SOLICITOR-GENERAL
WESTERN AUSTRALIA

OPINION ON CONSTITUTIONAL VALIDITY OF COURTS LEGISLATION AMENDMENT (MAGISTRATES) ACT 2021

Introduction

1. The *Courts Legislation Amendment (Magistrates) Bill 2021* (**Amendment Act**) has been introduced into the WA Parliament, to amend the *Children's Court of Western Australia Act 1988* (WA) (**CCA**). The Amendment Act provides for amendment to, and insertion of, various provisions into the CCA and the *Magistrates Courts Act 2004* (WA) (**MCA**). For convenience, in this advice we will refer to proposed sections of the CCA or the MCA, to be inserted by the Amendment Act, simply as "proposed sections of the CCA or the MCA".

2. The Magistrates Society of WA and the Law Society of WA have raised concerns about the constitutional validity of the Amendment Act. That is in a context where, historically, all magistrates have been appointed to hold commissions as members of both the Magistrates Court and the Children's Court. The prospect of dual appointments is specifically contemplated by section 12(1a) of the CCA, which provides that a magistrate who has taken the oath or affirmation under the MCA does not need to take a further oath or affirmation under the CCA, when appointed to the Children's Court.

3. As a consequence of their dual appointments, magistrates sitting in regional or suburban courts can dispose of the general business of the Magistrates Court, as well as cases which are in the Children's Court. That is obviously a convenient position, rather than having to send specialist Children's Court magistrates to every regional or suburban court throughout WA. In the Perth CBD, there is a physical separation between the buildings in which the Magistrates Court and the Children's Court are located. Certain magistrates in the Perth CBD sit in the Children's Court building and deal exclusively with Children's Court cases. Nevertheless, they are still dually appointed.

4. As the Magistrates Court and the Children's Court are separate courts, there are two separate heads of jurisdiction. The Chief Magistrate is the head of the Magistrates Court. The President of the Children's Court, who has the status and privileges of a District Court judge, is the head of the Children's Court.

5. Section 10(3) of the CCA provides that the Governor may appoint as many magistrates to the Children's Court as are needed to deal with the workload of the Children's Court. It is therefore necessary to consider the workload of the Children's Court, and how that is allocated to magistrates. The fact that magistrates hold dual commissions for the Magistrates Court and the Children's Court means that there is one set of individuals who undertake the duties of both courts. For regional and suburban magistrates, the workload of the Children's Court in each location depends upon the cases which require the magistrate to

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sit as a Children's Court magistrate in that location. The workload of Perth-based Children's Court magistrates depends upon the cases heard in the Perth CBD.

6. Prior to the amendments contained in the Amendment Act, the allocation of the workload to magistrates sitting as magistrates of the Children's Court has been decided as a matter of judicial comity between the Chief Magistrate and the President. However, judicial comity does not resolve situations where there is disagreement between the two heads of jurisdiction, or where a magistrate disagrees with the proposed allocation of work.

The Concerns of the Magistrates Society and the Law Society

7. To understand the concerns of the Magistrates Society and the Law Society it is necessary to refer to the two main effects of the provisions of the Amendment Act.

8. The first effect is to confer a range of specific administrative powers upon the President of the Children's Court to manage the business of that Court. This is achieved by proposed section 12A of the CCA, which is in very similar terms to section 25 of the MCA. We are unaware of any suggested constitutional issue about the enactment of this provision, which confers particular administrative powers upon a head of jurisdiction to direct members of the Court about carrying out the business of the Court.

9. The second major effect of the Amendment Act is for proposed section 11 of the CCA to prescribe a statutory mechanism for the allocation of work between magistrates who each hold commissions as a magistrate of the Magistrates Court and the Children's Court. Proposed section 11 may lead to magistrates who are based in one court having to perform increased work in the other court.

10. It has been suggested that proposed section 11 is constitutionally invalid because it threatens judicial independence. This is upon the basis that unilateral decisions of the President of the Children's Court to reduce the workload of Perth-based magistrates of that Court, who typically hear only Children's Court cases, may impermissibly affect the decisional independence of Perth-based magistrates. As far as we understand it, the constitutional objection does not apply to adjustments to the workload of regional or suburban magistrates.

