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Australian Principals Centre Ltd
ACN: 071 008 216
The University of Melbourne
Hawthorn Campus
Level 2, 442 Auburn Road
Hawthorn Victoria 3122
Australia

Ph: (03) 9810 3306
Fax: (03) 9810 3137
Email: apc@apcentre.edu.au
Web site: www.apcentre.edu.au

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Editor:
Keith Redman

CEO, APC:
Nick Thornton

JUDGE JENNIFER COATE
President, Children's Court
of Victoria

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CONTEMPORARY DEVELOPMENTS IN THE LAW RELATING TO CHILDREN AND THE CHILDREN'S COURT

by Judge Jennifer Coate

INTRODUCTION

In preparing for this paper, I was aware of the need to balance the abstract with concrete examples.

This reminded me of a story about an elderly man who lived on the outskirts of Melbourne. He was retired and used to stand outside his house, watching parents and children on their way to school. He took to being very critical of parents for the way in which they spoke to their children — he chided them and remonstrated with them, for not being patient enough and not taking the time to explain things well enough to their children.

One day, this gentleman had his driveway concreted. He was very happy with the result but woke up in the morning to find dozens and dozens of tiny handprints in the newly laid concrete. That morning, when the children walked past on their way to school, he yelled and screamed — abusing them for what had happened to his driveway.

One of the parents was quite surprised by this and said "Look, you're always telling us to take time with the children, talk to them and respect them. What happened to all of that? " "Ah well, yes," he said, "but that was in the abstract and this is in the concrete."

So, talking as one person who deals in both the abstract and the concrete, to others who have to do the same, I have chosen just a couple of topics that I thought would be of interest. One is Mandatory Reporting; the other is Children Stalking Children.

First however, I shall provide a short background to the court for those who are less familiar with it.

THE CHILDREN'S COURT

If you refer to Figure 1 (below), you will see the letters CYPA. That stands for the Children and Young Persons Act, legislation which directs that there shall be a Children's Court of Victoria. The Court operates in two divisions (see Figure 2, overleaf):

1 The Family Division, which is most often referred to as the Child Protection Division, and
2 The Criminal Division.

In the context of the State court 3-tier hierarchy, the Children's Court sits on the same level as the Magistrate's Court and the Coroner's Court. Above it is the County Court (of which I am now a member) and above that is the Supreme Court.

Jurisdiction

Figure 2 (overleaf) provides a summary of the Children's Court jurisdiction. The Children's Court has a jurisdiction in the Criminal Division that is notably broad when compared, say, with the jurisdiction of the Magistrate's Court. We deal

Figure 1:
Establishment of the Children's Court

Section 8 CYPA

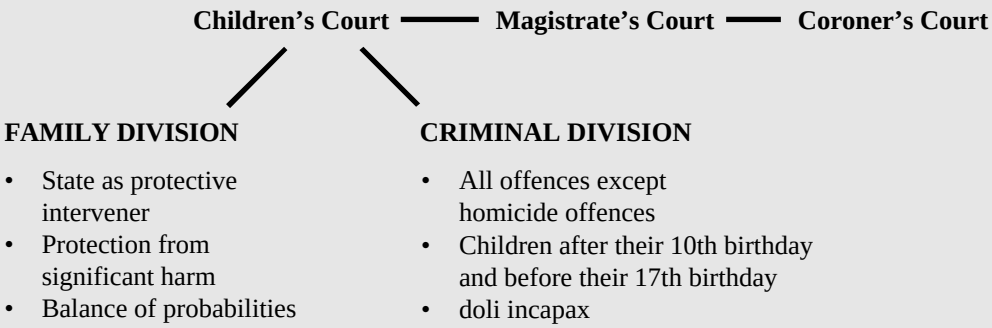
(1) There shall be a court called "The Children's Court of Victoria"

(3) The Court has the following Divisions

(a) the Family Division (Child Protection)

(b) The Criminal Division

Figure 2: Jurisdiction



with a full range of offences — arsons, armed robberies, and sexual offences, for example. The only ones that pass on to the Superior Courts are the "homicide offences", including attempted murder, murder, manslaughter, culpable driving causing death, and arson causing death. All the rest generally stay with us, although young people charged with those other serious offences have the option of going to the Superior Courts and having trial by way of judge and jury … which they rarely do.

The minimum age of criminal responsibility differs around Australia. In Tasmania, for example, it has recently been raised from 8 to 12. In Queensland it is also 12. In Victoria, it is 10. Our jurisdiction covers children from the day of their 10th birthday up to the day of their 17th birthday. In Victoria, if a child offends on the day of his/her 17th birthday, s/he is in the adult jurisdiction. Our current Attorney General in Victoria has indicated it is his intention to increase the jurisdiction, up to the day of the 18th birthday. The policy makers are working on that, but it has not happened yet. Currently we are the only State that has not increased its jurisdiction to 18.

