Children's Well-Being: Indicators and Research 7

Rosemary Sheehan
Allan Borowski *Editors*

Australia's Children's Courts Today and Tomorrow

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Australia's Children's Courts Today and Tomorrow

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Rosemary Sheehan • Allan Borowski
Editors

Australia's Children's Courts Today and Tomorrow

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Editors
Rosemary Sheehan
Department of Social Work
Monash University, Victoria, Australia

Allan Borowski
School of Social Work
and Social Policy
La Trobe University, Victoria, Australia

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Preface and Acknowledgments

The Children's Court is a critical social institution, deciding important social and legal issues relating to children and families. It is one of society's major means of holding parents accountable for the care and protection of their children and keeping them free from harm and of holding children accountable for their behaviour. There is a strongly held belief that this Court is an effective method of transforming the treatment of children by their parents or carers and of influencing the future behaviour of both criminal defendants and potential young offenders in the community.

The Children's Courts occupy a unique position in child welfare and juvenile justice in Australia given their authority to determine what is in the child's best interests. Both in Australia and overseas, there are philosophical and structural shifts which suggest that how the community and the legal system respond to vulnerable children and their families is ineffective and is contributing to longer-term problems that create social and economic challenges to governments and communities alike. Across Australia, the states and territories have looked to different ways to respond to these challenges. The idea for this book came from the findings of the first national study undertaken in Australia that both examined the operation of Children's Courts and sought the voices of key professionals – particularly judicial officers – about the current and future challenges faced by the child welfare and youth justice jurisdictions in Australia. Significantly, the study was funded by the Australian Research Council (Discovery Projects DP0987175 2009–11: awarded to Allan Borowski and Rosemary Sheehan). The study is significant as no previous effort has been made to 'assess' the Children's Court on a national basis. This book offers a unique contribution to potentially informing social policy responses to children and families who are often on the margins of Australian society.

This book was made possible by the generous support provided by Springer and their Social Sciences Division, whose interest in welfare and social policy matters encourages the kind of research and debate found in this book. Our thanks go to National Advisory Group who provided advice about aspects of the study's direction and implementation: Professor Arie Freiberg (Dean, Faculty of Law, Monash University), Professor Terry Carney (Professor of Law, University of Sydney), Judge Paul Grant (President, Children's Court of Victoria), Associate Professor

Helen Rhoades (University of Melbourne Law School), Magistrate David Fanning (Neighbourhood Justice Centre, Melbourne) and Andrew McGregor (Solicitor, Children's Court of Victoria). Grateful thanks go to all those who contributed to the writing of the book, providing a unique cross-sectoral perspective on the role and functioning of Children's Courts as they determine how best to deal with the individual needs and community expectations that underpin children in need of protection and youth offending.

Rosemary Sheehan
Allan Borowski

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Contributors

Jane Bolitho School of Social Sciences, University of New South Wales, Sydney, NSW, Australia

Allan Borowski School of Social Work and Social Policy, Faculty of Health Sciences, La Trobe University, Melbourne, VIC, Australia

Peter Camilleri School of Social Work, Australian Catholic University, Canberra, ACT, Australia

Judy Cashmore Sydney Law School, University of Sydney, Sydney, NSW, Australia

Brenda Clare Discipline of Social Work and Social Policy, University of Western Australia, Crawley, Perth, WA, Australia

Joseph Clare Crime Research Centre, School of Law, University of Western Australia, Crawley, Perth, WA, Australia

Mike Clare Crime Research Centre, School of Law, University of Western Australia, Crawley, Perth, WA, Australia

Marie Connolly Department of Social Work, School of Health Sciences, University of Melbourne, Parkville, VIC, Australia

Andrew Day School of Psychology, University of Adelaide, Geelong, VIC, Australia

Paul Delfabbro School of Psychology, University of Adelaide, Adelaide, SA, Australia

Elizabeth Fernandez School of Social Sciences, University of New South Wales, Sydney, NSW, Australia

Patricia Hansen School of Social Work, Australian Catholic University, Strathfield, NSW, Australia

David Heath Department of Social Work and Community Studies, Charles Darwin University, Darwin, NT, Australia

Myvanwy Hudson School of Social Sciences, University of New South Wales, Sydney, NSW, Australia

Daniel King School of Psychology, University of Adelaide, Adelaide, SA, Australia

