



A civil proceeding and the rule of law^{*}

The Honourable Marilyn Warren AC Chief Justice of Victoria

Remarks to the Commonwealth Law Conference, Melbourne Convention Centre

Tuesday 21 March 2017

On a Saturday evening, November 12 2016, a number of children detained at the Parkville Youth Justice Precinct rioted. The media reported that several youths had climbed onto the roof of the facility while up to 20 other children ‘trashed’ their cells.¹ The children on the roof demanded ‘junk food and a phone’.² Police dressed in riot gear with dog handlers attended the facility to restore order.³

Fifteen beds were lost and common areas were rendered unusable.⁴

The following night another riot broke out. Property was damaged and fire alarms were set off.⁵ Some of the children were alleged to be carrying tools taken from a workshop.⁶ For 17

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¹ Brendan Roberts, ‘Teen Prisoners Riot Again at Parkville Detention Centre’ (13 November 2016) Yahoo7 News <<https://au.news.yahoo.com/a/33193853/teen-prisoners-riot-again-at-parkville-detention-centre/#page1>>.

² Deborah Gough, Goya Dmytryschchak, ‘Melbourne Youth Justice Centre Hit By Fresh Riot, Officer Hurt at Second Jail’ (13 November 2016) The Age <<http://www.theage.com.au/victoria/melbourne-youth-justice-centre-hit-by-fresh-riot-officer-hurt-at-second-jail-20161112-gso268.html>>.

³ ABC News, ‘Riot Police, Dog Handlers Called After Another Riot at Melbourne Youth Justice Centre’ (13 November 2016) ABC News <<http://www.abc.net.au/news/2016-11-13/melbourne-justice-centre-riot-police-dog-handlers-called/8021236>>.

⁴ *Certain Children v Minister for Families* [2016] VSC 796, [27].

⁵ ABC News, ‘Melbourne Youth Justice Centre: Police Negotiating With Young Rioters Holed Up in ‘Inaccessible Area’ (14 November 2016) ABC News <<http://www.abc.net.au/news/2016-11-14/melbourne-youth-justice-centre-riot-police-called-second-time/8022206>>.

⁶ Ibid.



hours, a stand-off ensued between emergency services and a number of the children who had retreated to inaccessible areas of the facility.⁷

After the riot ended and control of the facility was handed back to the Department of Health and Human Services, an account was taken of the wreckage. It was claimed that 60 beds were lost, amounting to almost half of the accommodation at Parkville.⁸ The damage was estimated at a cost of \$2 million and the detained children had to be relocated.

Some of the children were transferred to the Malmsbury Youth Justice Precinct, a 'higher-security'⁹ youth detention facility located approximately 100 km north of Melbourne. Others were placed in safe rooms and isolation rooms at the Parkville facility, others still were taken to the Mill Park Police Station holding cells.¹⁰ It was reported that the accommodation was in many respects deficient, with male detainees being housed in the female accommodation and some children provided 'mattresses on the floor of rooms with no bathroom facilities'.¹¹

On Tuesday afternoon the government announced that a number of children would be sent to Barwon, a maximum security prison¹² for adult offenders, close to Geelong, south of Melbourne.

⁷ Ibid. ABC News, 'Melbourne Youth Justice Centre: Riot At Juvenile Prison Ends Peacefully' (14 November 2016) ABC News <<http://www.abc.net.au/news/2016-11-14/melbourne-youth-justice-centre-riot-ends/8023882>>.

⁸ *Certain Children v Minister for Families* [2016] VSC 796 [28].

⁹ ABC News, 'Melbourne Youth Justice Centre: Police Negotiating With Young Rioters Holed Up in 'Inaccessible Area' (14 November 2016) ABC News <<http://www.abc.net.au/news/2016-11-14/melbourne-youth-justice-centre-riot-police-called-second-time/8022206>>.

¹⁰ *Certain Children v Minister for Families* [2016] VSC 796 [29]–[30].

¹¹ Ibid [33].

¹² Department of Justice, Government of Victoria, *Corrections, Prisons & Parole: Barwon Prison* <<http://www.corrections.vic.gov.au/home/prison/barwon+prison.shtml>>.



On Wednesday 16 November 2016, applications were made by the Secretary of the Department of Health and Human Services to the Youth Parole Board seeking to have seven children moved to Barwon Prison. Each of these applications was rejected by the Board.¹³

On Thursday, 17 November 2016 the Minister for Families and Children gazetted an Order in Council referring to the *Children, Youth and Families Act 2005*. The order excised an area of Barwon Prison known as the Grevillea Unit from classification as a 'prison' and established it as 'a remand centre for emergency accommodation'.¹⁴ Later that day, a number of children in custody were moved to Grevillea.