Doli Incapax

In relation to the Court's jurisdiction in the Criminal Division, Figure 2 refers to something known by the Latin name *doli incapax*. This is what's called a "common law rebuttable presumption". What does that mean? Everyone knows what a presumption is. A "rebuttable presumption", for lawyers, is a presumption that is capable of being rebutted by evidence to the contrary. As the law stands currently in Victoria, a rebuttable presumption for children between the ages of 10 and 14 is that they don't have the capacity to understand the difference between "right" and "criminally wrong" — not right and wrong as in "you didn't wash your hands" or "the dog ate your homework", but *criminally* wrong. There has been quite a lot of debate about whether this should still be the law in Victoria — a debate sparked by the tragic events in the UK with the James Bolger murder, where the boys fitted well within the *doli incapax* presumption — but at the moment I do not believe there is any particular discussion that would lead to its disappearing.

The State as Protective Intervener

On the Family Division or Child Protection side, it is the State that acts as "protective intervener" (see Figure 3, below) — acting through the Department of Human Services as the child protection authority. The Victorian Police do have the capacity to be protective interveners, but by protocol they virtually never are. They tend to make a "notification" then hand over to Child Protection. The whole package of child protection law is to protect children from significant harm inside their families.

Figure 3:
Family Division

Originating Applications

(1) Protection Applications initiated by "protective interveners" (DHS or VICPOL)

(2) By notice (usually 21 days) or by apprehension

(3) Grounds S.63 CYPA

(a) Abandonment
(b) Parents dead or incapacitated
(c) Physical injury
(d) Sexual abuse
(e) Emotional or psychological abuse
(f) Neglect (basic care/medical)

The minimum age of criminal responsibility differs around Australia. In Tasmania, for example, it has recently been raised from 8 to 12. In Queensland it is also 12. In Victoria, it is 10.

Some of you in schools may be familiar with apprehensions in practice. Perhaps you have experienced the Department of Human Services actually arriving at the school and taking a young person directly from the school to the court.

Note that the standard of proof on the Family side of the court is the civil standard — the "balance of probabilities" — as opposed to the other standard you may be more familiar with, of "beyond reasonable doubt", which is the standard in the Criminal Division.

Figure 3 (opposite) provides more detail on the Family Division/Child Protection side of the court. What brings a matter before the court is something called a "Protection Application". This may be initiated either by the Department of Human Services (DHS) Child Protection protective interveners, or by Victoria Police. Applications come in either by "notice" or by "apprehension".

Some of you in schools may be familiar with apprehensions in practice. Perhaps you have experienced the Department of Human Services actually arriving at the school and taking a young person directly from the school to the court. It is not a "good day" for us when that kind of thing happens, of course, because we do not know they are coming. By their very nature, apprehensions emerge from emergency situations during the course of a day.

We receive apprehensions up to three o'clock in the afternoon on weekdays. Monday is usually the busiest day for apprehensions, because the court closes at five on a Friday afternoon and does not open again until nine on Monday morning, when we receive whatever is collected over the weekend. On the Monday before the ANZELA conference we had fifteen of them.

By contrast, with By Notice applications, the parties are served and get usually 21 days notice. Typically such applications may involve chronic neglectful parenting, perhaps with Mum, Dad or partner having long-term alcohol or drug problems. While By Notice applications relate to "chronic" situations, apprehensions relate to "acute" situations — for example, where a toddler is presented to a hospital, and the hospital makes an assessment of "non-accidental injury"; or perhaps where a young mother has been found passed out in the toilets of a fast food outlet, and somebody has attended to the children and decided that Mum is not capable of caring for them.

In Figure 3, I have summarised the categories that provide the basis for making applications for protection under Section 63 of the Children and Young Persons Act. What do the categories cover?

Abandonment

The word 'abandonment' speaks for itself. However it does not mean just that the child has been abandoned. It also means that there is no other family member or suitable person capable of caring for the child. A very small number of protection applications come in under this heading. Most typically they are the abandoned baby cases that you hear about from time to time in the media.

Parents Dead or Incapacitated

This again is not a particularly "high traffic" area. Where the parent is dead, most usually there is another member of the family in these tragic circumstances who can take care of the child. "Incapacitated' means not just what might have happened to a person on one heavy night of substance abuse. We take the view that it means incapacitation over a period of time. Most typically, it will involve mental health problems. For example, Mum might have been detained involuntarily in a psychiatric institution.

Physical Injury and Sexual Abuse

These two categories will perhaps be the most familiar to teachers and educational administrators, since they are the mandatory reporting areas. I shall come back to these two sub-sections later in the paper and deal with them separately.

Emotional or Psychological Abuse

This is the most heavily used area of child protection notifications and applications. Usually, this category will be used in tandem with the previous two, physical injury and sexual abuse. Often where there is physical injury, there are also allegations that there is risk of significant damage as a result of emotional or psychological abuse.

Neglect

Again this is not a commonly used area. It is generally about non-provision of basic medical care, and the ones that we get to see tend to be fairly extreme cases.

