against a government agency which is, by its nature, invariably in a more powerful position. This power imbalance is exacerbated if the applicant is unrepresented. Further, although alternative dispute resolution methods may be a more timely and economical option than fully contested hearings and may allow the parties to develop innovative solutions and take control over the outcome, important issues of general law or policy that may arise are likely to remain unresolved.

5.183 Submissions received by the Commission on this issue generally supported the use of alternative dispute resolution to resolve complaints provided it remains voluntary.<sup>320</sup> In particular, it was argued that alternative dispute resolution should not become a prerequisite step in the process of resolving a matter.<sup>321</sup> Consistent with the recommendations above,<sup>322</sup> the Commission considers that the CAMA provisions on alternative dispute resolution should be repealed and incorporated in the ADT Act so that all the procedural provisions relating to the CS Division are located together.

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## RECOMMENDATION 56

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317. CAMA s 43(2).

318. See generally H Astor and C Chinkin, *Dispute Resolution in Australia* (Butterworths, Sydney, 1992).

319. See H Astor and C Chinkin, *Dispute Resolution in Australia* (Butterworths, Sydney, 1992) at 105-109.

320. Autism Association of NSW, *Submission* at 14; and Disability Safeguards Coalition, *CAMA Submission 1* at 13.

321. Disability Safeguards Coalition, *CAMA Submission 1* at 13.

322. See Recommendation 53 at para 5.157.

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**Section 43 of CAMA should be repealed and incorporated in a Schedule to the *Administrative Decisions Tribunal Act 1997 (NSW)* which deals with the powers and procedures of the Community Services Division.**

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### **Power to decline to hear an application**

5.184 Section 44(1) of CAMA provides that the Tribunal may decline to hear or determine an application if:

- (a) the applicant has available an alternative and satisfactory means of redress, or
- (b) the applicant has not made appropriate attempts to have the matter to which the application relates resolved otherwise, or
- (c) the ground for the application is unacceptable having regard to the frequency of applications previously made ... in respect of the same subject-matter.

This section does not limit the powers of the Tribunal under the ADT Act.<sup>323</sup>

5.185 Some of these matters are also dealt with in the ADT Act. Where, for example, decisions may be the subject of an investigation by the Ombudsman under the *Ombudsman Act 1974 (NSW)*, the ADT Act provides that the Tribunal and the Ombudsman may make arrangements for the transfer of matters between them.<sup>324</sup> In matters arising under community services legislation, the Tribunal may, before it hears an application or before it determines the application, refer the matter to:

- the service provider for local level resolution;
- the CSC for alternative dispute resolution or investigation; or
- any other appropriate body for investigation.<sup>325</sup>

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323. CAMA 44(3).

324. ADT Act s 39.

325. CAMA s 43(2). The Commission has recommended that s 43 be transferred to the ADT Act: see Recommendation 55 at para 5.183.



In the Commission's view, s 44(1)(a) appears to duplicate other provisions contained in the ADT Act and in s 43 of CAMA and is therefore redundant.

5.186 Likewise, s 44(1)(a) and (b) seem to duplicate similar provisions contained in the ADT Act. Section 44(1)(b) appears to deal with internal review. Generally, the ADT Act provides that an application for a review of a reviewable decision may only be brought after an internal review has taken place.<sup>326</sup> Section 44(1)(c) is similar to the power of the Tribunal under the ADT Act to dismiss proceedings which it considers to be vexatious.<sup>327</sup> Duplication is both unnecessary and can be confusing particularly if the provision in CAMA is taken to be a guide to determine when an application may be declined by the Tribunal under the ADT Act. For these reasons, the Commission believes that s 44(1) should be repealed.

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**RECOMMENDATION 57**

**Section 44(1) of CAMA should be repealed.**

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### **Power to make recommendations**

5.187 When determining an application, the Tribunal may make recommendations for the Minister's consideration. If it does so, CAMA imposes a statutory duty on the Minister to inform the parties of any action that is taken in relation to any recommendations or that no action is proposed to be taken.<sup>328</sup> There is no similar provision in the ADT Act.

5.188 This is an unusual provision in that it places an obligation on the Minister not only to consider the Tribunal's recommendations but to advise the parties of his or her decision as to whether to implement the recommendations. The nature of the jurisdiction and the fact that the Tribunal is required to be constituted by persons with expertise and knowledge in community services<sup>329</sup> has persuaded the Commission that the provision is

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326. ADT Act s 55.

327. ADT Act s 73(5)(h).

328. CAMA s 44(2).

329. See para 5.26.

not unreasonable. Consistent with previous recommendations to incorporate all provisions relating to the powers and procedures of the Tribunal in the one Act, the Commission recommends that s 44(2) be transferred to the ADT Act.

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**RECOMMENDATION 58**

**Section 44(2) of CAMA should be repealed and incorporated in a Schedule to the *Administrative Decisions Tribunal Act 1997 (NSW)* which deals with the powers and procedures of the Community Services Division.**

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## Representation

5.189 It is sometimes considered that lawyers have a propensity to make proceedings more formal and protracted. Trained in courtroom procedures, they are often blamed for adopting legalistic and adversarial devices. Also, only the more wealthy are likely to have the resources to engage lawyers. Consumers of community services are unlikely to have such resources and are also unlikely to be able to obtain legal aid in view of successive cutbacks to legal aid funding. The power imbalance generally inherent between the individual applicant and the government agency whose decision is under review is thus exacerbated. For these reasons, it has been the practice in some tribunals not to allow legal representation as of right.<sup>330</sup>

5.190 This remains the case under CAMA,<sup>331</sup> despite the general provision in the ADT Act which entitles parties to be represented by an agent, which would appear to include lawyers.<sup>332</sup> However, the Tribunal may prohibit representation by “an agent of a particular class” in relation to the presentation of oral submissions.<sup>333</sup> The purpose of this power appears to be

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330. See for example, *Anti-Discrimination Act 1977 (NSW)* s 101(1)(b).