Morag McArthur Institute of Child Protection Studies, Australian Catholic University, Canberra, ACT, Australia

Michael McKinnon School of Sociology and Social Work, University of Tasmania, Hobart, Tasmania, Australia

Paul Mazerolle Professor and Pro Vice Chancellor (Arts, Education and Law), Griffith University, Queensland, Australia

Rosemary Sheehan Department of Social Work, Monash University, Caulfield, VIC, Australia

Caroline Spiranovic Crime Research Centre, Faculty of Law, University of Western Australia, Crawley, Australia

Lorraine Thomson Institute of Child Protection Studies, Australian Catholic University, Canberra, ACT, Australia

Clare Tilbury School of Human Services and Social Work, Griffith University, Queensland, Australia

Max Travers School of Sociology and Social Work, University of Tasmania, Hobart, Tasmania, Australia

Deborah West Director of Education and Training Development, Charles Darwin University, Darwin, NT, Australia

Rob White School of Sociology and Social Work, University of Tasmania, Hobart, Tasmania, Australia

Chapter 1
Introduction: Australia's Children's Courts – The Study and Its Context

Rosemary Sheehan

Abstract This chapter introduces this first Australian study undertaken of Children's Courts which comprehensively analyses the core business of the Children's Court in each of Australia's eight child welfare and juvenile justice jurisdictions. It presents judicial officers' and key stakeholders' perspectives of the contemporary status of, and current challenges faced by, Australia's Children's Courts and identifies what reforms they believe might be necessary and feasible to respond to these challenges and their degree of support for any such reforms. The chapter outlines how Children's Courts in Australia have become specialised courts with an exclusive jurisdiction. Child welfare legislation has been established that provides the legal parameters for child protection intervention and the statutory framework to respond to children in need of care and protection. However, the adversarial system which underpins the Children's Court is seen as less amenable to the multidisciplinary approaches and welfare role of the Children's Court, which feature in many US and European jurisdictions. The nexus between child protection and juvenile justice systems, with young people moving from state care to state custody, is noted by this study and remains a challenge for Children's Courts. The juvenile justice domain of the Children's Court and patterns of youth offending are compared with international trends and what approaches these might offer to Australia's Children's Courts. What is clear from the Australian study is that child maltreatment and youth offending continue to be significant social problems and challenge judicial decision-makers and others responding to the complex needs these problems create.

Keywords Research study • Legislation • Judicial officers • Child protection • Juvenile offending

R. Sheehan (✉)
Department of Social Work, Monash University,
Caulfield 3145, VIC, Australia
e-mail: Rosemary.Sheehan@monash.edu

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1.1 Introduction

Australian governments have varied in their enthusiasm about being involved in the well-being of children and young people (Picton and Boss 1981: 21). In the first half of the nineteenth century, responses to children who lived in socially unacceptable conditions were confined to founding orphanages and asylums. As far as young offenders were concerned, they were dealt with in the same courts as adults and were often sentenced to prison. The first dedicated Children's Court was established in South Australia in 1895 (Daly 1999) to deal with minor offences. Deviant child behaviour was generally attributed to poverty, destitution, abandonment by parents and incompetent or abusive parenting, and the court's remit was to aim for better care rather than prison for these children (Liverani 2005). Over the years, Australia's Children's Courts have assumed responsibility for handling both juvenile crime and child abuse and neglect cases.

1.2 Australia's Children's Courts

Children's Courts in Australia have become specialised courts with an exclusive jurisdiction. They balance the many conflicting social demands including advancing the best interests of the child, punishment, rehabilitation and buttressing legitimate adult authority. They regularly deal with individuals and their families whose social and economic deprivation is very often associated with their appearance in court (Roach Anleu and Mack 1997). Each of the six states and two territories in Australia has its own child welfare legislation that establishes the legal parameters for child protection intervention and the statutory framework to respond to children in need of care and protection. Children's Courts across Australia differ in approaches to child protection matters, although common to all is the adversarial framework of the justice system. Various states have incorporated family decision-making principles into child protection legislation and introduced alternative dispute resolution, to better accommodate welfare and legal concerns and address the unhelpful distance the adversarial approach creates between these (Seymour 2005).