11. In our view, for reasons set out below, proposed section 11 of the CCA will be constitutionally valid, if enacted.

12. We are unaware of any other suggestions of constitutional invalidity made by the Magistrates Society or the Law Society. Our advice is therefore confined to the constitutional validity of proposed section 11 of the CCA.

Existing Statutory Provisions

13. The Magistrates Court of Western Australia is established by section 4 of the MCA. The Children's Court of Western Australia is an entirely separate court established by section 5 of the CCA.

14. Magistrates may be appointed to the Magistrates Court by a commission under the Public Seal of the State, pursuant to clause 3, Schedule 1 of the MCA.

Magistrates may also be separately appointed to the Children's Court by a separate commission under the Public Seal of the State, pursuant to section 10 of the CCA.

15. The Chief Magistrate may direct a magistrate in respect of his or her functions as a magistrate of the Magistrates Court. Pursuant to section 25(1) of the MCA, the Chief Magistrate may: specify which case or cases, or class or classes of case, the person is to deal with or in which division of the Court the person is to sit; specify which class or classes of the judicial functions that the person has under written laws, whether as a magistrate or otherwise, the person is to perform for the time being; specify which administrative duties the person is to perform for the time being; and specify where, when and at what times to deal with those cases or perform those functions or duties.

16. A judge or judges may be appointed to the Children's Court, by commission under section 7 of the CCA. A judge shall be the President of the Children's Court: section 7(8) of the CCA. Judges appointed to the Children's Court have the entitlements of a District Court Judge: section 7(3) and (4) of the CCA.

17. The President of the Children's Court may direct a judge, magistrate or JP to sit at any place where the Court has a registry and may direct concurrent sittings of the Court at the same place for the prompt disposal of the Court's functions. The President is responsible for the administration of the Court, the disposition of the business of the Court and for its practice and procedure: sections 13(5) and 37(1) of the CCA.

18. The President of the Children's Court does not presently possess the statutory power to give specific directions as to the functions of a magistrate sitting in the Children's Court. Proposed section 12A of the CCA will be in similar terms to section 25 of the MCA (referred to above). As explained, no constitutional issue has been raised about the validity of proposed section 12A.

19. Proposed section 25(6) of the MCA makes it clear that the Chief Magistrate cannot give a direction under section 25(1) of the MCA in relation to a person's functions as a magistrate of the Children's Court.

Proposed section 11 of the CCA

20. Proposed section 11 only applies to a magistrate who holds commissions for both the Children's Court and the Magistrates Court. Such a magistrate is defined to be a "dually appointed magistrate" by proposed section 11(1).

21. Proposed section 11 provides for notice to be provided by the President of the Children's Court to the Chief Magistrate about the workload of particular dually appointed magistrates. Proposed section 54 is a transitional provision. It means that the workload of magistrates continues after the commencement of the Amendment Act as it was immediately prior to the Amendment Act coming into effect. The provision operates as if a notice had been given by the President to the Chief Magistrate that, to deal with the workload of the Court, it was necessary for the time being for each magistrate to perform Children's Court functions on the basis on which those functions were performed before the Amendment Act commenced, and the Chief Magistrate had consented to each magistrate performing functions on that basis.

22. Proposed section 11(2) addresses the situation where the President considers that it is necessary or desirable for a particular dually appointed magistrate to perform Children's Court functions. Proposed section 11(4) addresses the converse situation where the President considers that it is not necessary or desirable for a particular dually appointed magistrate to perform Children's Court functions. Both subsections provide for notice to be given by the President to the Chief Magistrate. Both subsections depend upon the President's consideration of the workload of the Court. Subject to that, by proposed subsection 11(6), the President has an absolute discretion and is not required to take into account the seniority or length of service of the magistrate or any other matter.