331. CAMA s 45(1).

332. ADT Act s 71(1)(b).

333. ADT Act s 71(2). This does not apply to proceedings before the Appeal Panel: s 71(5).

an attempt to minimise potential power imbalances and to ensure hearings are not overly protracted by minimising oral arguments.<sup>334</sup>

5.191 The Government clearly intended representation to continue by leave only in the CS Division. This is supported by submissions received on this issue.<sup>335</sup> The Commission accepts that this approach is appropriate, but recommends that the section (amended as recommended below) be removed from CAMA and incorporated in the ADT Act.

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**RECOMMENDATION 59**

**Section 45 of CAMA should be repealed and incorporated in a Schedule to the *Administrative Decisions Tribunal Act 1997 (NSW)* which deals with the powers and procedures of the Community Services Division.**

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***Guardian ad litem***

5.192 Under the ADT Act, the Tribunal may appoint a person to represent an incapacitated person, defined to be a minor or any person who is totally or partially incapable of representing himself or herself in the proceedings.<sup>336</sup> This provision is comparable to the power of the Tribunal, under CAMA, to appoint a person to act as a “guardian ad litem”<sup>337</sup> for a prescribed person

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334. L Katz, “ADT-ABC: An Introduction to the New South Wales Administrative Decisions Tribunal”, paper presented at the *Government Lawyers CLE Convention* (Sydney, 31 July 1997) at 25.

335. MS Society of NSW, *Submission* at 4; Disability Safeguards Coalition, *CAMA Submission 1* at 14; and Autism Association of NSW, *Submission* at 15. But compare People With Disabilities (NSW) Inc, *CAMA Submission* at 32.

336. ADT Act s 71(1), 71(4) and 71(7). In its forthcoming report on the Review of the *Anti-Discrimination Act 1977 (NSW)*, the Commission recommends that the power of the Tribunal to appoint a representative for an incapacitated person, while desirable, should only be exercised with the consent of the party (where the party is capable of giving or withholding that consent).

337. That is, an independent representative. A similar power is available to the Children’s Court: *Children (Care and Protection) Act 1987 (NSW)* s 66(1).

who is directly or significantly affected by proceedings before it.<sup>338</sup> A prescribed person is defined in the CAMA Regulation as a person with a disability or of an advanced age who requires supervision or “social habilitation” and who is unable to represent himself or herself in proceedings at the Tribunal.<sup>339</sup>

5.193 In proceedings involving children, it has been the practice of the CSAT to appoint an advocate whose role is to support the child during proceedings or participate in proceedings on behalf of the child if the child is unable or unwilling to attend or participate directly. Advocates have been drawn from SNYPIC, voluntary child care and protection agencies; specialist workers from Legal Aid and individual professionals selected on account of their skills and experience working with children in the substitute care system.<sup>340</sup> The practice of appointing guardians ad litem for children and people with disabilities who cannot speak for themselves is supported very strongly in submissions which addressed the issue.<sup>341</sup>

5.194 It is vital that the views and wishes of children and persons with disabilities, who are often at the centre of proceedings before the CS Division, are heard and considered by the Tribunal in order to ensure that the Tribunal makes its decision based on all the relevant material. While the intent of both provisions appears to be the same, the fact that they are framed somewhat differently raises issues of potential inconsistency and is confusing to parties. Further, the language used in the CAMA Regulation could be interpreted as being unnecessarily paternalistic and antiquated. Therefore the Commission recommends that the provision in CAMA and the associated Regulation be repealed and be effectively replaced by s 71 of the ADT Act.

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338. CAMA s 45(3).

339. CAMA Reg cl 7.

340. New South Wales, Legislative Council, Standing Committee on Social Issues, *Inquiry into Children’s Advocacy* (1996) at 180-181.

341. Physical Disability Council of NSW Inc, *Submission* at 17; Citizen Advocacy NSW, *Submission* at 9; People With Disabilities (NSW) Inc, *CAMA Submission* at 31-32; Disability Safeguards Coalition, *CAMA Submission 1* at 14; and NSW Council for Intellectual Disability, *CAMA Submission* at 12.

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**RECOMMENDATION 60**

**Section 45(3) of CAMA and cl 7 of the CAMA Regulation should be repealed and be effectively replaced by s 71 of the *Administrative Decisions Tribunal Act 1997 (NSW)*.**

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### **Publication of names**

5.195 There appears to be some inconsistency in the ADT Act in relation to provisions about the publication of names. Section 126 provides that a person must not, without the consent of the Tribunal, publish or broadcast the name of any party, witness or person involved in proceedings. This provision, however, does not prevent the publication of an official report, including the names of persons. Section 75, on the other hand, provides that hearings are to be open to the public subject to an order of the Tribunal prohibiting or restricting the publication of names and addresses of witnesses appearing before it.<sup>342</sup> These provisions mirror those which previously applied under CAMA.<sup>343</sup>

5.196 Section 126 of the ADT Act is very broad. It can operate to prevent the publication of the name of a service provider involved in proceedings and even the name of the Minister or Director General who made the decision under review. It has been submitted that while it is appropriate for the names of vulnerable persons (including children and people with disabilities) involved in proceedings to be suppressed, protection should not automatically extend to parents, service providers, and certainly not government decision-makers unless publishing or broadcasting their names would be likely to reveal the identity of a child.<sup>344</sup>

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342. ADT Act s 75(2).

343. CAMA s 56 and 57, both now repealed.

344. CSAT, *Submission* at 19-20.

5.197 Ordinarily, a non-publication order would be made by a Tribunal upon the application of a party. In this case, as in matters under the *Family Law Act 1975 (Cth)*,<sup>345</sup> non-publication is the rule, subject to release by the Tribunal. In light of the personal nature of many matters brought under community welfare legislation, particularly under child protection laws, and the vulnerability of persons within its jurisdiction, the Commission is satisfied that s 126 is appropriate in its application to matters heard by the CS Division. However, it is not generally appropriate in other matters heard by the Tribunal. Section 126 appears to have been imported from CAMA for application in community service matters. However, it conflicts with section 75 which was probably intended to apply to all other matters. The Commission therefore believes that section 126 should be confined to community services matters.

