ON THE BOTTOM OF THE PILE

Phillip Swain

Judicial independence and the Victorian Children's Court

The function of the court system is '... to be the forum in which impartial justice is administered according to the law ...'[1] Judicial independence and effective judicial administration are critical for this function to be realised. An independent judiciary should mean that there is freedom from pressure or influence in the making of decisions, which ought to be determined on the basis of legal principles alone.[2] The means to independence include, first, security of tenure for the judiciary including protection from removal save in clear and unambiguous circumstances and through acknowledged public accountability processes, and second, institutional independence — that is, independence of the judiciary to manage the resourcing and finances of the courts themselves.

Independence is engendered by certainty of tenure and the public commitment that judicial decision making ought not be subject to even oblique political interference. Australia might not have experienced direct interference into the judiciary by political or criminal elements, such has occurred elsewhere, but has endured a series of public assaults on the independence and tenure of judicial officers in several jurisdictions, by governments of varying political persuasions. The Australian experience has included '... the simple expedient of abolishing the [judicial] office which [the officers concerned] have held'.[3] In Victoria since the election of the Liberal Government in 1992 there has been public questioning by government and senior public servants of the role and performance of the Director of Public Prosecutions, the Commissioner for Equal Opportunity, the Coroner, The Guardianship and Administration Board, the Children's Court itself and its Senior Magistrate, and, in more recent times, the Victorian Auditor-General. Since the 1992 Victorian election the principal officers of all but the latter of these jurisdictions have resigned, in several instances after extensive political and public questioning of the role of the offices they held.

Legal and practice parameters of the Victorian Children's Court

Legal systems are imperfect vehicles with which to determine disputes involving families and children. These disputes involve such nebulous concepts as 'the best interests of the child'and 'custody' and 'guardianship', and difficult and complex judgments about parental behaviour that justifies state intervention.

Victorian Children's Court practice is governed by the *Children and Young Persons Act 1989* (the Act), introduced in 1989 after the 1984 Child Welfare Legislation and Practice Review (usually referred to as the Carney Report) into Victorian child welfare practice and legislation, which itself came as another in a series of major reviews of child welfare in Victoria since the 1950s.

The 1989 Act covered the jurisdictions of both child protection and juvenile crime, established a set of re-drafted grounds for intervention

Phillip Swain is a lawyer and social worker, and teaches social work at the University of Melbourne and at La Trobe University.

consequent on reports of alleged child abuse or neglect (s.63), and provided an expanded series of graduated outcomes for those children found to be in need of protection.

The Act by s.87(1)(k) requires that the powers of the Court be exercised 'in the interests of the child'and his or her protection: '[t]here is no punitive purpose to be served ... [powers] ... should be exercised ... solely for the purpose of protecting the child'.[4]

The Carney Report

The Carney Report recommended a 'Tribunal'structure for the Family Division of the Victorian Children's Court. It suggested (refer Volume II, p.239) a three-person panel of 'people with experience and expertise in child protection ... one of whom should be a lawyer ... the other two having expertise in child and family welfare and experience in community welfare respectively', and that the Court be presided over by a judge of equivalent status to a County Court judge. Victorian governments since then have been unwilling to adopt either recommendation. The previous Children's Court structure of a senior and other allocated magistrates has been retained, although there has been some support for a separation of the Children's from the Magistrates'Court as a means to greater independence.

Following the Carney Report particular aspects of Victorian child welfare practice have been subjected to a series of investigations and public debate, including the 'dual track'reporting system (under which reports of suspected child abuse could be made either to the Victorian Community Services Department, or to the police), and the mandatory reporting of suspected abuse.[5] Again, following the death of Daniel Valerio, and the interventions into the 'Children of God' sect, questions have been raised about the capacity of the 'system'to adequately protect children brought to its attention.[6] The 1996 Auditor-General's report provides further evidence that these questions remain unresolved.

Recent Victorian developments — a rude awakening?

It has been suggested that judicial officers have taken a greater interest recently in court administration, for various reasons — the litigation 'explosion', the implications of pre-trial procedures, and the development and enforcement of expanded remedies and 'far-reaching'dispositions.[7]

Each of these can be seen reflected in the work of the Children's Court in Victoria; each has operated to demand greater efficiencies of that Court.

For example, the mandatory reporting of suspected child abuse and neglect, introduced progressively in Victoria since 1993, is already having a massive effect on demand for the assessment and investigative resources of the child protection system. Reported rates of notification have increased by in excess of 50%, and the annual reports of Health and Community Services (Victoria) indicate that numbers of protection applications lodged in the Children's Court increased by 57% between 1992-93 and 1994-95. Such increases will be reflected in greater demands for adjudication and to further pressure on court facilities and personnel.

