

The Rule of Law

Hon Marilyn Warren AC
Chief Justice of Victoria
Commonwealth Law Conference
Tuesday 21 March 2017, 11.30 am to 1.00 pm

Late afternoon on Friday 2 December 2016, a writ of originating motion was filed in the Supreme Court of Victoria's Registry seeking the issue of a writ of habeas corpus and an order requiring the removal of a number of children who had been moved to detention in Barwon Prison, a maximum security prisonⁱ close to Geelong, south of Melbourne.

Two weeks earlier, a riot had broken out in Parkville, a suburb just north of Melbourne's CBD, at the Parkville Youth Justice Precinct. The facility in Parkville had 123 beds,ⁱⁱ accommodating children between 10 and 14 years old who had been sentenced to a youth residential centre order,ⁱⁱⁱ children from 15 to 20 years old who had been sentenced to a youth justice centre order^{iv} and children being held on remand or custody after being charged with an offence.^v In November 2016 about 80% of the children in Parkville were on remand.^{vi}

On a Saturday evening, November 12 2016, a number of children detained in Parkville rioted. Online it was reported that several youths had climbed onto the roof of the facility while up to 20 other children 'trashed'

ⁱ <http://www.corrections.vic.gov.au/home/prison/barwon+prison.shtml>

ⁱⁱ Deborah Glass, *Ombudsman's Report into Youth Justice* (6 February 2017) 9 [15] <<https://www.ombudsman.vic.gov.au/getattachmenUc6880f35-3cf3-4237-b463-9be28db448c8>>.

ⁱⁱⁱ *Children, Youth and Families Act 2005*, s 410.

^{iv} *Children, Youth and Families Act 2005*, s 411.

^v *Children, Youth and Families Act 2005*, ss 3(1) 'remand centre', 347, 478(a); See also *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2016] VSC 796, [12] ('*Certain Children v Minister for Families*').

^{vi} <http://www.theage.com.au/victoria/melbourne-youth-justice-centre-hit-by-more-unrest-after-tumultuous-weekend-20161113-gsoh3j.html>: see also Deborah Glass, *Ombudsman's Report into Youth Justice* (6 February 2017) 9 [14] <<https://www.om.budsman.vic.gov.au/getattachmenUc6880f35-3cf3-4237-b463-9be28db448c8>>.

their cells.^{vii} The children on the roof demanded ‘junk food and a phone’.^{viii} Police dressed in riot gear and dog handlers attended the facility to restore order.^{ix}

The damage caused was extensive. Fifteen beds were lost and common areas were rendered unusable.^x

The following night another riot broke out, again at the Parkville facility. The reports stated 40 of the children detained were involved in damaging property and setting off fire alarms.^{xi} Some of the children were carrying tools taken from a workshop.^{xii} For 17 hours, a stand-off ensued between emergency services and a number of the youths who had retreated to inaccessible areas of the facility.^{xiii}

After the riot ended and control of the facility handed back to the Department of Health and Human Services, an account was taken of the wreckage. 60 beds were lost, amounting to almost half of the accommodation at Parkville.^{xiv} 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’^{xv} 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.^{xvi} The accommodation was in many respects deficient,

vii <https://au.news.yahoo.com/a/33193853/teen-prisoners-riot-again-at-parkville-detention-centre/#page1>

viii <http://www.theage.com.au/victoria/melbourne-youth-justice-centre-hit-by-fresh-riot-officer-hurt-at-second-jail-20161112-gso268.html>

ix <http://www.abc.net.au/news/2016-11-13/melbourne-justice-centre-riot-police-dog-handlers-called/8021236>

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

xi <http://www.abc.net.au/news/2016-11-14/melbourne-youth-justice-centre-riot-police-called-second-time/8022206>

xii <http://www.abc.net.au/news/2016-11-14/melbourne-youth-justice-centre-riot-police-called-second-time/8022206>

xiii <http://www.abc.net.au/news/2016-11-14/melbourne-youth-justice-centre-riot-ends/8023882>;
<http://www.abc.net.au/news/2016-11-14/melbourne-youth-justice-centre-riot-police-called-second-time/8022206>.