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#### **RECOMMENDATION 61**

**Section 126 of the ADT Act should be confined in its application to community service matters.**

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## **Costs**

### ***Duplication of provisions***

5.198 Both CAMA and the ADT Act contain similar provisions in relation to the powers of the Tribunal to award costs. Under CAMA, the Tribunal may make orders in relation to the payment of costs where it thinks it appropriate to do so.<sup>346</sup> Under the general provisions of the ADT Act, the Tribunal may only award costs where there are “special circumstances” warranting such an award.<sup>347</sup>

5.199 Generally, the rule in most Australian courts is that costs follow the event, that is, the costs of the successful litigant are paid by the unsuccessful

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345. *Family Law Act 1975 (Cth)* s 121.

346. CAMA s 46(1).

347. ADT Act s 88(1).

party.<sup>348</sup> The costs indemnity rule has been displaced in a number of jurisdictions, including the Family Court and in matters heard by the ADT under the *Anti-Discrimination Act 1977* (NSW) because it is considered to act as a deterrent to bringing or defending an action in court.<sup>349</sup> Just paying one's own costs is seen as a sufficient barrier to the inappropriate use of the justice system.<sup>350</sup> While neither CAMA nor the ADT Act, in relation to community services matters, expressly displace this general rule, both statutes stipulate that costs orders should only be made where the Tribunal thinks it is appropriate to do so in the particular circumstances of the case before it or where there are special circumstances warranting an award of costs.

5.200 The ADT Act also provides that the Tribunal must not award costs unless the power to do so is conferred by the principal Act under which proceedings are brought.<sup>351</sup> However, this is confined to proceedings for an original decision and consequently has no application in the CS Division. There is therefore no reason for separate provision to be made in CAMA. Further, leaving the provision in CAMA gives rise to unnecessary duplication and may cause confusion. In view of this, the costs provision in CAMA should be repealed, rather than transferred to the ADT Act as the Commission recommends in respect of other procedural provisions. The general provision in the ADT Act would therefore apply to the CS Division.

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348. This is called the 'costs indemnity' rule. The rationale for the rule is that success at litigation vindicates the winning party who should not then have to pay his or her legal costs in successfully asserting a valid legal claim or defending an unjust claim. Usually, the party may only recover those legal costs reasonably incurred in preparing and presenting the action in court. These are generally referred to as 'party and party costs'. Special circumstances must exist to justify an award for full recovery of all expenses reasonably incurred, known as an award for "indemnity costs". See generally, Australian Law Reform Commission, *Who Should Pay? A Review of the Litigation Costs Rules* (Issues Paper 13, 1994) and Australian Law Reform Commission, *Costs Shifting: Who Pays for Litigation* (ALRC 75, 1995).

349. See the *Family Law Act 1975* (Cth) s 117(1) and *Anti-Discrimination Act 1977* (NSW) s 114.

350. See Australian Law Reform Commission, *Who Should Pay? A Review of the Litigation Costs Rules* (Issues Paper 13, 1994); Australian Law Reform Commission, *Costs Shifting: Who Pays for Litigation* (ALRC 75, 1995); Australia, Access to Justice Advisory Committee *Access to Justice – An Action Plan* (AGPS, Canberra, 1994).

351. ADT Act s 88(3).

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**RECOMMENDATION 62**

**Section 46 of CAMA should be repealed.**

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***Criteria to determine “special circumstances”***

5.201 The ADT Act does not provide any guidance in relation to what criteria the Tribunal should take into account when determining whether there are “special circumstances” which would warrant an award of costs. Yet, some guidance may be both beneficial and desirable, in terms of making the exercise of the Tribunal’s discretion more transparent. This issue is discussed in more detail in the Commission’s forthcoming report on the review of the *Anti-Discrimination Act 1977* (NSW).

5.202 In that Report, the Commission recommends that the following criteria should guide the Equal Opportunity Division (the “EO Division”) of the ADT when determining whether to make an order for costs.<sup>352</sup>

- whether any important public policy considerations were raised;
- the behaviour of the parties during the inquiry process;
- whether the complaint was pursued in a genuine belief that it had merit;
- whether the matter was dismissed on the basis that it was frivolous or vexatious;
- whether the matter is brought to enforce a previous order of the Tribunal; and
- the registration of any written offers of settlement.

Mindful of the need to ensure that complainants are not deterred from bringing or pursuing genuine complaints because of the potential costs they may incur if unsuccessful, the Commission recommends that costs orders should only be made against an unsuccessful applicant if the application was not

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352. Note: the Commission endorses the general rule under the *Anti-Discrimination Act 1977* (NSW) that each party should bear their own costs unless there are circumstances which warrant the making of a costs order.



made, or was not pursued, in a genuine and reasonable belief that it had merit. It also recommends that the Tribunal should be able to award costs to a successful applicant where the matter involved an element of public interest, beyond the private interests of the applicant. A costs order should also be able to be made in favour of a successful applicant, who brought a matter purely in his or her own interests, where the Tribunal is satisfied that the conduct of the respondent was unreasonable.

5.203 The general criteria, with the exception of the last two, appear to be equally applicable to applications brought to the CS Division. The general approach recommended also appears appropriate. Accordingly, when determining whether there are special circumstances warranting an award of costs, the CS Division should take into account the following factors.

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### **RECOMMENDATION 63**

**In determining whether the circumstances of the case justify the making of a costs order under s 88 of the ADT Act, the CS Division should consider:**

- **whether any important public policy considerations were raised;**
  - **the behaviour of the parties during the inquiry process;**
  - **whether the complaint was pursued in a genuine belief that it had merit; and**
  - **whether the matter was dismissed on the basis that it was frivolous or vexatious.**
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## **REVIEW STRUCTURE**

5.204 The ADT is a two-tier structure. The majority of the work of the Tribunal is in the first tier where it exercises its original or review

jurisdiction. This tier is divided into several Divisions as outlined previously.<sup>353</sup> The second tier is quite an innovation in an administrative tribunal. It is where the Tribunal has jurisdiction to hear internal appeals from decisions made at Divisional level. Apart from these two internal tiers, the ADT Act requires an internal review to have been conducted at the local level before an application for a review of a reviewable decision is made. At the other end of the spectrum, the ADT Act provides a further right of appeal from a decision of the Appeal Panel to the Supreme Court on questions of law.