In 1993 an amendment to the *Children and Young Persons Act 1989* provided for the appointment of convenors to conduct pre-hearing conferences in disputed matters before the Family Division of the Children's Court. Introduced to reduce waiting time before hearings, and to remove from the court list matters which are able to be settled, the development nevertheless has ramifications for the workings of the Court. Pre-hearing conferences, like the various other predetermination procedures (such as first and second directions hearings, and the like), entail a commitment of administrative time and of the physical facilities necessary for the conferences to be conducted. The conferences also necessitate training obligations both for convenors and for judicial and other court staff unfamiliar with such approaches, and a continuing obligation to provide judicial oversight in order to meet the legislative requirements that all be done in the 'interests of the child'— an obligation which under s.87 of the Act rests on Magisterial shoulders alone. Initially convenors were specialist appointments from outside the existing court personnel; on 16 October 1995 the Melbourne *Herald-Sun* reported the suggestion that registrars and deputies will in the future carry out this role. Notwithstanding the questions of skill and whether such a step would jeopardise the independence of pre-court processes, this development has been rationalised on the basis of the anticipated costs of extension of pre-court conferences to outer-suburban and country regions. The Children's Welfare Association of Victoria described use of registrars in this way as '... a cheapskate way to conform with the legislation'(*Herald-Sun,* 16 October 1995). The evaluation of pre-hearing conferences in Victoria strongly supported the need for independent specialist staff to undertake the role of conference convenor.[8]

The Victorian Act, too, encompassed a greater range of potential dispositions than its predecessors, and envisaged an increased role for the Court in monitoring the implementation of the orders it makes. So, for example, the Children's Court now must determine whether Custody to or Guardianship to Secretary orders ought to be extended beyond their initial time limit, whereas previously such extensions could be authorised through internal administrative review by the appropriate statutory department.

Each of the above has increased or is expected to increase the demands on the Children's Court, at the same time as the Court — like the rest of the legal system — is being encouraged to improve access and to deal more efficiently with a complex jurisdiction. Other than in relation to the establishment of pre-hearing conferences in the Family Division of the Court, there is little evidence of an increased capacity in the Children's Court to meet the changes and expectations mentioned above. On 2 September 1993 the *Age* reported that:

> ... the Children's Court is so starved of resources [that] it has been without a typist or receptionist since June, forcing magistrates to handwrite correspondence and reports. The court building is out of date and overcrowded just three years after it was opened, forcing a conference room to be used as a court room. The move to mandatory reporting of child abuse is expected to stretch court resources even thinner.

In the same article the then Senior Magistrate acknowledged that the Court was 'very under-resourced'. More recently the Court has been described as working in crowded and primitive circumstances, making quality outcomes impossible. The resources devoted to the jurisdiction have changed little in recent years.

A threat to judicial independence?

The 1985 Victorian Law Department report into the operation of the courts in that State suggested that, to meet community expectations regarding the administration of justice, courts need to be adaptable, accessible, efficient, effective and comprehensible. Similar sentiments were expressed by

the 1994 Report 'Access to Justice'(the Sackville Report) which argued cogently that reformation of the justice system in Australia ought to be built on the principles of equality of access to judicial services, national equity, and equality before the law. In the light of these analyses, how might the Victorian Children's Court be perceived?

Independence and tenure of magistrates

Being a magistrate in any jurisdiction has been characterised as a 'lonely job', but the Children's Court has been described by magistrates themselves as 'messy', a 'real pain', and 'one of the hardest jurisdictions in which to work'.[9] The demands of the task of 'judging'are high:

> The qualities the community requires in a modern judge are: a person with a strong independence of will, a good knowledge and experience of law, a good legal mind, a good understanding of human nature, and a temperament suited to judicial work. Judges must devote the considerable time, effort and thought necessary to reach correct decisions ...[10]

One could ask, given these expectations, who would or could be a judge or magistrate at all? Despite the daunting expectations, morale and commitment amongst the Victorian magistracy has been found to be a generally high but fragile commodity.[11]

In Victoria, the appointment of all magistrates is governed by the provisions of the *Magistrates'Court Act 1989*. Magistrates are assigned to the various jurisdictions within the ambit of the Magistrates'Court, or to the Children's Court itself, by the Chief Magistrate who in the latter instance must (under s.11) have regard to the particular magistrate's experience in 'matters relating to child welfare', the only requirement peculiar to magisterial appointment to the Children's Court. The assignment can be revoked by the Chief Magistrate at any time (s.11). From within the ranks of those magistrates assigned to the Children's Court the Senior Magistrate is appointed by the Governor-in-Council on the nomination of the Chief Magistrate (s.12).