23. Where a notice is given by the President under proposed subsection 11(2), the increase of a magistrate's workload to undertake more duties in the Children's Court requires the consent of the Chief Magistrate. See proposed subsection 11(3). That is because the increase of workload in the Children's Court will have a corresponding effect upon the ability of the magistrate to undertake duties in the Magistrates Court. However, where notice is given by the President under subsection 11(4), to reduce the duties of a magistrate in the Children's Court, no consent of the Chief Magistrate is required, as this will only increase the ability of the magistrate to undertake duties as a magistrate in the Magistrate's Court. It is then a matter for the Chief Magistrate whether he or she gives directions to that magistrate regarding further duties in the Magistrates Court. However, the reduction in the magistrate's Children's Court duties is a matter which the Chief Magistrate is required to take into account in giving directions under section 25 of the MCA. This is by reason of proposed section 11(5) of the CCA.

24. There is a particular matter of construction which we should mention. We do not consider that a notice provided under proposed section 11(2) could be used to reduce the workload of a Children's Court magistrate. As explained, proposed section 11(2) applies where the President considers it necessary or desirable that a magistrate should "perform" Children's Court functions. On the other hand, proposed section 11(4) applies where the President considers that it is not necessary or desirable for a magistrate to perform Children's Court functions at all or on the basis that previously applied. This contrasting language, as well as the evident difference in the consent requirements, in our view compels the construction we have set out in the last paragraph.

25. The effect of a notice under proposed section 11(2) or (4) does not remove any commission held by a magistrate in either court. By reason of section 11(7), a further notice can always be given subsequently which increases or decreases the duties of that magistrate in either the Magistrates Court or the Children's Court.

The Constitutional Question

26. The constitutional question is whether proposed section 11 of the CCA would substantially detract from and interfere with the reality and the appearance of the independence of the Children's Court, contrary to Ch III of the Commonwealth *Constitution* and the principle derived from ***Kable v DPP (NSW)*** [1996] HCA 24; (1996) 189 CLR 51.

27. As far as we can ascertain, there are two strands to the ***Kable*** argument. The first is that the proposed section 11 would substantially interfere with the reality and appearance of the independence of magistrates who have performed functions in the Children's Court. The second is that the proposed section 11 would substantially detract from the statutory force of appointment to, and the security of tenure of magistrates of, that Court. We understand that these issues are only raised in so far as proposed section 11 would enable a reduction in the Children's Court work of a magistrate who had performed functions in the Children's Court.

28. Before dealing with these arguments, it is helpful to refer to the scope and consequences of the constitutional issues which we have just identified.

29. As we have explained, we do not think that, properly construed, a notice under section 11(2) could be used to reduce the workload of a magistrate in the Children's Court. Hence, any challenge to the constitutional validity of subsections 11(2) and (3) falls away, to the extent that it is a challenge which only applies in so far as these provisions would enable a reduction of a magistrate's workload in the Children's Court. Further, the constitutional challenge appears to be limited to Perth-based Children's Court magistrates, who exclusively perform functions of the Children's Court.

30. It follows that the constitutional challenge essentially appears to be directed at the ability of the President to give a notice under proposed section 11(4) to reduce the workload of a Perth-based Children's Court magistrate.

31. These observations suggest that it would be odd if the ***Kable*** principle could be used to invalidate legislation such as proposed section 11, which contains an administrative power, when the true complaint seems to be that there is a legislative change to a pre-existing requirement that Perth-based magistrates who carry out functions of the Children's Court are to do so exclusively.

32. The reality is that there is no such pre-existing requirement. There is no particular legislative reason why Perth-based magistrates of the Children's Court should have any expectation that they would sit exclusively to perform functions of the Children's Court. The legislation does not at all distinguish between regional and suburban magistrates, and Perth-based magistrates.

Chapter III of the Constitution and Decisional Independence

33. The ***Kable*** principle has been described by French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ as follows: "The principle for which *Kable* stands is that because the *Constitution* establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid": ***Attorney-General (NT) v Emmerson*** [2014] HCA 13; (2014) 253 CLR 393 at [40]. See also the recent statement of principle in ***Minister for Home Affairs v Benbrika*** [2021] HCA 4; (2021) 95 ALJR 166 at [81] (Gageler J), [158] (Gordon J).