A closer look at the most familiar categories

Let me now address in more detail what Physical Injury and Sexual Abuse look like in the legislation (see Figure 4, overleaf). First, let's take the wording for Physical Injury. It can be considered in two parts. First, the legislation states that "The child has suffered or is likely to suffer, significant harm as a result of physical injury". We don't need to find actual evidence of physical

Figure 4: Sub-sections relating to Physical Injury and Sexual Abuse

(c) the child has suffered, or is likely to suffer, significant harm as a result of ***physical injury*** and the child's parents have not protected or are unlikely to protect, the child from harm of that type;	(d) the child has suffered, or is likely to suffer, significant harm as a result of ***sexual abuse*** and the child's parents have not protected or are unlikely to protect, the child from harm of that type;

injury – we are looking for either actual injury or the likelihood of it. 'Likelihood' may well relate to the experiences of another child – either a part of that sibling group or a child from some other family grouping – who has been physically injured at the hands of an alleged perpetrator. This may have implications for the child who is the subject of the application. Significant harm' means more than 'trivial' and less than 'serious'. That is the way our superior courts make the distinction.

The second part of the test is that the "parents have not protected or are unlikely to protect the child from harm of that type". Obviously this second part is important. This legislation is not meant to catch, for example, the stressed parent who is sitting inside at home with a baby, a four year-old and a two year-old, and in a moment of inadvertence the two-year old runs out the front of the house and is hit by a car or bitten by a dog. In this case, there would certainly be significant harm as a result of physical injury, but the Child Protection investigators may be satisfied that while there was indeed an unfortunate moment of inadvertence, there is no ongoing likelihood that the child will need to be protected by state intervention.

You will see from Figure 4 that the Physical Injury wording is substantially replicated with regard to Sexual Abuse. We would approach the two elements of the sub-section in the same way. These may just be words, but when we are struggling with what a term like 'likely' means, we look for guidance on interpretation. In this case, we use a test that we've adapted from the House of Lords in the UK – 'likelihood' being defined as 'a real possibility that can't be sensibly ignored'.

I am explaining in this kind of detail so that you get a sense of how we work in the court context. In your own context as educators — for example in relation to mandatory reporting, and being a 'Notifier' — you are not expected to apply those tests.

Being a Notifier

Figure 5 (below) summarises Section 64 of the Act, referring to Notifications. The first paragraph means just what it says. Any person in the community can make a notification to Child Protection — aunts, uncles, neighbours, teachers, or perhaps someone in a park.

The next paragraph is the one that refers to mandated notifiers — the people who are compelled to report and in what circumstances.

This is of direct relevance to educators, since it includes teachers, as well as psychologists and similar professionals who work in educational contexts. Such people are mandated to notify, if in the course of carrying out the duties of their "office, position or employment" they "form the belief that a child is in need of protection" on the grounds set out previously (for example, Physical Injury, Sexual Abuse). The section then lists the groups to whom this applies.

Figure 5: Notifications

Section 64

Any person who believes on reasonable grounds that a child is in need of protection ***may*** notify

The following persons ***must*** notify if in the course of "carrying out the duties of his or her office, position or employment forms the belief that a child is in need of protection on grounds 63(c) or (d)":

- Registered Medical Practitioner
- Psychologist
- Nurse
- Teacher
- Registered Child Carer

… teachers, as well as psychologists and similar professionals who work in educational contexts. Such people are mandated to notify, if in the course of carrying out the duties of their "office, position or employment" they "form the belief that a child is in need of protection" on the grounds set out previously (for example, Physical Injury, Sexual Abuse).

The scale of notifications — emerging trends

Figure 6 (below) shows the number of Child Protection notifications made between 1992 (when mandatory reporting was introduced) and 2000. It was in 1993 and 1994 that we really started to see rises, continuing on to the present day. You will note that in 1992/93 there were just under 20,000 notifications per annum in Victoria, and that in 2000 this had risen to around 40,000. This covers notifications with respect to all areas, not just mandatory notifications. These figures and trends are returned to later.

Protecting the identity of notifiers

During the development of the Children and Young Persons Act, there were considerable debates about a wide range of matters. In relation to Section 64, for example, social scientists and lawyers argued about the extent to which there should be an emphasis on legal representatives — acting on behalf of the children, young people and their families — needing to know what information was coming into the court against their clients and from where. The alternative argument was to emphasise the greater good of the protection of children, taking the view that if we protect the identity of the notifier, we are more likely to get more notifications. The validity of the latter view seems to be supported by the figures cited above.

The compromise reached in this area was that the notifier's details are protected, but the Court can grant leave, or the notifier can give consent in writing (see Figure 7, next column) to have identity revealed.