The potential remains for political or executive influence over the appointment of both the senior and other magistrates to the Children's Court. Whilst under s.14 of the *Children and Young Person's Act* magistrates have the formal protections and immunities of a Supreme Court judge, magistrates have no security of specific tenure to a Children's Court appointment, notwithstanding any personal commitment to that jurisdiction or experience in it. There is no legislative obligation for due cause or reason to be shown should the assignment to the Children's Court of a particular magistrate be withdrawn by the Chief Magistrate, or should the Chief Magistrate's nomination as Senior Children's Court Magistrate not be endorsed. Although an appointment of the Governor-in-Council, recent Victorian experience has shown that considerable pressure can be brought to bear on the incumbent Senior Children's Court Magistrate through political and media comment. Like the criticism of tribunal and similar appointments that they could be subject to pressures, express or implied, to comply with government policy, the limited tenure afforded to Children's Court magistrates has the potential to undermine independence and public confidence in that independence. The recent Auditor-General's Report has re-affirmed the earlier suggestion of the Carney Report that the Children's Court be established as a separate jurisdiction headed by a judge of County Court status.

Resourcing of the Children's Court

The Australian reality is that the judiciary is dependent on the government of the day for the financial and administrative resources necessary to run the court system. The courts, and judicial and court officers, are funded from the public purse and governments are generally reluctant to give to the judicial system unrestricted and unquestioned access to financial resources. The demands of public accountability for use of the community's resources means that access to them will always be mitigated by economic and political considerations, and by the relative importance with which the judicial system (and particular component jurisdictions within it) is viewed vis-a-vis other priorities of government.

Responsibility for the financing of the Children's Court falls to the Justice Department, under the portfolio of the Victorian Attorney-General. As such, the Court must compete on an annual basis for resources, against other divisions of the Magistrates Court and the various priorities within the Justice portfolio. The Court officers (Principal Registrar, Registrars and Deputies) are appointed under the *Public Service Act 1974* (Vic.) and, as such, are employees of the Justice Department, not of the Court. If additional such staff are required, the Children's Court has no direct power to appoint.

The Victorian superior courts, and even the Victorian Magistrates'Court itself, have undergone a considerable revolution in the use of information technology, computer-based case recording and management, and adoption of case-flow approaches to dealing with the business of the courts. This revolution has not, to date, arrived at the Children's Court. That Court is not computerised; its files and information management are paper-based and to a large

extent manually recorded and extracted; its manual filing system is outmoded and relies on a knowledge of the specifics of hearing dates to locate a particular client file. In this jurisdiction it is still true that:

> ... the sluggish performance of [the Court] today is due in part to the sludged blood of [its] records systems which, astonishingly, have changed little in two hundred years; modern forms management, storage and retrieval systems, are largely unknown ...[12]

In September 1993 the *Age* reported that resources allocated to computerise the Children's Court were spent instead on the adult court system, and no significant improvements in the information systems at the Court have occurred since. The absence of appropriate information and management systems makes improvement in the efficient administration in the Children's Court jurisdiction more difficult to achieve, but also means that the data on which an argument for change could be mounted is harder to assemble. It has been suggested that the Court facilities are inadequate to meet the needs of families and children, and that some may breach international expectations under the United Nations Convention on the Rights of the Child.[13]

In matters involving children there are international, legislative and ethical principles which suggest that the Children's Court must be sufficiently resourced so as to ensure informed judgments about their welfare.

On the bottom of the pile?

By its very nature, the Children's Court relies on the availability of an active, accessible and competent network of services to support the families and children with whom it must deal, the vast majority of whom continue to reside within the community under supposedly supportive arrangements. Given this unique partnership of Court and community, it is not surprising that the Children's Court is from time to time driven to comment publicly about the effect of government policy on those appearing daily before it. There is, of course, an inherent conflict in such a stance between, on the one hand, the ethical and legal commitment to such principles as 'the welfare of the child'as enshrined in the enabling legislation; and, on the other, the practical reality that the Court is effectively dependent on government for its resources. Hence there is the possibility that any overt questioning of the impact of government policy may jeopardise future funding negotiations or result in interference in the jurisdiction or the assignment of magisterial tasks.