### Internal review

5.205 An internal review by the original decision-maker is a prerequisite to bringing an application to the Tribunal for a review of a reviewable decision.<sup>354</sup> This requirement is common in many areas of administrative law, particularly at the federal level.<sup>355</sup> The process for internal reviews is governed by s 53 of the ADT Act. It provides that a person other than the person who made the original decision should deal with the application for a review. Within 14 days of the completion of an internal review, the administrator must notify the applicant of the outcome of the review, the reasons for the decision and their rights to have the decision reviewed by the Tribunal.

5.206 Advantages of internal review include that it is quick and easily accessible to persons who would not otherwise pursue external review mechanisms. It is also a very useful quality control mechanism for the agency whose decision is under review. It is a way for the agency to receive feedback on its decision-making processes and for that agency to implement mechanisms to improve those processes. Internal review has also been shown to be an effective filter in some jurisdictions in reducing the number of appeals to external review tribunals.<sup>356</sup> However, internal review also has its disadvantages. It can lead to lengthy delays and possible capture by the

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353. See para 5.7.

354. ADT Act s 55(1)(b).

355. For example, internal review, as a prerequisite to external review, is mandatory for reviewable decisions made under the Social Security Act: *Social Security Act 1991* (Cth) s 1247(1).

356. N Waters, "Internal Review and Alternative Dispute Resolution" [1996] *Canberra Bulletin of Public Administration* (No 79) 91 at 93.

predominant agency culture resulting in little if any change to the original decision. It also raises concerns about the consistent and equitable treatment of applicants seeking review.<sup>357</sup>

5.207 Provided there are checks on the process and applicants may seek leave to apply directly to the Tribunal in special circumstances,<sup>358</sup> the Commission is satisfied that a process for internal review is appropriate. It is consistent with the object of CAMA to encourage, wherever practicable, resolution at the local level.<sup>359</sup>

### **Appeals to the Appeal Panel of the ADT**

5.208 Chapter 7 of the ADT Act provides for the internal review of an “appealable decision” by the Appeal Panel of the ADT constituted by at least three members of the Tribunal.<sup>360</sup> The Appeal Panel is not a permanent body, but a rotating one. An appealable decision is a decision of a Division, either in the exercise of its original or review jurisdiction. It also includes decisions of the Tribunal that a person is not entitled to apply for a review of a reviewable decision; an order that a person may not be represented by an agent of a particular class; or a decision refusing an application by a person to be made a party to proceedings.<sup>361</sup>

5.209 Appeals to the Appeal Panel may only be brought by a party to the proceedings in which the appealable decision was made. Although one might expect that such appeals would be available on the merits, the Act provides that appeals are to be made only on questions of law. The Appeal Panel may, however, grant permission to extend the appeal to a review of the merits of

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357. The Administrative Review Council has made a number of recommendations in relation to internal review mechanisms: see Better Decisions Report at para 6.42-6.67 and Recommendation 75.

358. ADT Act s 55(2).

359. CAMA s 3(1)(c).

360. ADT Act s 24 and 113.

361. ADT Act s 112.

the appealable decision,<sup>362</sup> which is what most appellants will probably want.<sup>363</sup>

## Appeals to the Supreme Court

5.210 Appeals are available, on questions of law alone, to the Supreme Court but only after an internal appeal has been heard in respect of the matter by the Appeal Panel.<sup>364</sup> Leave can be sought, however, from the Supreme Court to hear an appeal notwithstanding that the applicant has not exhausted the internal appeal mechanism. These provisions have created an extra step in the appeals process than that which existed under CAMA. Under CAMA, appeals from decisions of the CSAT on questions of law could be made directly to the Supreme Court.<sup>365</sup>

## GOVERNMENT POLICY

5.211 Section 64 of the ADT Act specifically provides that the Tribunal is to give effect to government policy except to the extent that the policy is unlawful or would produce an unjust decision in the circumstances of the case. Evidence of government policy may be provided by ministerial certificate. Effectively, s 64 codifies the practice of the federal AAT, which has generally adopted a cautious approach in relation to its consideration and application of relevant government policy. There is no express statutory obligation on the AAT to apply government policy. However, the AAT accepts the importance of consistency in decision-making and to that end will

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362. ADT Act s 113.

363. See L Katz, "ADT-ABC: An Introduction to the New South Wales Administrative Decisions Tribunal", paper presented at the *Government Lawyers CLE Convention* (Sydney, 31 July 1997) at 10.

364. ADT Act s 119. The Supreme Court retains its original jurisdiction to review decisions of the ADT (ADT Act s 122) but it may decline to exercise that jurisdiction if satisfied that an alternative mechanism, such as the statutory right of appeal, is adequate: ADT Act s 123.

365. CAMA s 67.

apply any relevant government policy unless it is unlawful or creates an unjust result in the circumstances of the particular case before it.<sup>366</sup>

5.212 The AAT also acknowledges the significant role that Parliament plays in the supervision of policy. In one of the leading cases, Justice Brennan (as he then was) warned against departing from stated government policy without justifiable reasons:

If the Tribunal, in reviewing a decision made in pursuit of a lawful administrative policy, consciously departed from that policy, it would nullify not only the policy made by the repository of the discretionary power, but also any mechanism of surveillance which the relevant statute permits or provides. To depart from Ministerial policy thus denies to Parliament its ability to supervise the content of the policy guiding the discretion which Parliament created. On some occasions, reasons may be shown to warrant departure from Ministerial policy; for example, where the intervention of new circumstances has clearly made a policy statement obsolete. But in general, it would be manifestly imprudent for the Tribunal to override a Ministerial policy and to adopt a general administrative policy of its own.<sup>367</sup>

This is not to say that the AAT applies such policy uncritically. Its principal function is to conduct an independent assessment of all the circumstances of the case.<sup>368</sup>

## Appropriateness of s 64

5.213 There are concerns that a statutory requirement that review tribunals implement government policy will change the objective of merits review from ensuring that all decisions of government are correct and preferable to ensuring that the agency's decision is lawful and not unreasonable.<sup>369</sup>

5.214 If the original decision-maker has made a decision based on government policy, it is essential that the review tribunal, when reviewing

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366. *Drake and Minister for Immigration and Ethnic Affairs (No.2)* (1979) 2 ALD 634 at 645 per Brennan J.

367. *Drake and Minister for Immigration and Ethnic Affairs (No.2)* (1979) 2 ALD 634 at 644 per Brennan J.