34. It is not possible to state exhaustively what features of legislation may be regarded as impermissibly impairing a court's institutional integrity: eg ***Forge v ASIC*** [2006] HCA 44; (2006) 228 CLR 45 at [63]-[64] (Gummow, Hayne and Crennan JJ). It is a matter of examining the substantive effect of the totality of the legislation in each particular case: eg ***Kuczborski v Queensland*** [2014] HCA 46; (2014) 254 CLR 51 at [106] (Hayne J); ***Condon v Pompano Pty Ltd*** [2013] HCA 7; (2013) 252 CLR 38 at [137] (Hayne, Crennan, Kiefel and Bell JJ). However, while it is not possible to state exhaustively the features of legislation which may lead to the conclusion that Ch III has been contravened, it is possible to analyse the case law in which Ch III has been applied to strike down legislation.

35. There are only four decisions of the High Court of Australia where legislation has been held invalid upon the basis of the ***Kable*** principle. These are ***Kable*** itself, ***International Finance Trust Co Ltd v NSW Crime Commission*** [2009] HCA 49; (2009) 240 CLR 319, ***South Australia v Totani*** [2010] HCA 39; (2010) 242 CLR 1 and ***Wainohu v New South Wales*** [2011] HCA 24; (2011) 243 CLR 181.

36. None of these is in any way similar to the present case. All of these concerned the manner in which a court exercised judicial power. By contrast, proposed section 11 is concerned with the administration of the Children's Court.

37. In three cases, a function or power was conferred upon a court which was not necessarily inconsistent, by itself, with a Ch III court's functions. However, in each case, the process provided for carrying out the function was inconsistent with the institutional integrity of the court because it required resolution of an issue which involved imposing a process upon the court which impermissibly intruded into the court's decision-making role, or effectively enlisted the court (by reason of a narrowly prescribed process) into making a decision dictated by the Executive.

38. In ***Kable***, the relevant law empowered a State Supreme Court to order the detention of a named person where, upon considering the relevant statute as a whole, the NSW Parliament was using the Court to implement a plan to keep that person detained in custody upon the basis of evidence which was not admissible in legal proceedings.

39. In ***International Finance***, the relevant law conferred the function of making a freezing order upon a court, where the process involved an ex parte order with ongoing effect, based upon a suspicion of wrongdoing and without scope for discharge of that order if the duty of full disclosure on an ex parte application had been breached.

40. In ***Wainohu***, the law conferred the function of making declarations about criminal organisations upon judges of a State court. However, the prescribed process was incompatible with the institutional integrity of the State court as it exempted judges from giving reasons for decision.

41. The fourth case, ***Totani***, was different. The function conferred upon the court was, by itself, inherently inconsistent with the functions of a Ch III court. The legislation required a court to impose and enforce a control order following a declaration by the Executive that an organisation was a criminal organisation.

The findings that formed the basis for the declaration made by the Executive could not be tested or challenged judicially except in very limited circumstances. The conferral of that function enlisted the court to do the will of the Executive.

42. As observed, these cases are markedly different from the present case. For these reasons, there is no precedent which directly supports the view that the proposed section 11 of the CCA is contrary to Ch III of the Commonwealth *Constitution*.

43. The focus of the cases just mentioned is upon the effect of legislation upon judicial function and decision-making. The principle of "decisional independence", also referred to as internal judicial independence, is the freedom to determine a case without improper influence or pressure in any form, including any promise of reward or threat of reprisal. Decisional independence may be compromised by the influence of executive government (eg ***Totani***). It might also include independence from another judicial officer.

44. In ***Re Colina; Ex parte Torney*** [1999] HCA 57; (1999) 200 CLR 386, Gleeson CJ and Gummow J said, at [29]:

> "It is frequently overlooked that the independence of the judiciary includes independence of judges from one another. The Chief Justice of a court has no capacity to direct, or even influence, judges of the court in the discharge of their adjudicative powers and responsibilities. The Chief Justice of the Family Court has, by virtue of s 21B of the *Family Law Act*, responsibility for ensuring the orderly and expeditious discharge of the business of the Court. That administrative responsibility does not extend to directing, or influencing, or seeking to direct or influence, judges as to how to decide cases that come before them. As a member of an appellate bench, the Chief Justice may be a party to decisions which are authoritative or influential in relation to the decision-making of single judges, but that is a different matter, and is of no present relevance."