Late afternoon on Friday 2 December 2016, a writ of originating motion was filed in the Supreme Court of Victoria seeking habeas corpus and an order requiring the removal of those children from detention in the Grevillea Unit at Barwon Prison. This came to be the *Certain Children* case.¹⁵

The children had been housed at Grevillea for about two weeks when the writ was filed. The matter came before Garde J of the Supreme Court, sitting as the Practice Court judge. As allegations were made that the children would suffer significant detrimental effects if left in an environment formerly an adult prison, the matter was treated as urgent and proceeded to trial without pleadings.

¹³ *Certain Children v Minister for Families* [2016] VSC 796 [40].

¹⁴ *Ibid* [41]–[42]. Order in Council:
<http://www.gazette.vic.gov.au/gazette/Gazettes2016/GG2016S354.pdf#page=2>

¹⁵ *Certain Children v Minister for Families* [2016] VSC 796



Garde J heard the trial over four days from 12 – 15 December. Submissions were made by Fitzroy Legal Service and the Human Rights Law Centre who brought the claim. The Victorian Government Solicitor’s Office represented the Minister for Families and Children and the Victorian Equal Opportunity and Human Rights Commission intervened in the matter. Affidavits were filed and some deponents were cross-examined. In responding to the claims quickly, the government acted in accordance with the responsibilities placed upon government parties by the Model Litigant Guidelines,¹⁶ an articulation of the expectations that the rule of law will be respected in particular by those in power.

Among the plaintiff’s submissions was an argument that the government’s decision to annexe Grevillea as a remand centre suitable for children had not had due regard to certain mandatory statutory considerations. The *Children, Youth and Families Act 2005* under which the Minister had the power to create a remand centre also provided certain entitlements for the children who would be there detained.¹⁷ For example, children ‘are entitled to have their developmental needs catered for’ (e.g. education).¹⁸

The plaintiffs also relied on the *Charter of Human Rights and Responsibilities Act 2006* (‘the Charter’). The Charter provides that ‘it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.’¹⁹ The plaintiffs submitted that in making the Order in Council to establish Grevillea as a remand centre, the Minister had failed to give proper consideration to the

¹⁶ Department of Justice, Government of Victoria, *Victorian Model Litigant Guidelines* <<http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/victorian+model+litigant+guidelines>> 2(c).

¹⁷ *Children, Youth and Families Act 2005*, s 482.

¹⁸ *Ibid* s 482(2)(a).

¹⁹ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38(1).



human rights of the detained children. They identified, among others, ss 10(b) and 17(2) of the Charter which respectively mandate that people are not to be treated in a cruel, inhuman or degrading way and that children have the right to such protection as is in their best interests simply by reason of their being a child.

Garde J delivered an 86 page judgment on 21 December 2016; six days after the hearing concluded. Ultimately, Garde decided that according to principles of administrative law, the Minister was required by the *Children, Youth and Families Act 2005* to consider whether a remand centre of Grevillea would answer the children's statutory entitlements. Quite apart from whether these entitlements were met, Garde J found that there was no evidence that these had ever been considered in making the decision.²⁰ He declared the Order in Council invalid and ordered the government party to remove the children from the unit.²¹

Garde J also noted that the Order in Council was unlawful as the Minister had failed to consider the Charter rights that had been engaged by the decision, in contravention of s 38(1) of the Charter.²²

On the pronouncement of Garde J's judgment, the government party immediately sought a stay of the order. The government urged it could not place the children in any other facility. The judge ultimately stayed his earlier order pending further order of the court stating it was 'simply because there [was] nowhere else that is satisfactory or safe for [the children] to go'.²³

²⁰ *Certain Children v Minister for Families* [2016] VSC 796 [275]–[278].

²¹ *Ibid* [321].

²² *Certain Children v Minister for Families* [2016] VSC 796 [230], [321].

²³ Transcript, T 443.20–443.22.



The Minister for Families and Children immediately commenced steps to seek leave to appeal. The matter came before the Court of Appeal for directions the afternoon of the same day. Garde J handed down his decision. The matter was set down to return before the Court of Appeal a few days later. Over the holiday period the parties filed materials and were in constant contact with the Court throughout Christmas Eve, Boxing Day and the other days. On December 28 2016, the appeal commenced.