Figure 7:
Disclosure of Notifier

No evidence likely to lead to the identification of the notifier is admissible or question permissible unless:

Section 64 (3A) Court grants leave
OR
Notifier consents in writing

Court may only grant leave if:

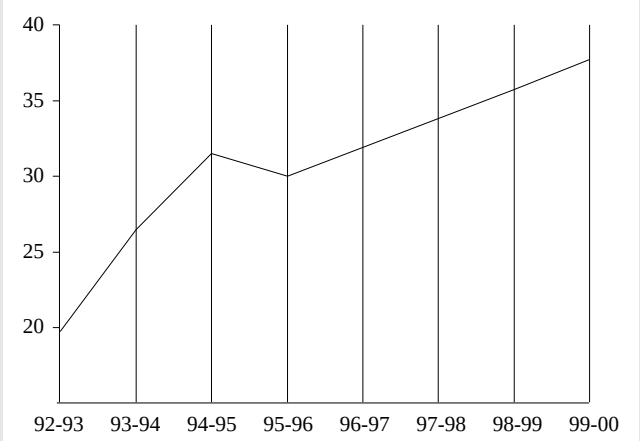
satisfied it is necessary to ensure the safety and well-being of the child
OR
satisfied that the interests of justice require the evidence to be given.

… the notifier's details are protected, but the Court can grant leave, or the notifier can give consent in writing … to have identity revealed.

This means that no evidence, no document, not even a piece of oral evidence coming from a witness during the proceedings, is permissible or admissible if it is likely to lead to the identification of a notifier — unless the court grants leave in those circumstances where it is satisfied that it is "necessary to do so for the safety and well-being of the child; or satisfied that the interests of justice require the evidence to be given".

I have now spent just under six years full-time sitting in the Children's Court. In that time I think I have had about four applications to reveal the identity of a notifier, and I have not granted one. It is a difficult hurdle to jump. It is fair to say, of course, that in certain circumstances, given the nature of the actual notification, the

Figure 6: Number of Child Protection Notifications 1992-2000 ('000)



generalised origin will be absolutely clear — in the case of hospitals, for example. Importantly, however, even in these cases it is not necessarily clear which individual member of the medical staff or team has made the notification. Similarly, while it may be clear that a notification has come from a school, we certainly don't know whether the information has come from a particular member of staff, or the Principal or the Vice Principal.

NOTIFICATIONS AND MANDATORY REPORTING

Figure 8 (below) shows figures for the flowthrough of notifications for Sexual Abuse in Victoria following the introduction of mandatory reporting. The three columns for each year show the number of notifications, investigations and substantiations. The full range of notifications is shown. You can see, as we noted before, a dramatic jump after the introduction of mandatory reporting. However, it is clear after some analysis of the figures that the number of mandated reports does not account for the way in which the figures went up overall. The publicity at the time, surrounding the introduction of mandatory reporting, seems to have led to a dramatic increase in public awareness, which resulted in an increase in the general level of responsibility in the community with respect to children. It seems likely that this led in turn to the overall dramatic surge in notifications.

Some of you will recall that mandatory reporting was introduced particularly in the wake of a couple of very high profile and tragic cases where children had died. One in particular — the Valerio case — had considerable publicity and was the subject of a coronial inquest. Such cases served as a catalyst for the introduction of new legislation, because of the emerging trail of professionals who had been involved with such children's lives — all thinking that somebody else was doing something about the situation.

Figure 8 shows quite a large disparity between notifications and investigations, with a drop of almost 50%. There is a further dramatic drop back to substantiations. The total figure for notifications generally across Victoria has reached 40,000, but only about half of that number are turned into investigations. Furthermore, actual applications at the court have remained fairly steady throughout the period from 1992 to 2000 at about 3000-3500 — despite the figure going up and up for notifications. I do not know the answer to why that is so.

Figure 9 (opposite) shows the collected figures for mandated notifiers, on the mandatory notification grounds of Physical and Sexual Abuse. Again you can see a dramatic increase post-1992, continuing to around 1994 and then starting to level out. You can also see that, after the police, teachers are by far the greatest single group of professional notifiers. My anecdotal perception is that there are notifications coming in from non-mandatory areas in schools as well. Figure 10 (opposite) shows the flowthrough of notifications by mandated and non-mandated notifiers.

I remarked before that the tests we are applying, in the court, are not the tests for you to apply as educators. You don't need proof before you are required to make a notification. You only need to form a belief, formed on reasonable grounds. You don't need to investigate; indeed, I caution you against doing it. Investigations can lead to some very messy situations, with people overlapping into other people's territory. That can cause all sorts of problems, for example in terms of what we know about sexual abuse disclosures.

… while it may be clear that a notification has come from a school, we certainly don't know whether the information has come from a particular member of staff, or the Principal or the Vice Principal.

Figure 8: Flowthrough of Notifications of Sexual Abuse, Victoria, 1992-93 to 1997-98