368. *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591 per Bowen CJ and Deane J.

369. Better Decisions Report at para 2.17-2.18 and 2.43.

that decision, take into consideration all the relevant considerations, including current government policy. In the Commission's view, section 64 does not preclude the ADT from making an independent assessment of all the relevant circumstances, nor of assessing the lawfulness of the government policy and its applicability to the circumstances of the particular case before it. Rather, as Justice Brennan states:

The general practice of the Tribunal will not preclude the Tribunal from making appropriate observations on ministerial policy, and thus contributing the benefit of its experience to the growth or modification of general policy; but the practice is intended to leave to the Minister the political responsibility for broad policy, to permit the Tribunal to function as an adjudicative tribunal rather than as a political policy-maker, and to facilitate the making of consistent decisions in the exercise of the same discretionary power.<sup>370</sup>

## **Inconsistency with s 5 of CAMA**

5.215 Section 64 of the ADT Act differs in significant respects from the equivalent provision in CAMA. Section 5 of CAMA provides that decisions made under it must not be made in a way that is inconsistent with government policy or that would have resource implications.<sup>371</sup> This provision clearly applied to the former CSAT, which was established under CAMA. In view of the fact that the CSAT has been reconstituted as the CS Division of the ADT and now exercises most of its powers and functions under the ADT Act, the CS Division is probably no longer bound by s 5 of CAMA. However, as it is preferable for the Acts to be consistent, the Commission recommends that s 5 of CAMA be repealed.<sup>372</sup>

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### **RECOMMENDATION 64**

#### **Section 5 of CAMA should be repealed. (see Rec 3)**

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370. *Drake and Minister for Immigration and Ethnic Affairs (No.2)* (1979) 2 ALD 634 at 645 per Brennan J.

371. This issue is discussed at para 2.40-2.50.

372. See Recommendation 3 at para 2.43-2.45.







# 6. Community Services Review Council

- Background
- What is the Review Council?
- Operation of the Review Council
- Submissions
- The Commission's view

6.1 The Review Council is the last of the four bodies established by CAMA. It was originally intended to oversee the implementation of the complaints, appeals and monitoring system created by CAMA. In recent years, the Review Council appears to have lapsed into disuse, raising the question of whether its role and functions remain valid. Comparatively few submissions were received on this issue. In this Chapter, the Commission examines the membership, functions and effectiveness of the Review Council.

## BACKGROUND

6.2 The Review Council is established by Part 8 of CAMA. The terms of section 108 indicate that its primary role is to oversee the proper co-ordination of the functions of the bodies established by CAMA and other agencies with related functions, such as the Public Guardian and the NSW Ombudsman.<sup>1</sup>

6.3 In its early days, the Review Council was very active. It met monthly to discuss a range of issues, such as strategies to ensure consumer participation, and to raise community awareness of the complaints, appeals and monitoring system established by CAMA. It provided advice to the Minister on diverse matters such as the impact of the (then) proposed ADT on the CSAT. In addition, it held annual open meetings at which key individuals or organisations were invited to address the Council. Sub-committees were created to deal with particular projects, papers were prepared<sup>2</sup> and community consultations were organised.<sup>3</sup>

6.4 In 1996, in response to a request by the Minister to consider its future role, functions and membership, the Review Council proposed that it be restructured to be more consumer-oriented. The aim of the proposed restructure was to promote the objects and principles of CAMA more effectively, and to distinguish itself from other advisory bodies. A decision

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1. NSW Ombudsman, *Submission* at 5.
  2. See for example, New South Wales, Community Services Review Council, *Consumer Participation: A Resource Document for Community Service Providers and Consumers* (1996); and A Tang, *Independent Advocacy for Children: A Discussion Paper* (Community Services Review Council, 1995).
  3. See for example, New South Wales, Community Services Commission, *Annual Report 1996/97* at 91; and New South Wales, Community Services Commission, *Annual Report 1995/96* at 86.

on the future role of the Review Council was deferred pending the outcome of this review.

## WHAT IS THE REVIEW COUNCIL?

### Composition of the Review Council

6.5 CAMA provides that the Review Council comprise 13 members, seven of whom are appointed because of the positions they hold and six as community members appointed by the Minister for Community Services. The seven ex-officio members are:

- the Commissioner of the CSC;
- the Director General of DOCS;
- the Director General of ADD;
- the NSW Ombudsman;
- the President of the Guardianship Tribunal;
- the Divisional Head of the CS Division of the ADT; and
- the Public Guardian.

6.6 Of the six persons whom the Minister may appoint, two are required to have knowledge and experience gained as service providers, two must have knowledge and experience gained as service users and two must be persons who, in the opinion of the Minister, have an interest in the provision of community services.<sup>4</sup>

6.7 All are part-time members<sup>5</sup> and are appointed for a period of up to five years.<sup>6</sup> They may be reappointed.<sup>7</sup> The Minister may appoint one of the members as Chairperson.<sup>8</sup> Administrative and policy support is provided by the CSC.

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4. CAMA s 107(1) and (2).

5. CAMA s 107(1).

6. CAMA s 110.

7. CAMA s 110.

8. CAMA s 107(3).

## Functions of the Review Council

6.8 The Review Council was established to:

- encourage co-ordination of the functions of the Tribunal, the CSC, the Community Visitors and any other persons or agencies in so far as their functions relate to community services; and
- provide strategic advice to the Minister on the operational effectiveness of the review and monitoring system established under CAMA.<sup>9</sup>

The legislation also stipulates that the Minister must consult with the Review Council prior to making any statutory appointments under CAMA. This applies to the appointment of Community Visitors,<sup>10</sup> the Community Services Commissioner<sup>11</sup> and, until recently, the President of the CSAT.<sup>12</sup>

## OPERATION OF THE REVIEW COUNCIL

6.9 Although the Review Council appears to have been quite active in the early days of the implementation of CAMA, and was used quite effectively by the Minister for advice, it has been largely defunct since the first Ministerial appointments expired at the end of 1996. Indeed, since that time, the Minister has made only a minimum number of short-term appointments prompted by the need to consult with a quorum of the Review Council prior to making an appointment under CAMA.