The difference between enquiry-based and adversarial systems is perhaps the most significant difference in the legal framework of child protection systems in Australia, New Zealand, the UK and Western Europe. Most Western European child welfare systems, including England and Scotland, use the legal system as a last resort. There is considerable emphasis on informal discussions between parents and welfare and legal decision-makers to resolve child protection matters and less emphasis on legal representation of parties. Emphasis on the welfare role of the Children's Court, and the need for multidisciplinary approaches, is found also in many US jurisdictions – in which there are forums, or similar administrative processes, chaired by judicial officers or magistrates that bring together the main agencies involved in child protection (e.g. police, education, health and mental health, child and family support services as well as child protection), to debate

issues that impact on decision-making and achieving good outcomes for children. These approaches are perceived as preferable to the more intrusive court processes of Australian Children's Courts and involve the range of professionals who are responding to the growing complexity of problems experienced by child protection client families, including the increasing incidence of parental mental illness, drug abuse and intellectual disability.

The differences between the Children's Courts in the states and territories (and the juvenile justice systems in which they are embedded) are succinctly captured in the marked differences in the rates of juvenile detention (due to being either sentenced or remanded in custody awaiting trial or sentencing) across Australia. The detention rate in 2005 in Victoria per 100,000 people aged 10–17 years was 11.8, while this rate was 21.7 in Queensland, 29.7 in New South Wales, 36.4 in South Australia, 46.5 in Western Australia and 66.8 in the Northern Territory (Naylor 2006). Sentencing options that allow young offenders to be supported in the community with a range of interventions that seek to change behaviour explains Victoria's low rate of juvenile detention (Grant 2007). Indigenous Australians are subject to still higher rates of incarceration. For example, in Western Australia, Indigenous young people are 44 times more likely to be detained than non-Indigenous youth. This multiple is 24 in New South Wales, 22 in South Australia and 18 in Queensland (Naylor 2006).

The nexus between the child protection and juvenile justice systems, with young people moving from state care to state custody, remains a challenge for Children's Courts. The high rate of children moving between these two systems is exacerbated by the co-morbidity and increasing complexity of issues children bring to the attention of the courts (Freiberg 2004). With a view to keeping children out of the courts and enhancing rehabilitative capacity, many of the states and territories (e.g. South Australia's and New South Wales' *Young Offenders Act 1997* and the Northern Territory's new *Youth Justice Act* which came into effect in August 2006) have established forms of diversion from prosecution using restorative justice practices, such as mediation and conferencing, which emphasise both the social integration of perpetrators and the rights and needs of victims. However, as courts now find themselves dealing with more serious offences and repeat offenders, there is renewed emphasis on formal justice and attention to legal procedure and holding the offender accountable for his/her behaviour. These developments are underpinned by the dominant contemporary theories of crime which emphasise individual choice, personal responsibility and risk rather than the effects of socio-economic factors on crime causation (Roach Anleu and Mack 2007).

In Australia, as overseas, Children's Courts are the subject of debate and suggested changes that might better respond to both the legal and increasingly complex welfare concerns of children and young people who are brought to the attention of the court. Therapeutic jurisprudence and restorative justice approaches have become increasingly popular in Australian justice systems (Freiberg 2001). Problem-oriented courts, including Indigenous courts, drug courts, mental health courts, community courts and family violence courts, have been introduced in some jurisdictions, recognising that adversarial, punishment-oriented responses do not tackle the underlying personal (and

social) causes of offending and recidivism (Feinblatt et al. 2002: 437). It is an approach that offers individualised rehabilitation interventions which focus on opportunity for change, albeit within a criminal justice framework (Roach Anleu and Mack 2007).

Changes in court structure have also been advocated. It has been proposed, for instance, that the Children's Courts be replaced with a unified court system which integrates the Family Court and the Children's Court (Edwards 1996; Nicholson 2003; Freiberg et al. 2004) to provide a coherent and systemic approach to child-related law (Seymour 2005). This unified court would combine public law child welfare and youth justice matters with private law family and matrimonial matters, recognising the often interlocking problems of families: family breakdown, criminal behaviour, abuse and neglect. It is an approach that offers the opportunity to move away from adversarial towards non-adversarial approaches (Freiberg 2007), more akin to inquisitorial and problem-solving approaches characteristic of other jurisdictions.