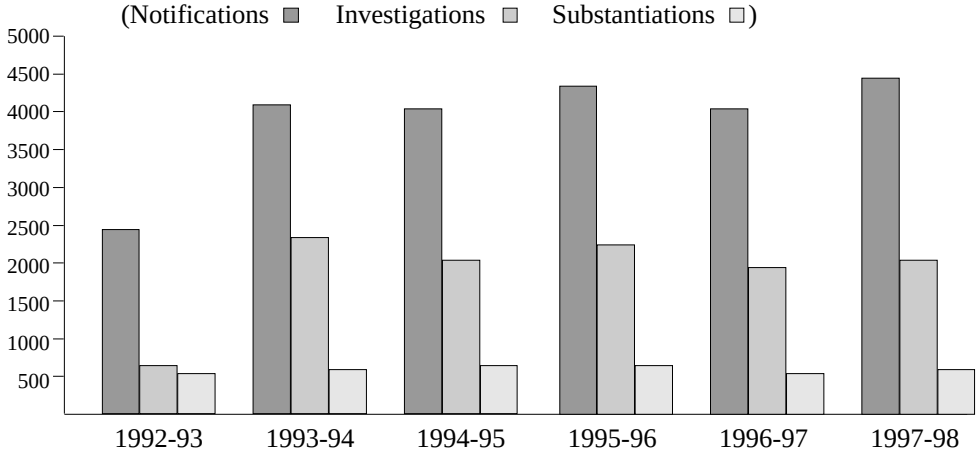
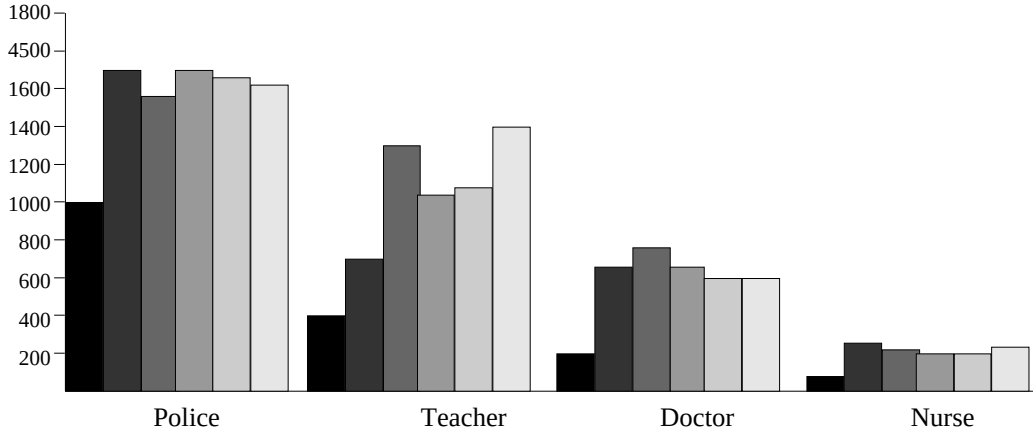


Figure 9: Notifications by Mandated Notifiers, Physical & Sexual Abuse Types, Victoria
(1992-93 ■ 93-94 ■ 94-95 ■ 95-96 ■ 96-97 □ 97-98 □)



Be careful that you do not promise one of your students or a young person that you will have a chat or conversation with them and keep the content secret. If you get the information, you are mandated to report it if that information causes you to form a belief with respect to that young person's exposure to physical or sexual abuse.

These can easily be contaminated by someone who is not appropriately skilled in asking questions of young people. We would encourage you not to ask any questions at all once you have formed a belief based on reasonable grounds, but to report straight away. Two waves of information were circulated to schools about mandatory reporting. I saw some very sensible advice in there, including the need to be cautious of what you say to young people about confidentiality. Be careful that you do not promise one of your students or a young person that you will have a chat or conversation with them and keep the content secret. If you get the information, you are mandated to report it if that information causes you to form a belief with respect to that young person's exposure to physical or sexual abuse.

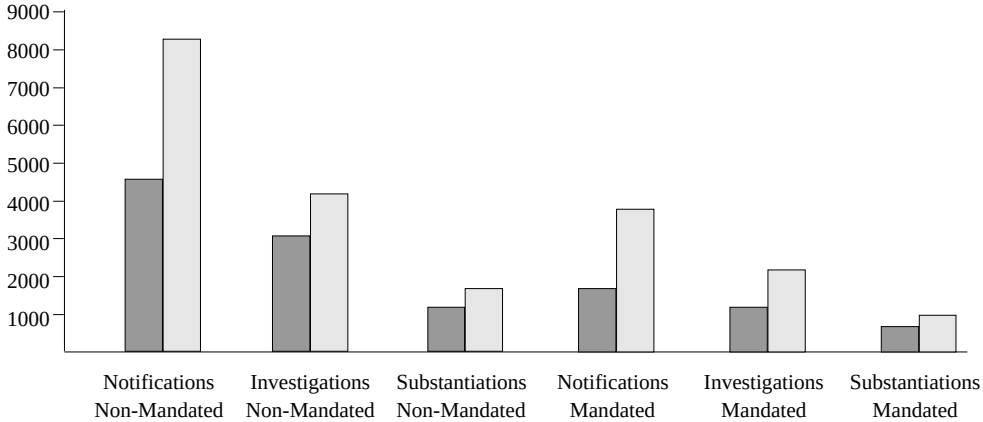
Failure to report

Prosecutions for failure to report are prosecutions by the police. They are nothing to do with the Children's Court, and what's more the prosecutions do not come to the Children's Court, because they are prosecutions of adults.