## Limitations on its effectiveness

6.10 The NSW Ombudsman has submitted that the major limitation on the effectiveness of the Review Council is that its role has never been properly defined. Ever since its inception, its role has been the subject of continuous debate, in particular whether it should focus on the complaints, appeals and

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9. CAMA s 108.

10. CAMA s 7(1).

11. CAMA s 78(1).

12. CAMA s 92(2)(a). Repealed by the *Administrative Decisions Legislation Amendment Act 1997* (NSW) Sch 1.6[8] which commenced 1 January 1999.

monitoring systems established by CAMA or whether it should take a broader more consumer-oriented approach to the provision of community services.<sup>13</sup>

6.11 Its role in relation to consultation on appointments is particularly ambiguous. Although the legislation requires the Minister to consult with the Review Council prior to making an appointment under CAMA, it does not specify at what stage in the process the Review Council must be consulted nor how that consultation should occur.<sup>14</sup> In theory, the Minister could discuss an appointment with the Review Council after the selected appointee has been referred to, and indeed, approved by, Cabinet.

6.12 Another significant limitation on its effectiveness is its composition. It brings together a large number of ex-officio members with different agendas. It is also argued that its membership is inappropriate in light of some of the Review Council's functions.<sup>15</sup> For example, the inclusion of the Directors-General of DOCS and ADD presents a potential conflict of interest in relation to the Review Council's function of providing advice to the Minister on the appointment of the Community Services Commissioner. Further conflict would arise if the head of a large non-government service provider is also a member of the Review Council.<sup>16</sup>

6.13 Another severe constraint on the Review Council is its lack of resources, in particular the fact that it has no permanent secretariat or research support.<sup>17</sup>

### **Do the Review Council's functions overlap or duplicate the functions of other bodies?**

6.14 Some submissions have noted that there is a "plethora" of committees and advisory bodies which has implications for the effectiveness of the Review Council. It has been variously suggested that the whole gamut of

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13. NSW Ombudsman, *Submission* at 5.

14. CSC, *CAMA Submission 1* at 14.

15. CSC, *CAMA Submission 1* at 14.

16. CSC, *CAMA Submission 1* at 14.

17. Autism Association of NSW, *Submission* at 15.

committees be reviewed<sup>18</sup> and that the money used to fund the Review Council would be better spent if it were injected directly into services.<sup>19</sup>

6.15 Similar concerns were also raised by the NSW Government's submission to this review. It claimed that the functions of the Review Council are limited and either duplicate the functions of other existing bodies or are functions that may be more effectively and efficiently achieved in other ways. For example, the Government argued that community consultation prior to statutory appointments could be achieved by ensuring that appropriate community representatives are on selection panels.<sup>20</sup>

6.16 The two bodies most generally referred to as bodies which either duplicate the Review Council's functions or which could perform the functions of the Review Council are the Community Welfare Advisory Committee ("CWAC") and the Disability Council of NSW. Both of these committees are established under the *Community Welfare Act 1987* (NSW).<sup>21</sup> The Commission understands that the *Community Welfare Act 1987* is presently being reviewed by the Minister for Community Services who administers it. Another body that may also be relevant is the new Commission for Children and Young People which is intended to provide advice to Government on matters concerning the welfare of children.<sup>22</sup>

#### **Community Welfare Advisory Committee**

6.17 As an umbrella piece of legislation, the *Community Welfare Act 1987* (NSW) is framed broadly. So too, it appears, are the terms of reference of the CWAC. Its functions include providing advice to the Minister on matters relating to community welfare or social development; furnishing reports to the Minister on matters that it considers should be brought to the attention of the Minister; and conducting public inquiries, seminars or investigations, with the approval of the Minister.<sup>23</sup> However, its functions do not specifically include co-ordination of the various agencies involved in the provision or monitoring of community services. In terms of composition, when reconstituted in 1996, the CWAC comprised 16 consumer representatives, from the full range of program and population groups covered by DOCS and

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18. Autism Association of NSW, *Submission* at 15.

19. L Moffit, *Submission* at 2.

20. NSW Government, *CAMA Submission* at 7.

21. *Community Welfare Act 1987* (NSW) s 15 and s 16 respectively.

22. *Commission for Children and Young People Act 1998* (NSW) Pt 2.

23. *Community Welfare Act 1987* (NSW) s 15(2).

ADD. Its ex-officio members include the Directors-General of both those departments.<sup>24</sup>

### ***Disability Council of NSW***

6.18 The Disability Council clearly performs an advisory and co-ordination function but only in relation to one of the population groups covered under CAMA.<sup>25</sup> Members of the Disability Council include persons employed by peak disability consumer groups, representatives of government agencies and other persons experienced in the welfare of people with disabilities.<sup>26</sup> The *Community Welfare Act 1987* (NSW) provides expressly that the majority of members are to be people with disabilities.<sup>27</sup>

6.19 It is not clear that the functions of the Review Council could be performed effectively by either of these bodies. The fact that CWAC comprises both ex-officio members and community representatives suggests that it may suffer from the same limitations as the Review Council. The membership of the Disability Council, on the other hand, appears quite appropriate for the function of providing expert advice. However, it relates to only one of the target groups covered under CAMA.

## **SUBMISSIONS**

6.20 The few submissions which considered the role and operation of the Review Council supported the policy objective of Part 8 of the Act, namely to establish a body to oversee the implementation and effectiveness of the complaints, appeals and monitoring system under CAMA and to provide expert advice to the Minister in relation to issues affecting the provision of

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24. New South Wales, Department of Community Services, "Committees and Bodies" <<http://www.community.nsw.gov.au/committees.html>>.

25. *Community Welfare Act 1987* (NSW) s 16(2). The functions of the Disability Council are principally to monitor the implementation of the Government's disability policy and provide advice to the Government on the effect of services provided to people with disabilities, priorities to be accorded to services and the role of voluntary organisations. It is also charged with promoting the integration of people with disabilities into the community; promoting community awareness of matters concerning the welfare of people with disabilities; and consulting with other similar bodies.

26. *Community Welfare Act 1987* (NSW) Sch 1.4[2].