1.3 Previous Research

There has been little empirical research on the Children's Court in Australia. Previous research has included, for instance, studies of defendants' experiences and judicial officers' sentencing decisions. Sheehan (2001) interviewed magistrates in Victoria who presided over child protection cases and observed and tracked cases in order to identify the factors they took into account in deciding child protection matters. Travers (2007) undertook a qualitative study, based on both observation and analysis of transcripts, of how sentencing decisions are made in the Youth Justice Division of the Magistrates' Court in Hobart, Tasmania. The only national study of Australian judicial officers was a national survey of magistrates presiding over adult Magistrate's Courts undertaken by Roach Anleu and Mack (2007). Magistrates were interviewed about their work and their views about social change and social justice in Australia. The study found that the magistrates believe their work is less about "refined legal issues" and more about "offending behaviour, social inequalities, and human emotion (that) are directly apparent and remain fused" (Roach Anleu and Mack 2007: 196) and that do not fit easily into adversarial, punishment-oriented approaches. However, no national studies involving a focus on the Children's Courts' judicial officers have been undertaken, nor has there been any focus on the contemporary and future issues and challenges that confront the Children's Court. The few international empirical studies of Children's Courts' judicial officers have focused on the criminal jurisdiction of the court to the exclusion of its child welfare jurisdiction.

1.4 A National Assessment of Australia's Children's Courts

This book offers a comprehensive analysis of the core business of the Children's Court in each of Australia's eight child welfare and juvenile justice jurisdictions. It presents judicial officers and key stakeholders' perspectives of the contemporary status of, and current challenges faced by, Australia's Children's Courts and

identifies what reforms they believe might be necessary and feasible to respond to these challenges and their degree of support for any such reforms. The book draws on findings from this first Australian study undertaken of Children's Courts to explore such perspectives. The inclusion of the views of judicial officers and other key stakeholders is unique to this study and offers those engaged in the policymaking process a major contribution about what is desirable and acceptable to implementing any reforms. Unique also is the support for such a study from each senior judge or senior magistrate from each of Australia's Children's Courts. Importantly, the operation of Australian Children's Courts and the challenges they face, as presented in this book, allow comparison with other jurisdictions.

The study participants were drawn from both metropolitan and country areas of Australia. Judges and magistrates who only hear Children's Court cases (located mostly in metropolitan areas) as well as magistrates who periodically hear Children's Court cases (who are located in regional and rural centres) around Australia were individually interviewed. Focus groups were conducted in each state and territory, both in city and regional areas, with key stakeholders (e.g. police, statutory child welfare and juvenile justice personnel, legal aid lawyers, representatives of community service agencies and Indigenous agencies, representatives of child welfare and children's rights advocacy groups, select academics and researchers). The questionnaires developed for both individual interviews and focus groups were shared with a small number of judicial officers and key experts for comment, prior to data collection. Interview and focus group responses were thematically analysed to identify the issues and challenges they deemed salient. Each of the eight national jurisdictions set up an advisory committee to assist the implementation of the study, to assure its rigour and to enhance the prospects that its findings and recommendations would be adopted.

The book is divided into two sections: the first part comprises Chaps. 2, 3, 4, 5, 6, 7, 8 and 9 of the book and profiles each of the eight state and territory Children's Courts in Australia, examining the responses of the judicial officers and other key stakeholders involved in the core business of the court to questions posed about the current and future status and operation of the court. The second section – Chaps. 10, 11 and 12 – explores commonalities across all Australian jurisdictions and how these resonate with approaches found in the international context.

Chapters 2, 3, 4, 5, 6, 7, 8 and 9 thus present findings from the study, as undertaken in each of their respective states and territories. Chapter 2 profiles the Australian Capital Territory, the smallest jurisdiction in Australia, while Chap. 3 profiles New South Wales, the most populous state in Australia. Chapters 4 and 5 profile the Northern Territory and Queensland, both of which feature significant Indigenous populations. Chapters 6, 7 and 8 profile South Australia, Tasmania and Victoria. Chapter 9 profiles Western Australia, which as the largest state in Australia is challenged by distance and isolated communities.

Chapter 10 examines what is common across each court in terms of its socio-politico context and organisational purpose and what such commonalities suggest about national challenges confronting the institution of the Australian Children's Court. Chapter 11 extends these ideas to explore how the functioning of the child welfare jurisdiction in Australia compares with international trends and what the

Children's Court can draw on from these approaches. Chapter 12 attends to the juvenile justice domain of the Children's Court and explores the functioning of this jurisdiction compared with international trends and what approaches they might offer to Australia's Children's Courts.