Before the Court of Appeal (Warren CJ, Maxwell P and Weinberg JA), the parties agreed (at the court's urging) to split the hearing into two parts: first, the appeal against the administrative law component; second, the appeal against the finding of breach under the Charter. This latter component was deferred to a later date.

After hearing argument and adjourning for deliberation, on the same day of the hearing the Court of Appeal announced its affirmation of the judgment save for an adjustment to the orders of Garde J (granting leave in a limited respect and making a new order). The Court upheld the finding that the Minister failed to take into account relevant considerations which amounted to jurisdictional error and which invalidated the Order in Council.²⁴ The Court announced a statement of its decision and gave a summarised direction of its reasons to be delivered the next day.

The following day, the Court of Appeal published its reasons for judgment. That same day, 29 December 2016, the Victorian government re-gazetted the Grevillea Unit of Barwon Prison as a remand centre for youth detainees. This gazettal contained statements that the

²⁴ See, eg, *Minister for Families and Children v Certain Children by their Litigation Guardian Sister Marie Brigid Arthur* [2016] VSCA 343 [5]–[6].



Minister had given consideration to the relevant requirements of the Act. The detention of children in that facility continued.²⁵

The appeal against the finding of unlawfulness because of incompatibility with the Charter was, as indicated, deferred to a later date and was subsequently discontinued by the government. The finding that the decision to detain children in the Grevillea facility at the relevant time was in breach of the Charter by Garde J stood unchallenged.

On the basis that children remained in the Grevillea Unit, another Writ was issued seeking judicial review of the second gazettal of the Grevillea Unit on 29 December 2016 and of the decision to ‘transfer’ children to that unit. That matter was heard before John Dixon J over six days in April and Dixon J handed down his judgment on 11 May 2017.

In that judgment, Dixon J concluded that the realities of life for children in the Grevillea Unit infringed their rights and considered that the government parties had not demonstrably justified that infringement. Dixon J found that the children’s detention was unlawful under s 38(1) of the Charter and ordered the children’s removal. The government complied.

Dixon J concluded as follows regarding the government parties’ response to the accommodation crisis facing them:

This evidence makes clear that there were less restrictive ways reasonably available at the time of the relevant decisions to achieve the purposes that the limitations sought to

²⁵ *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251.



achieve. I infer also that other less restrictive means may have been available from the absence of positive evidence from the defendants. The defendants bear the onus, once *prima facie* incompatibility is established, to justify the limitations created by their actions or decisions. The standard of proof is high, requiring a degree of probability which is commensurate with the occasion, and must, by reason of the vulnerability of the plaintiffs, be strictly imposed.

...

The evidence does not support the proposition that the defendants thought extensively or creatively about solutions to the emergency crisis that was before them. A traditional, but limited, response emerged that imposed some significant limitations on the rights of a few. Broadly speaking, the resources available to government are a relevant factor when determining what reasonable limits on human rights can be justified.

In a free and democratic society based on human dignity, equality and freedom, the executive is expected to make a proper proportion of its resources available for the protection and advancement of its children. The defendants do not contend, appropriately, that the Victorian community lacks the resources that could be applied to advance less restrictive means of providing secure accommodation. By simply identifying four alternative places that are not suitable, the defendants fell well short in demonstrating that resources were inadequate for the provision of less restrictive measures.²⁶

²⁶ Ibid [471], [474]-[475].



It is relevant to understand the context of the *Certain Children* cases. The original trial, the appeal and the second trial were much publicised.

The need to respond to the damage caused by the rioting children at Parkville was self-evidently difficult and challenging. The riots in November were the subject of much commentary, indeed community concern.²⁷ Further, there was evidence that the damage from the riots prevented use of facilities that had previously been available to detain children in custody.

Another layer of background had arisen a few months earlier. In July 2016 an investigative television program, *Four Corners*, aired a report alleging grievous misconduct of those managing child detainees at the Northern Territory's Don Dale Juvenile Detention Centre. The allegations sparked a royal commission into the treatment of child detainees in the Northern Territory. Interest and commentaries on youth detention and the rights of the child are not novel.²⁸ However the *Certain Children* case brought into sharp focus the role of the courts in resolving disputes between the citizen and the state.