Children, generally, are unable to speak for themselves and are frequently overlooked even in policy debates in which they have a direct interest. Given the nature of the jurisdiction, it is arguably ethical and incumbent on its magistracy to speak publicly about areas of concern, especially as those most affected by the jurisdiction — children — are realistically unable to do so. This is perhaps especially so when legislative obligations are thwarted by paucity of resources and the lowly status of the Court.

The difficulty for the Children's Court is that it is literally 'on the bottom of the pile'. Those who practice in or frequent the Court are acutely aware of the complexity of the matters which it must determine, and of the great potential for good and ill which the intervention of the Court can mean for child and family. For others, though, the Children's Court remains a shadowy domain, knowledge of which comes from the occasional media report into generally extra-ordinary matters of abuse, which do not necessarily reflect the day-to-day reality.

If 'there are no votes in courts'[14] then it could be said that the Children's Court is doubly jeopardised — that there are no votes in children either. Hence the Court's independence and efficient administration is very largely dependent on the largesse of government, and on the status accorded by the community to its children. The separation of the Children's Court from the Magistrates'Court (as suggested by Justice Fogarty of the Family Court, reported in the *Age,* 18 October 1995), together with elevation of the Senior Magistrate to the status of a County Court judge (recommended by the Carney Report a decade ago), would not only assist the independence of the Court, but would acknowledge the critical status of children within the court system and community.

The juxtaposition of the under-resourced and under-valued Children's Court directly opposite the burgeoning lavish development of the Victorian casino, has not gone unnoticed in the current debates about the Victorian child protection system. To date, there is not much evidence to counter the conclusion that, when considered alongside the preoccupations of government and community, children and the Children's Court are still very much 'on the bottom of the pile'. There they will remain unless there are clear and unambiguous commitments to the independence of the Court, and to the provision of physical and financial resources, such that it can meet its legislative and international obligations to children.

References

1. Law Department (Vic.), Future Organisation and Operation of Courts in Victoria, May 1985, p.7.
2. King, L., 'Minimum Standards of Judicial Independence', (1984) 58 *Australian Law Journal* 341.
3. Kirby, M., 'Wreckers at Work', (1994) 19(3) *Alternative Law Journal* 103 at 106.
4. *J v Liesche* (1987) 11 Fam LR 417 at p.421; see also Chisholm, R., 'Natural Justice in the Children's Court: The High Court's Decision in J v Liesche', (1986-87) 1 *Australian Journal of Family Law* 267 at 269.
5. Refer to Law Reform Commission of Victoria, 'Sexual Offences Against Children Melbourne, 1988; Goddard, C., 'Victoria's Protective Services: Dual Tracks and Double Standards', Victorian Society for the Prevention of Child Abuse and Neglect 1988; Fogarty, J. and Sergeant, D., 'Protective Services for Children in Victoria: an Interim Report', Community Services Victoria, 1988; Fogarty, J., 'Protective Services for Children in Victoria', Health and Community Services Victoria, 1993.
6. See, for example, Goddard, C. and Liddell, M., 'Child Abuse and the Media: Victoria Introduces Mandatory Reporting after an Intensive Media Campaign', (1993) 18(3) *Children Australia* 23; Swain, P., 'Vale Daniel: Is the System Failing to Thrive?', (1993) 18(1) *Children Australia* 20.
7. Hammond, R., 'The Judiciary and the Executive', (1991) 1 *Journal of Judicial Administration* 88 at 101 ff.
8. Lagay, B. and others, 'To Seek the Best Possible Outcomes — The Evaluation of Pre-Hearing Conferences in the Family Division of the Children's Court of Victoria', Department of Social Work, Melbourne University, December 1994.
9. Douglas, R. and Laster, K., 'Women Magistrates — And Now for Something Completely Different'(1992) *Law Institute Journal* 907; Douglas, R. and Laster, K., 'So you Want to be a Magistrate?'(1993) *Law Institute Journal* 460.
10. McGarvie, Hon. Justice R., 'The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence'(1992) 1 *Journal of Judicial Administration* 236 at 248.
11. Douglas and Laster 1993, above, p.461.
12. Quoted in Civil Justice Committee Report to the Honourable the Attorney-General Concerning the Administration of Civil Justice in Victoria Volume 1, 1984, p.312.
13. Refer Brewer, G. and Swain, P., 'Where Rights are Wronged — A Critique of Australia's Compliance with the United Nations Convention on the Rights of the Child', National Children's Bureau of Australia, Melbourne, 1993. See also *Age* articles, June 1996.
14. Civil Justice Committee Report, above, p.315.