27. *Community Welfare Act 1987* (NSW) Sch 1.4[3].

community services. However, it was generally agreed that because of the limitations outlined above, the Review Council does not perform these functions effectively.<sup>28</sup>

6.21 There is a strong view, among the submissions received on this issue, that the Review Council has become so ineffective that it should be abolished.<sup>29</sup> As one submission noted:

The Review Council has never operated effectively, and most recently has been severely degraded by short-term politically motivated appointments. It now enjoys no respect or standing within the community services sector, and ought to be abolished.<sup>30</sup>

The NSW Government also submitted that the Review Council should be abolished on the grounds that it is redundant.<sup>31</sup>

6.22 It has been suggested that its supervisory function be transferred to a PJC which would oversee the operation of the CSC and report back to both Houses of Parliament on the overall effectiveness of CAMA.<sup>32</sup> The Commissioner would be required to report to the PJC rather than to the Minister, which is currently the case.

6.23 It has also been suggested that the PJC be complemented by an Expert Advisory Committee (“EAC”) which would be established by the Commissioner. Its role would be to provide advice to the CSC to ensure that its operations and strategies remain relevant and accessible to the key target groups and to suggest ways of achieving inter-agency collaboration.<sup>33</sup> The EAC would be made up of people with expertise in the delivery of disability

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28. See for example, CSC, *CAMA Submission 1* at 53; Disability Safeguards Coalition, *CAMA Submission 1* at 12; and Barnardos Australia, *Submission* at 9.

29. See, for example, Physical Disability Council of NSW Inc, *Submission* at 18; Barnardos Australia, *Submission* at 9; L Moffit, *Submission* at 2; CSC, *CAMA Submission 1* at 53; and Disability Safeguards Coalition, *CAMA Submission 1* at 12.

30. People with Disabilities (NSW) Inc, *CAMA Submission* at 8.

31. NSW Government, *CAMA Submission* at 7.

32. NCOSS, *CAMA Submission* at 2 and 16; Physical Disability Council of NSW Inc, *Submission* at 18; NSW Council for Intellectual Disability, *CAMA Submission* at 12; Disability Safeguards Coalition, *CAMA Submission 1* at 12; and CSC, *CAMA Submission 1* at 53; People with Disabilities (NSW) Inc, *CAMA Submission* at 34. See also para 3.24-3.30.

33. CSC, *CAMA Submission 1* at 53.



services, child protection and substitute care options and consumer representatives from these areas.<sup>34</sup> It has also been submitted that Community Visitors be represented on any advisory body to the CSC.<sup>35</sup> One submission has suggested that the Minister be required to consult with the EAC prior to making any statutory appointments under CAMA.<sup>36</sup>

## THE COMMISSION'S VIEW

6.24 The Commission agrees that the Review Council is no longer an appropriate body to perform a supervisory role under CAMA or to provide expert advice to the Minister. It has lost community support and is practically defunct already. It appears to the Commission that the ineffectiveness of the Review Council is largely due to the fact that it attempts to merge into the one body the functions of both a quasi-interdepartmental committee, comprising heads of relevant agencies, and a consumer advisory role. Both functions are important and continue to be valid but neither can be performed effectively by the Review Council in the light of its membership.

6.25 The Commission considers that there is a need for an independent body to oversee the operation of the complaints, review and monitoring processes set up under CAMA. There is also clearly a need for a new and separate chain of accountability to ensure the independence of the bodies established by CAMA. This issue is discussed in more detail in Chapter 3 where the Commission recommends that a PJC be established.<sup>37</sup> However, on the issue of providing advice to the Minister in relation to statutory appointments under CAMA, the Commission is of the view that making provision for community representatives to be on selection panels is a better and more direct way of ensuring community participation in the appointment process.

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34. Disability Safeguards Coalition, *CAMA Submission 1* at 12; Physical Disability Council of NSW Inc, *Submission* at 18; CSC, *CAMA Submission 1* at 53; and NCOSS, *CAMA Submission* at 2.

35. B Semmler, *Submission* at 2.

36. CSC, *CAMA submission 1* at 14 and 53. See also para 6.25.

37. See Recommendation 6 at para 3.30.

## **Expert advisory committee**

6.26 It is important that there be direct participation in important decisions by people affected by the legislation. It is also important that the Minister consult with people with expertise and knowledge in the area. However, the Commission does not consider that an expert advisory committee needs to be established by statute. Experience demonstrates that legislation does not necessarily guarantee the effectiveness of any committee. Rather, effectiveness is best assured by delineating clear functions to the committee and ensuring that membership of the committee is appropriate in respect of the performance of those functions.

6.27 The Commission notes that there are a number of ad hoc advisory committees which meet regularly and which are effective. One example is the Criminal Justice Forum sponsored by the Attorney General, which meets twice a year. Its members include all the relevant Cabinet Ministers,<sup>38</sup> senior judicial officers, senior Departmental officers and senior players such as the Director of Public Prosecutions, the Senior Public Defender, the President of the Bar Association and the Director of the Bureau of Crime Statistics and Research.

6.28 As there appears to be no appropriate existing committees which can perform this advisory function, the Commissioner should, with the approval of the Minister, develop appropriate consultation mechanisms. A consultative committee comprising persons who represent the interests of consumers, families, carers, advocates and service providers may be most effective. The Commission is not suggesting that such a committee be a substitute for wider community consultation but it should be broadly representative of all the various interest groups to stimulate informed debate.

## **Inter-agency forum**

6.29 In the Commission's view, the co-ordination function of the Review Council also remains an important function. A forum is required in which the heads of the relevant agencies, including the new Children's Commissioner

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38. Namely, the Attorney General and the Ministers for Police, Corrective Services and Community Services (the latter of whom was previously responsible for juvenile justice before it was transferred to a separate portfolio).

and the Divisional Head of the CSD, meet to exchange information and develop collaborative strategies. As previously argued, the Commission does not consider it necessary that such a committee be established by legislation. Rather, the Community Services Commissioner should be encouraged to initiate a forum, similar to the Network of Watchdog Agencies of which the Commissioner is a member, to meet regularly to exchange information, discuss issues of overlap and duplication and devise strategies to co-ordinate their services in a more effective way.