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

xv <http://www.abc.net.au/news/2016-11-14/melbourne-youth-justice-centre-riot-police-called-second-time/8022206>

xvi *Certain Children v Minister for Families* [2016] VSC 796 [29]-[30].

with male detainees being housed in the female accommodation and some children provided ‘mattresses on the floor of rooms with no bathroom facilities’.^{xvii}

On Tuesday afternoon it was announced that a number of children would be sent to Barwon, a prison for adult offenders.

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.^{xviii}

On Thursday, the Minister for Families and Children published an Order in Council in the Victorian Government Gazette 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’.^{xix} Later that day, a number of children were moved to Grevillea.

The children had been housed at Grevillea for about two weeks when the writ was filed in the Supreme Court Registry. 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.

^{xvii} Ibid [33].

^{xviii} *Certain Children v Minister for Families* [2016] VSC 796 [40].

^{xix} Ibid [41]-[42]. Order in Council:
<http://www.gazette.vic.gov.au/gazette/Gazettes2016/GG2016S354.pdf#page=2>

Garde J heard the trial on the 12th, 13th, 14th, and 15th of December. Numerous submissions were made by counsel for Fitzroy Legal Service and Human Rights Law Centre who brought the claim, for the Victorian Government Solicitors Office representing the Minister for Families and Children and for the Victorian Equal Opportunity and Human Rights Commission who intervened in the matter. In responding to the claims so quickly, the government acted in accordance with the responsibilities placed upon government parties by the Model Litigant Guidelines,^{xx} an articulation of the expectations that the rule of law will be respected in particular by those in power.

Critical among the submissions was one from the plaintiffs that the government's decision to annex Grevillea as a remand centre suitable for children had not had due regard to certain considerations. First, 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.^{xxi} For example, children 'are entitled to have their developmental needs catered for'.^{xxii}

The plaintiffs also raised Victoria's *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.'^{xxiii} 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 human rights of the detained children. They identified, for example, ss 10(b) and 17(2) of the Charter which respectively record 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

^{xx} Department of Justice, Government of Victoria, Victorian Model Litigant Guidelines <<http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/victorian+model+liti+gant+guidelines>> 2(c).

^{xxi} *Children, Youth and Families Act 2005*, s 482.

^{xxii} *Ibid* s 482(2)(a).

^{xxiii} *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38(1).

their best interests simply by them being a child.

With admirable efficiency, Garde J delivered 86 pages of reasons on 21 December 2016; only six days after the hearing concluded. Ultimately, his Honour 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.^{xxiv} He declared the Order in Council invalid and ordered the government party to remove the children from the unit.^{xxv} After resistance from the government, the judge simultaneously stayed the order pending further order of the court stating it was 'simply because there [was] nowhere else that is satisfactory or safe for them to go.'^{xxvi}

His Honour 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.^{xxvii}

The Minister for Families and Children filed notice of her intention to appeal the decision. 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 week later. Christmas passed. On December 28 2016, the appeal commenced before a bench consisting of President Maxwell, Justice Weinberg and me.

The Court of Appeal affirmed the conclusion of Garde J. We upheld the finding that the Minister failed to take into account relevant

^{xxiv} *Certain Children v Minister for Families* [2016] VSC 796 [275]-[278].

^{xxv} *Ibid* [321].

^{xxvi} Transcript, T 443.20-443.22.

^{xxvii} *Certain Children v Minister for Families* [2016] VSC 796 [230], [321].

considerations which amounted to jurisdictional error and invalidated the Order in Council.^{xxviii} The appeal against the finding of unlawfulness because of incompatibility with the Charter was deferred to a later date and was subsequently discontinued. I note again that in agreeing to focus on the decisive issue, regarding the validity of the Orders in Council, the government again demonstrated its responsibility to embody a respect for the rule of law through its compliance with Victoria's Model Litigant Guidelines.^{xxix}

You may be wondering why I have recounted this to you. I will make this clear but first I want to fill out the picture a little more.

The pressure to respond to the damage caused by the rioting children was significant. The riots in November were not isolated incidents. Newspapers, in paper and online, repeatedly carried stories denouncing the youth menace.^{xxx} Further, it was clear that the damage from the riots prevented use of facilities that had been available to the Victorian government.

^{xxviii} See, eg, *Minister for Families and Children v Certain Children by their Litigation Guardian Sister Marie Brigid Arthur* [2016] VSCA 343 [5]-[6].

^{xxix} Department of Justice, Government of Victoria, *Victorian Model Litigant Guidelines* <<http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/victorian+model+liti+gant+guidelines>> 2(g)(iii).