To the best of my knowledge so far there has been one prosecution in the State of Victoria, and it failed. The particular case was a prosecution in the Magistrate's Court. The defence to the prosecution was that the person who did not notify had not formed the belief that was needed to be formed. The submission made to the court was that the prosecution must therefore fail — because the necessary pre-requisite to actually reporting is that YOU form the belief, on reasonable grounds, and that only if and when you do are you required to report.

In effect, the magistrate who dealt with the matter decided that the belief that one forms is a ***subjective*** belief. This means that it should not be understood in law in terms of the "reasonable person" test that we apply elsewhere. That test would ask "Would a reasonable person, a reasonable teacher, or a reasonable Principal, in the same circumstances as this person, have

Figure 10: Flowthrough of Notifications by Mandated and Non-mandated notifiers, Physical & Sexual Abuse Types, Victoria
(1992-93 ■ 1997-98 □)



formed the belief on the basis of the information that s/he had in front of them at the time?" That is what we call an objective test. The Magistrate, however, had decided that the appropriate test is a subjective one: "Did this particular person form the belief?" The court then decided there was no evidence that she did, and on that basis she was acquitted.

I know there was a lot of discussion at the time behind the scenes about whether that decision should have been appealed. Ultimately it was not appealed and it remains the only prosecution in the area.

Of course magistrates' decisions, being the lowest point in the hierarchy, are not binding on each other. It is in the superior courts where judges' decisions are binding on each other. Arguably, another magistrate could come along and read that section differently, saying that s/he didn't agree, and arguing that the forming of the belief that needed to be formed is an objective reasonable belief, and could be tested objectively by a reasonable person.

My personal view is that as matters stand, the Prosecution, the police, are much less likely to prosecute because that decision relates to the one and only attempt to prosecute under the mandatory reporting provisions. I am not aware of any proposed legislative changes in this area, even though it has been raised and talked about.

That is the current state of the law regarding mandatory reporting. It carries a $1000 fine, but since 1993 that has never been imposed. Remember, however, that the figures show that the very fact mandatory reporting ***exists*** has caused an increase in notifications and substantiations.

CHILDREN STALKING CHILDREN

Children Stalking Children is a new and interesting trend in the law relating to children. In my view — and I'll explain to you just briefly why — it has not only been unintended by our law makers but also represents a fairly unsatisfactory state of affairs. You may have seen its manifestations in your own contexts; we are certainly seeing them in the Children's Court.

What's happened is that the way the law has developed in other areas has had a flow-on effect of creating a pathway into the Children's Court. It allows children and young people to come to the Court seeking restraining orders — what we call intervention orders — against each other. Most instances would fit into the definitions of bullying or victimisation — in schools, in neighbourhoods, on public transport, in any of those places where young people circulate.

Let me start with a brief explanation about the introduction of the Crimes Family Violence Act in 1987. As the name suggests, it was introduced to address situations inside families — violent situations where the only avenue of redress at that stage, fourteen years ago, was the rather long, slow and expensive process of going through the Family Court to get a restraining order. Even if you could get such a restraining order, there were then arguments between federal and state police over what they could do in practice — for example, whether federal police could enforce such an order if it was really a state police matter, and so on.

Around the nation at that time, each State and Territory introduced its own version of the Crimes Family Violence Act. They have different names around the country but amount to pretty much the same thing. Since then, there have been a number of amendments and expansions to the Crimes Family Violence Act in Victoria. For example, we have expanded the definition of 'family' to include the words "intimate personal relationships", so that we can include girlfriends, boyfriends and same-sex couples to also have the protection of the Act available to them.

In 1995, we introduced a crime called Stalking. Figure 11 (opposite) shows the definition. It sits inside the Crimes Act, rather than the Crimes Family Violence Act. If any of the elements shown in Figure 11 can be shown ***factually*** to have occurred — following, telephoning, loitering and so on, as well as the general element of "acting in any other way that could be reasonably expected to arouse apprehension or fear …" — the court will then look to the ***mental element,*** or "Mensrea" (see Figure 12, opposite).

What did the person intend to do, when following the other person around? You have to establish that it was "with the intention of causing physical or mental harm to the victim or of arousing apprehension or fear in the victim for his or her own safety or that of any other person …" You also need to establish that the "course of conduct did have that result" — that the victim was apprehensive or fearful.

If you can establish all of this, then that makes out the crime of Stalking. If what you are really

Children Stalking Children is a new and interesting trend in the law relating to children. In my view … … it has not only been unintended by our law makers but also represents a fairly unsatisfactory state of affairs.

I can tell you, with some authority, it was never anticipated or discussed that children would be making these applications against each other.