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**RECOMMENDATION 65**

**The Community Services Review Council should be abolished. In its place, the Community Services Commissioner should develop appropriate consultation mechanisms with persons representing the interests of consumers, families, carers, advocates and service providers. It should also establish an inter-agency forum comprising the heads of all relevant agencies to discuss ways of ensuring more efficient and effective co-ordination of services.**

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## **Appendix A REFERENCE GROUP MEMBERS**

Mr Lester Bostok, Aboriginal Disabilities Service

Ms Jane Eales, Carers NSW Inc

Ms Belinda Epstein-Frisch, Institute for Family Advocacy and Leadership Development

Ms Jane Frazer, Action for Citizens with Disabilities

Mr Glenn Gardner, The Northcott Society

Ms Rosemary Kayess, Disability Council of NSW

Ms Bronwyn Moye, People With Disabilities (NSW) Inc

Ms Diana Qian, Multicultural Disability Advocacy Association

Mr Robert Strike, Self Advocacy Sydney Inc

Ms Robin Way, ACROD

## **Appendix B SUBMISSIONS**

ACROD Ltd NSW Division, 17 December 1998

Action for Citizens with Disabilities, 13 December 1998

Australian Federation of Carers, 12 December 1998

Australian Quadriplegic Association Ltd (NSW), 14 December 1998

Autism Association of NSW, 23 December 1998

Barnardos Australia, 14 December 1998

Baulkham Hills Shire Council, 3 December 1998

Baxter Mr S, 20 November 1998

Birnie, Ms M, 24 December 1998

Blind Citizens Australia, Sydney Branch, 25 January 1999

Bowles, Miss M, 10 December 1998

Burnside, 10 December 1998

Carers NSW Inc, 14 December 1998

Carers of Protected Persons Association, 7 December 1998

Caringa Enterprises, 26 November 1998

Centacare Sydney, 11 December 1998

Centre for Developmental Disability Studies, University of Sydney, 11 December 1998

Citizen Advocacy NSW, 20 December 1998

Clifton, K and J, 15 December 1998

Coalition for Approved Supported Accommodation, 17 January 1999

Comfrey Cottage, 21 January 1999

Community Services Appeals Tribunal, 14 December 1998

Community Visitors, *CAMA Submission*, 23 December 1998;  
*DSA Submission*, 24 December 1998

Confidential 1, 28 October 1998

Confidential 2, 6 January 1999

Confidential 3, 10 January 1999

Confidential 4, 28 January 1999

Confidential 5, 5 February 1999

Crossroads Christian Fellowship with Disabled Persons in  
NSW Inc, 21 December 1998

Community Services Commission, *CAMA Submission 1*,  
24 December 1998; *CAMA Submission 2*, 4 January 1998;  
*DSA Submission*, 19 January 1998

Dare to Care, 18 December 1998

Deaf Society of NSW, 21 December 1998

DeafBlind Association NSW, 18 December 1998

Disability Assistance for Shoalhaven Inc, 10 December 1998

Disability Council of NSW, *Submission 1*, 15 October 1998; Disability  
Council of NSW; *Submission 2*, 16 December 1998

Disability Information Service Inc, 11 November 1998

Disability Safeguards Coalition, *DSA Submission*, 11 December 1998; *CAMA  
Submission 1*, 11 December 1998; *CAMA Submission 2*,  
5 March 1999; *CAMA Submission 3*, 16 March 1999

Dixon, B and D, 2 December 1998

Dunrossil Challenge Foundation Ltd, 21 December 1998

Ethnic Child Care, Family and Community Services Co-operative Ltd, 14  
December 1998

Ferguson, Ms C, 15 November 1998

Goges, A, 29 December 1998

Greystanes Children's Home, 7 December 1998

Hunter Region Disabled Lobby Group, 8 December 1998

Hutten, Mr P, *CAMA Submission*, 7 December 1998;  
*DSA Submission*, 28 February 1999

Institute for Family Advocacy and Leadership Development Association Inc,  
24 December 1998

Intellectual Disability Rights Service Inc, 21 December 1998

Intellectual Disability Rights Service Inc, 2 February 1999

Kingsgrove Community Access Service, 10 December 1998

Kurrajong-Waratah Industries, 14 December 1998

Latham, Ms C, 14 December 1998

Local Government and Shires Associations of NSW, 15 December 1998

Manly Warringah Community Access Service, 14 December 1998

McCredie, Ms R, 10 December 1998

McKenzie, Ms S, 8 December 1998

Moffit, Ms L, 1 December 1998

Morgan Key Training Resources, 4 December 1998

Morris, Mrs L, 19 November 1998

Multicultural Disability Advocacy Association of NSW Inc,  
16 December 1998

Multiple Sclerosis Society of NSW, 14 December 1998

NCOSS, *DSA Submission*, 22 December 1998; *CAMA Submission*, 22  
December 1998

Nepean Independent Living Committee Inc, 18 December 1998

New Horizons Enterprises Ltd, 9 December 1998

Newey, Ms D, 14 December 1998

NSW Council for Intellectual Disability, *DSA Submission*,  
24 December 1998; *CAMA Submission*, 15 January 1999

NSW Government, The Hon F Lo Po' MP, Minister for Community Services  
and Minister for Disability Services, *DSA Submission*,  
5 January 1999; *CAMA Submission*, 5 January 1999

NSW Ombudsman, 7 December 1998

NSW Statewide Disability Coalition, *CAMA Submission*,  
14 December 1998; *DSA Submission*, 14 December 1998

Paraquad NSW, 14 December 1998

People With Disabilities (NSW) Inc, *CAMA Submission*,  
27 January 1999; *DSA Submission*, 2 February 1999

Physical Disability Council of NSW Inc, 15 December 1998

Price, The Hon J C, MP, Member for Waratah, Legislative Assembly, 24  
November 1998

Prince, Mr L, 17 December 1998

Seares, Ms H, on behalf of G Curnick, 18 January 1999

Semmler, Mr B, 30 December 1998

Spark, Ms L, 14 December 1998

Sticotti, Ms S, 18 December 1998

Stockton Hospital Welfare Association Inc, 28 October 1998

The Northcott Society, 21 December 1998

The Spastic Centre of NSW, *DSA Submission*, 7 January 1999; *CAMA  
Submission*, 7 January 1999



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Western Sydney Intellectual Disability Support Group Inc,  
*DSA Submission*, 16 December 1998; *CAMA Submission*,  
16 December 1998

Wilson, Ms M, 11 January 1999

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