What is clear from the Australian study is that child maltreatment and youth offending continue to be a significant social problem. The rapid growth of child protection and the increased role of legal institutions in children's and young people's lives challenge legal and welfare systems internationally. We hope that this book encourages ongoing discussion and debate; we hope it contributes to greater understanding of the role of Children's Courts and the difficulties they face in their day-to-day work and the need for national support in the approaches taken to respond to reduce the vulnerability and marginalisation that underpins both child maltreatment and youth offending.

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Part I
The Mandate of the Children's Courts

Chapter 2
The Childrens Court in the Australian Capital Territory

Peter Camilleri, Lorraine Thomson, and Morag McArthur

Abstract This chapter describes the Australian Capital Territory (ACT) Childrens Court (In ACT, the court is termed the 'Childrens Court' (section 288 of the *Magistrates Court Act 1930*) not the 'Children's Court' which is the term used in many other states). It summarises and discusses the views of key stakeholders about the court and its work gained through interviews and focus group discussions held in 2010. One of the key findings in the ACT was that there is a common and strong desire amongst people involved in the Childrens Court for the community to do the best that is possible for the children and young people who come before the court as part of care and protection or criminal proceedings. However, there are differing opinions about how this can best be accomplished. The ACT is a small jurisdiction – despite housing Canberra which is the capital of Australia. It has its own unique history which has affected the development of the Childrens Court and the service system to which it relates.

Keywords Young people • Children • Court • Child protection • Youth justice

P. Camilleri (✉)
School of Social Work, Australian Catholic University, Signadou Campus 223 Antill St, Watson, Canberra, ACT 2602, Australia
e-mail: Peter.Camilleri@acu.edu.au

L. Thomson • M. McArthur
Institute of Child Protection Studies, Australian Catholic University, Signadou Campus 223 Antill St, Watson, Canberra, ACT 2602, Australia
e-mail: Lorraine.Thomson@acu.edu.au; Morag.McArthur@acu.edu.au

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2.1 Introduction

This chapter briefly describes the Australian Capital Territory (ACT) Childrens Court.[1] It summarises and discusses the views of key stakeholders about the court and its work gained through interviews and focus group discussions held in 2010. The Australian Catholic University's Human Research Ethics Committee approved this exploratory research project. Stakeholders almost without exception enthusiastically participated in the research which was seen as a step towards filling a knowledge gap. This reflected one of the key findings in the ACT: There is a common and strong desire amongst people involved in the Childrens Court that the community does the best that they can do for the children and young people who come before the court as part of care and protection or criminal proceedings. However, there are differing opinions about how this can best be accomplished. The ACT is a small jurisdiction – despite housing Canberra the capital of Australia – with its own unique history which has affected the development of the Childrens Court and the service system to which it relates.

2.2 Context of the ACT Childrens Court

2.2.1 The Australian Capital Territory

The population of the ACT is 347,800 (Australian Bureau of Statistics 2009a) with 18.6% of this population aged 0–14 years (Australian Bureau of Statistics 2009b). The 2006 census data show that 1.2% of the population identifies as Aboriginal or Torres Strait Islander (Australian Institute of Aboriginal and Torres Strait Islander Studies 2009). The ACT was the first jurisdiction to enact legislation on human rights (*The Human Rights Act 2004* (ACT)) which provides a human rights framework for government and nongovernment services in the ACT. The Office for Children Youth and Family Support (OCYFS) located within the Community Services Directorate (CSD)[2] has responsibility for both youth justice and the statutory care and protection of children and young people in the ACT. This work is legislated under the *Children and Young People Act 2008* (ACT) (the Act).

In 2008 the ACT opened the first human rights compliant youth justice centre in Australia (Bimberi Youth Justice Centre). This followed an audit in 2005 on the previous youth detention centre which had been 'run-down' and not human rights compliant.

[1] In ACT, the Court is termed the 'Childrens Court' (section 288 of the *Magistrates Court Act 1930*) not the 'Children's Court' which is the term used in many other states.

[2] On 1 July 2011, the Department of Disability, Housing and Community Services, which previously contained the Office for Children Youth and Family Support, became the Community Services Directorate (CSD) as part of ACT Government restructure of all ACT Government Departments into one ACT public service. The head of the CSD is the Director-General.