Figure 11: Crimes Act: Stalking

Section 21A(2)

(a) following the victim or any other person;

(b) telephoning, sending electronic messages to or otherwise contacting the victim or the other person;

(c) entering or loitering outside the victim's or any other person's place of residence or of business or any other place frequented by the victim or the other person;

(d) interfering with property in the victim's or any other person's possession (whether or not the offender has an interest in the property);

(e) giving offensive material to the victim or any other person or leaving it where it will be found by, given to or brought to the attention of, the victim or the other person;

(f) keeping the victim or any other person under surveillance

(g) acting in any other way that could reasonably be expected to arouse apprehension or fear in the victim for his or her own safety or that of any other person …

Figure 12: Crimes Act

MENSREA
(Mental element)

… With the intention of causing physical or mental harm to **the victim or of arousing apprehension or fear in the victim** for his or her own safety or that of any other person …

… **and the course of conduct did have that result**

Figure 13

Crimes Act 1958

I

So by virtue of Section 21A (5)
the Court
may on being satisfied the defendant has on the balance of probabilities stalked another person
and is likely to do so again
make an Intervention Order

I

Crimes (Family Violence) Act 1987

after is an intervention order, from the Children's Court or the Magistrate's Court, you can use the crime of stalking to move from the Crimes Act to the Crimes Family Violence Act. By virtue of the definition of Stalking laid out in the Crimes Act, if we in the Family Division of the Children's Court are satisfied that the defendant has, on the balance of probabilities, stalked another person, and is likely to do so again, we can make an intervention order (see Figure 13, above, right).

That is how the pieces fit together. I can tell you, with some authority, it was never anticipated or discussed that children would be making these applications against each other. The pathway to the Children's Court was developed for use with adults, in the context of the Crimes Family Violence Act. The categories were expanded to deal with situations such as a person being stalked by somebody in their workplace, or somebody they met on the train or at a disco. These situations did not previously fall into any of the categories within the Crimes Family Violence Act, because the victim hadn't had an intimate personal relationship with the alleged stalker. They were still being subjected, however, to the very distressing behaviour of being stalked. Consequently the lawmakers developed this way of crossing over from the Crimes Act to the Crimes Family Violence Act.

What are we now seeing in the Children's Court? There are increasing numbers of applications for intervention orders, stalking and non-stalking figures now exceeding six hundred for 2000-2001. Consider the following randomly selected examples from the Court's records (with the identifying information deleted, of course).

Example 1

The victim is a sixteen-and-a-half year old girl. She is at the same school as the defendant, who is also a sixteen year old girl. The complaint in the court document reads as follows: *The defendant is an ex-friend of mine. Her Mum tried to run me over. The defendant has threatened me at school. She has called me names such as 'whore' and 'slut' … I have also received a number of threatening phone calls and she passes messages to me at school telling me I am going to get bashed. The defendant has also spread rumours around the school that I was raped. I want no further contact with the defendant.*

There was a cross-complaint on this file, from the sixteen year old girl who was the defendant from the original initiating complaint. This cross-complaint reads as follows: *The defendant is an ex-friend of mine. She has made threatening comments towards me and has called me names such as 'slut' or 'stupid little bitch' and 'fat slut'. Threatened to bash me and attempted to get other people to bash me. One of the defendants told my Mum she and her friend were going to set me up. I'm really scared that people are after me."*

Example 2

An adult can be the complainant on behalf of the victim or "aggrieved family member". This complaint was made by a mother on behalf of her thirteen year old son, against a thirteen year old defendant. The boys were not only at the same school; they were in the same class. The mother alleges that the defendant is bullying her son and victimising him, but that the school has refused to get involved because the incidents are only occurring outside school hours. The mother alleged that she has been unable to get her son back to school because he doesn't feel safe. Consequently she is seeking an intervention order as a last resort.

Example 3

The victim and the defendant are both fifteen year old girls at the same school. The complaint is brought by the mother of the victim. Several months ago the victim separated from her then boyfriend and thereafter the defendant began harassing and threatening the victim, yelling filth and abuse at her, and making numerous calls to the house at all hours of the night. The defendant has also threatened the life of the victim, who remains absent from school as she is fearful of being seriously harmed.

Those are the three examples. As I explained earlier, if the court is satisfied on the balance of probabilities that the defendants were engaging in that course of conduct, and that they were doing it with intent to arouse fear or apprehension in the victim, then that constitutes stalking. Of course that means that if the court is satisfied that is going to happen again, without the making of an intervention order, then it is a proper exercise of one's discretion to make such an order.

The need to learn more about the problem

Please don't misunderstand the comments that I made earlier about the growth in this area of court work. I take the view that these situations are extremely serious, very debilitating for the victims, and likely to leave significant long term effects on those who are the subjects of this awful behaviour. The question that I ask myself, and that I pose to you rhetorically, is "Have we got the process right?" or "Is the court the right forum for dealing with these problems between adolescents?"

It is very difficult to get a full picture of the extent of the problem. Currently our statistics-gathering is not as good as it needs to be. We are working on that and on improving our system overall to ensure that we keep up with both the big picture and the detail of what is happening. As a result of discussions earlier in the year with our statistical staff, and a lot of work on their part, we do have at least a first set of figures to indicate the scale of what we are dealing with. Last year I had estimated the number of cases at about 160, which was bad enough, but it actually looks much bigger than that.

Some of the complaints get screened out at Registrar level — by the court staff who interview the young people when they come in. Sometimes they will indicate to them that they are in the wrong place, for all sorts of reasons.