^{xxx} 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>>.

However, when the response of the government was that children would be placed in what had been an adult facility at Barwon, many were surprised. For years, lobbying groups had focussed on remedying a similar situation in Queensland, claiming all the other states had left behind such practices. So the question emerged: were the government's actions in line with Victoria's system of law?

It is exactly this question that underpins the court's most critical role in protecting the rule of law. Requiring citizens to comply with the rule of law by adjudicating disputes and sentencing criminals are, of course, central to this. However, holding the executive to account is something that courts are uniquely positioned to do. In a common law system such as ours, even in the 'thin' conception of the rule of law - where the rule of law does not itself import any values but simply requires compliance with the external standards agreed by the legislature – 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.'^{xxxii}

The rule of law does not give rise to exceptions. All, even those institutions in power, are bound by it. There was a comment made by Garde J in his reasons concerning the human rights component of his decision which reinforced this principle. In response to a submission raised by the government that this was a situation of dire necessity, the judge said '[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.'^{xxxiii}

^{xxxii} 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.

^{xxxiii} *Certain Children v Minister for Families* [2016] VSC 796 [188] (emphasis added).

Ultimately, the decisions by Garde J and by the bench in the Court of Appeal showed that the checks built into the *Children, Youth and Families Act 2005* stipulating the children's entitlements in a corrective facility could not be disregarded in the decision made by the Minister. The entitlements were not ornamental; they were standards that Victorians had agreed were necessary.

Of course, courts are not the only guardians of the rule of law. After the decision was made to move children to the Grevillea unit at Barwon, the Commissioner for Children and Young People was regularly corresponding with the Department to monitor the conditions of the children.^{xxxiii} The Victorian Ombudsman has since released a report on the suitability of the facilities,^{xxxiv} and a parliamentary inquiry has been launched into the issues at Parkville and Malmsbury Youth Justice Centres including an investigation into the implications of incarcerating young people.^{xxxv}

And, as I have flagged, the government itself has responsibilities to obey the rule of law in disputes. For example, the Model Litigant Guidelines impose an obligation on government parties to consider avoiding or limiting legal proceedings through negotiation and to pay legitimate claims without litigation.^{xxxvi} This works, in part, to ensure that the government itself polices its actions for compliance with the rule of law.

However, notwithstanding these checks, 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

^{xxxiii} Deborah Glass, *Ombudsman's Report into Youth Justice* (6 February 2017) see, eg, 18-36 <<https://www.ombudsman.vic.gov.au/getattachment/c6880f35-3cf3-4237-b463-9be28db448c8>>.

^{xxxiv} Deborah Glass, *Ombudsman's Report into Youth Justice* (6 February 2017) <<https://www.ombudsman.vic.gov.au/getattachment/c6880f35-3cf3-4237-b463-9be28db448c8>>.

^{xxxv} Parliament of Victoria, *Inquiry into Youth Justice Centres in Victoria: Terms of Reference* (23 November 2016) <<https://www.parliament.vic.gov.au/lsic/inquiries/article/3194>>

^{xxxvi} 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(e), 2(f)

recommendations. The risk to the rule of law if courts were unable to do this, if, for example, they were ‘too expensive or too slow^{xxxvii} is significant.

It is for this reason that I tell the tale of the Barwon matter – the court was able to assemble to hear the trial and the appeal and hand down its decisions within only a few weeks of the writ being filed. It was able to hold the government to account, according to the standards that the legislature, on behalf of the community, had agreed it should be bound by. I’m pleased at the efforts of the court and its affirmation that the rule of law is a binding condition on Victoria’s society. In this age, vigilance to our role as protectors of the rule of law and mobility to ensure actions do not come too late are essential.

Finally, speaking of the power of passing judgment on those that act lawlessly, it is worth referring to the power we all have, simply as citizens. Societal censure can be a hugely important force. In recent years, we have witnessed the power of consumer sentiment in regulating the behaviour of large corporations. Just last week a beer company was boycotted in Australia for its involvement in an ad that was perceived to be freezing or impeding the same-sex marriage debate. This is an extreme example and the force is a nebulous and wanton one that has the capacity to be misdirected quite destructively. But it is, it cannot be refuted, a facility by which compliance with the rule of law can be monitored and its absence called out by any one of us.

^{xxxvii} 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.