45. However, it should be recognized that these comments were made in the context of addressing an argument about the perception of bias. They were not made in response to any challenge to the constitutional validity of particular legislation.

46. As explained, the proposed section 11 is essentially an administrative power which permits the allocation of proper workload across two courts which are administered by common individuals. Presently, there is no statutory framework for this to occur.

47. We do not consider that the President's administrative power contained in proposed section 11 is exceptional, or embeds a systemic issue which affects the decisional independence of Children's Court magistrates into the statutory framework. The need for work to be allocated by a head of jurisdiction exists in every court. The legislation requires decisions about a particular dually appointed magistrate to be made upon the basis of workload. There should be no assumption that the President (who is equivalent to a District Court judge) would disregard this requirement. In any event, that requirement means that there is no systemic issue. It should not be presumed that the existence of a power to allocate work by a senior judicial officer would ever be used to procure

or influence a specific outcome upon particular judicial decisions made by a magistrate.

48. Proposed section 11(6) provides the President with an "absolute discretion" to reduce the workload of a Children's Court Magistrate. However, such a discretion must still be exercised in a bona fide and non-arbitrary way. See ***Shrimpton v The Commonwealth*** (1945) 69 CLR 613 at 619-620, 627, 629-630, 632. This means that the power to issue a notice under section 11(4) must only be used in the circumstances prescribed by the statute, where "the President considers that, to deal with the workload of the Court, it is not necessary or desirable for the magistrate for the time being to perform Children's Court functions" at all or on the basis which previously applied.

49. To put our conclusions in a slightly different way, if the Children's Court was a division of the Magistrates Court, we do not think that there could be any complaint about constitutional invalidity if there was a power to re-allocate a magistrate between two different divisions of the Magistrates Court to undertake duties relating to young offenders and general duties. Indeed, a similar power to direct a magistrate in the Magistrates Court as to which division the magistrate is to sit in already exists in section 25(1)(a) of the MCA. The separation of the Magistrates Court and the Children's Court into two courts, rather than into two divisions of a single court, should not change this position as a matter of substance, where a magistrate is already a member of both courts. The only real difference is that it becomes necessary to provide for a consultation mechanism between two heads of jurisdiction.

50. Accordingly, we do not think that there is any systemic issue affecting the decisional independence of magistrates in any particular case by legislation which confers an administrative power to allocate work on the President of the Children's Court, and which gives the President the power to make an under-utilised magistrate available to carry out work in another court of which that magistrate is already a member.

51. Likewise, we do not consider that the proposed provisions contained in the Amendment Act detract from the security of tenure of dually appointed magistrates. Magistrates who are under-utilised in the Children's Court and made available for duties in the Magistrates Court still hold commissions for both courts. They have secure tenure in both courts, but may be re-allocated between the courts as necessary.

52. As we have previously suggested, we think that the difficulty which any constitutional challenge faces is that there is no existing legislative requirement that Perth-based magistrates who carry out Children's Court functions are to do so exclusively. Consequently, there is no change to the constitution or composition of the Children's Court which is brought about by proposed section 11. We do not consider that the ***Kable*** principle will invalidate a provision such as proposed section 11 which simply amplifies the procedural and administrative powers of the President of the Children's Court and the Chief Magistrate to ensure the full utilization of magistrates.

Conclusion

53. For these reasons, we do not consider that the proposed section 11, or any part of it, is constitutionally invalid. Instead, it promotes the efficient administration of justice, by allowing the workload of magistrates dually appointed to the Children's Court and the Magistrates Court to be allocated as resources are available.

54. As we have mentioned, no other grounds for constitutional invalidity have been raised by the Magistrates Society or the Law Society.

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