How and why is it happening? We know something about the how — as I said, this pathway has developed, in my view, in a completely unintended and inadvertent way. We also know — and I realise I do not need to tell you, as educators — that the Victorian school system has codes and practices in place to ensure that schools maintain safe and supportive environments. Bullying policies are being developed all over the place. Yet it is clear, as you can see from those random examples, that some of these situations are developing and existing inside schools.

The question that I ask myself, and that I pose to you rhetorically, is "Have we got the process right?" or "Is the court the right forum for dealing with these problems between adolescents?"

What we do not know, is how they are getting to us. We don't know what the pathway is — from where they are starting, to how they are getting to the court. As yet, we don't have a system that is sufficiently sophisticated to pick that up.

Anecdotally, we hear they are being sent from police stations. Some are coming to us after the children have talked with their parents. We have certainly seen a couple where the parties have indicated to us that the school has sent them, but as we're not investigating that, we don't know it to be so.

Currently we have research being undertaken by academics in La Trobe Law School, on exactly what the pathways are. I hope that within twelve months they may have some answers on that.

the time has come for proper, informed and sensible debate — to create a system and develop appropriate information. The time is now.

As far as the schools are concerned, we don't know if they are being advised of these problems. We don't know if parents may have told the school and the school has not responded satisfactorily and the parents have taken the matter to the court themselves, or to the police station. We don't know if it's schools feeling under-resourced or ill-equipped to handle this situation. We don't know if the schools feel that the heavy burden of duty of care, as interpreted in schools, means they must refer these matters to the police. It seems where reported situations look serious, the police will re-direct the parties to the courts. Sometimes, once there, it is difficult to work out why there has not been a criminal prosecution by the police and why the police have referred the parties directly to the Court.

We don't know whether referrals are being made because the schools are anxious to show how they are taking the situations seriously, and treating them as crimes. We don't know if it is parents not showing appropriate guidance with respect to their children, and being unable to resolve these situations together with the adults around the children. Sometimes all of the parents will actually be sitting in the back of the courtroom, barracking for their "teams".

Some cases are coming in from the neighbourhood, and not from the schools at all. Even then, the parents are usually somewhere near them.

Importantly, we do not know, because of the ad hoc way in which things are happening, what is the ***value*** in this court process — what impact it is going to have on those involved, and whether it is going to "work". We do not know if it results in positive outcomes for the victim. We don't know if it results in anything positive that will assist defendants in understanding the consequences of their behaviour and actually changing their behaviour, which would be a desired outcome.

We do all know that homes, schools and communities are the places in which we nurture, guide and teach our young people how to grow, develop and be responsible citizens. Part of that is about conflict resolution. We haven't yet had the debate about whether this is the way that we should be teaching young people to resolve their conflicts. My view is that it is not. What has happened is that they are resorting to the courts when we don't quite know how they've got there, why they've got there, and what they hope to achieve.

What I am suggesting is that the time has come for proper, informed and sensible debate — to create a system and develop appropriate information. The time is now.

SOME FINAL COMMENTS

Look at Figure 14a, and at 14b (below), showing the figures for stalking/non stalking applications for intervention orders.

Figure 14a:
Children's Court of Victoria Outcomes of Applications for Intervention Orders — Number of Aggrieved Family Members

OUTCOME	2000-2001
Order made	361
Dismissed	31
Struck out	179
Withdrawn	107
Revoked	8
TOTAL	**686**

Figure 14b:
Children's Court of Victoria Applications for Intervention Orders Stalking/Non-Stalking — Number of Aggrieved Family Members

Stalking/Other	2000-2001
Victim of stalking	291
Other	395
TOTAL	**686**

As you'll see, there were 291 applications in 2000/2001. It seems that this figure, for child-on-child applications, has almost doubled from last year. These applications generally came to us from schools and neighbourhoods. Our anecdotal information is that most of them are coming from metropolitan areas, with very few from the country. Other than that, we have little information either on the pathways or on any related demographic factors, although we intend to investigate these areas further.

In closing this paper, what is the most important message for me to get across? On the basis of how we see the issues coming into the court, I am of the view that liaison between schools, education, Child Protection and Juvenile Justice would benefit from a major rethink. Liaison is the key. From where I sit, in the court, not a lot can be made to happen where it needs to happen, or on the scale that it needs to happen. That will require liaison of a different kind and joint efforts on all of our parts. I have had limited space here to produce evidence for why I say that, but I am grateful for the invitation to address ANZELA. I have absolutely relished the opportunity to participate. From the worlds of Law and Education we have an enormous amount to say to each other and should be saying more. For my part, I am happy to be able to make this start and look forward to further opportunities.

Notes about the paper

This edited version of Judge Coate's presentation at the ANZELA conference was prepared by Keith Redman & Associates Pty Ltd, with the judge's approval.

The "Figures" referred to and included throughout the text have been re-drawn from the overhead projection transparencies used by the author during her presentation.

From the worlds of Law and Education we have an enormous amount to say to each other and should be saying more.

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