²⁷ See, eg, Wes Hosking and Fiona Hudson, 'Youth Crime the Latest Game in Melbourne for Teens', *Herald Sun* (online), 18 July 2016 <<http://www.heraldsun.com.au/news/law-order/youth-crime-the-latest-game-in-town-for-teens/news-story/6607d6e2f28763991184e86d9fa58172>>; Tom Cowie, 'Grand Theft Auto generation' to Blame for Spike in Crime: Chief Commissioner', *The Age* (online), 17 March 2016 <<http://www.theage.com.au/victoria/grand-theft-auto-generation-to-blame-for-spike-in-crime-chief-commissioner-20160316-gnl2v9.html>>; Emily Woods, 'Youth Crime 'Will Simply Not Go Away', Says Police Association Secretary Ron Iddles', *The Age* (online), 7 August 2016 <<http://www.theage.com.au/victoria/police-to-get-wider-powers-to-tackle-violent-youth-crime-20160807-gqmt3n.html>>; Richard Willingham, 'Malmsbury Riot: Youth Justice Is Out of Control, Pressure Mounts on Premier Daniel Andrews', *The Age* (online), 25 January 2017 <<http://www.theage.com.au/victoria/malmsbury-riot-youth-justice-is-out-of-control-pressure-mounts-on-premier-daniel-andrews-20170125-gtypkd.html>>; Wes Hosking, Kara Irving and Mark Butler, 'Melbourne Youth Crime Victims No Longer Feel Safe', *Herald Sun* (online), 31 January 2017 <<http://www.heraldsun.com.au/news/law-order/melbourne-youth-crime-victims-no-longer-feel-safe/news-story/f3e3162ffa71e41499df0c16ae1e288c>>.

²⁸ Chief Justice Marilyn Warren, 'Responding To Young People Offending' (The Hon Austin Asche AC QC Oration in Law and Governance, Charles Darwin University, 11 October 2016). See also Amanda Chambers, 'Children's Rights in Australia' (Speech delivered at Victoria University's 2015 Chancellor's Lecture, Melbourne, 28 October 2015).



It is a fundamental principle that 'government itself is bound by the same rules as citizens and that disputes involving governments are resolved in the same way as those involving private parties'.²⁹

The rule of law does not give rise to exceptions. In response to a submission raised by the Minister that the *Certain Children* case was a situation of dire necessity, Garde J reinforced this principal, observing:

'[t]he existence of an emergency, extreme circumstance or need for haste *confirms*, not obviates, the need for proper consideration to be given to relevant human rights'.³⁰

Ultimately, the successive decisions of Garde J, the Court of Appeal and Dixon J ensured that the protection built into the *Children, Youth and Families Act 2005* stipulating the children's entitlements in a corrective facility would be appropriately considered in a decision made by the Executive. The entitlements were not ornamental; they were standards that Victorians through the Legislature had agreed were necessary. In due course they were enforced by the Court.

This case was not, nor could it be, an assessment of how Victorians *should* treat its juvenile detainees. As the Court of Appeal said in its judgment

this Court (like the trial judge) is not concerned with, and expresses no view about, the merits of the decision made by the Minister to establish a youth detention centre at Barwon Prison. That is a matter of policy for Government, which is accountable to the electorate for its decisions. Quite properly, the courts play no part in such decisions.³¹

²⁹ Cheryl Saunders and Katherine Le Roy, 'Perspectives on the Rule of Law' in Cheryl Saunders and Katherine Le Roy (eds) *The Rule of Law* (Federation Press, 2004) 1, 5; see, for example *Commonwealth v Verwayen* [1990] 170 CLR 194, 417 (Mason CJ).

³⁰ *Certain Children v Minister for Families* [2016] VSC 796 [188] (emphasis added).



Courts have a unique power by virtue of their position in the tripartite system of government. A court can ask with the greatest consequence whether an act has been done lawfully. It has the power to declare an act invalid, it does not criticise or make recommendations. Even when declaring executive action valid, the court is holding the government to account. The risk to the rule of law if courts were unable to do this, if, for example, they were ‘too expensive or too slow’³² is significant.

In *Certain Children* the court was able to assemble to hear the trial and the appeal and hand down its decisions within only a few weeks. In the second trial, the judge produced 225 pages of reasons in only four weeks. The court acted with such expedition because it was necessary. In this age, the role of courts particularly as protectors of the rule of law requires agility to ensure decisions are made speedily if needed.

³¹ *Minister for Families and Children v Certain Children by their Litigation Guardian Sister Marie Brigid Arthur* [2016] VSCA 343 [10],

³² Cheryl Saunders and Katherine Le Roy, ‘Perspectives on the Rule of Law’ in Cheryl Saunders and Katherine Le Roy (eds) *The Rule of Law* (Federation Press, 2004) 1, 6.