Of the 385 young people appearing before the Court in 2009–10 in the ACT for alleged criminal offences, the highest proportion of final charges (109) was for 'acts intending to cause injury' (Australian Bureau of Statistics 2011). This was a 55% increase in this category of offences from 2008 to 2009 (Australian Bureau of Statistics 2011). Of the 332 defendants found guilty, 31 were given custodial orders (including placement in a correctional institution, serving the order in the community or being granted a fully suspended sentence), and 301 were given non-custodial orders (Australian Bureau of Statistics 2011). ACT Policing statistics for 2009–2010 show that 607 young people were taken into police custody (Australian Federal Police 2010). The proportion of young people identified as Aboriginal and Torres Strait Islander in Bimberi Youth Justice Centre (the ACT's juvenile justice detention facility) on either remand or committal during the 3 months 30 June 2010–30 September 2010 was 26%, a dramatic over-representation of Indigenous young people in the youth justice system (ACT Department of Justice and Community Safety 2010).

In relationship to care and protection matters in the 12 months 30 June 2009–30 June 2010, 246 applications for court orders were finalised and 234 applications were commenced. In this period, 108 emergency actions were taken[3] (changing the care arrangements of a child under emergency conditions). In 2009–2010, 331 children in the ACT were admitted to care orders (this includes voluntary agreements not requiring a court order) (Australian Institute of Health and Welfare 2011). Of these children admitted to care orders, 40% were aged from birth to 4 years of age. In the ACT, there was a decrease in the number of children admitted to out of home care in 2009–2010 with 532 children living in out of home care on 30th June 2010 (Australian Institute of Health and Welfare 2011). One hundred and twenty-five of these children (23%) were identified as Indigenous (Australian Institute of Health and Welfare 2011), once again reflecting the over-representation of Indigenous children in out of home care across Australia.

2.2.2 History of the Childrens Court in the ACT

The Childrens Court in the ACT is a court within the ACT Magistrates Court, dating back to at least 1937. Prior to the *Child Welfare Ordinance 1957* (ACT), New South Wales (the state within which the territory of the ACT is geographically located) legislation applied in the ACT (Seymour 1988). This was replaced by the *Children's Services Ordinance 1986* (ACT). Following self-government in the ACT, this ordinance was converted into specific legislation, the *Children's Services Act 1986* (ACT). The appointment of a Childrens Court Magistrate was legislated in 1999 (*Children's Services Amendment Act 1999* which revised section 20 of the *Children's Services Act 1986*). Prior to that five magistrates shared the duties of the Childrens

[3] Information provided by Office for Children Youth and Family Support (OCYFS).

Court. There was not necessarily a consistency of approach and the designation of a specific Childrens Court Magistrate was designed to ameliorate that.

The ACT Magistrates Court is established by Section 4 of the *Magistrates Court Act 1930*. It has limited jurisdiction to hear and determine civil and criminal cases across an extensive range of disputes and consists of seven resident magistrates. It is formally designated as the Childrens Court when the Childrens Court Magistrate exercises this jurisdiction (under Chapter 4A of the *Magistrates Court Act 1930*). The physical structure of the court allows for the separation of child and adult matters for hearing (Australian Institute of Health and Welfare 2008).

The *Children and Young People Act 1999* (ACT) replaced the *Children's Services Act 1986.* It introduced the concept of 'parental responsibility' (*CYPA 1999* Part 3) to replace notions of custody, guardianship and wardship and retained the paramount decision-making principle of 'the best interests of the child' (*CYPA 1999* Part 2). It also emphasised cooperation with children and families through the provision of voluntary support to families and the introduction of voluntary family group conferencing as a process by which families could reach agreement about how they could continue to care for children (*CYPA* Part 2). Enduring parental responsibility was introduced as a new care provision for children who had been in stable out of home care for 2 years (S.260); this allowed for carers under certain conditions to exercise parental responsibility for those children to 18 years.

2.2.3 Current Legislation and Policy Environment

The Children and Young People Act 2008 (ACT) replaced the *Children and Young People Act 1999* and included 'youth justice principles' (s. 94) which aimed to give greater recognition to involving children and young people and Aboriginal and Torres Strait Islander communities in decision-making. It aimed also to provide timely access to legal assistance and expeditious legal proceedings, ensuring detention is used only as a measure of last resort and for the shortest appropriate period of time, aiming further to provide for 'promoting the young offender's rehabilitation whilst balancing the rights of victims and the community's interests' (Legislative Assembly for the ACT 2008, p. 4). The principles are intended to be interpreted in the light of human rights instruments such as the United Nations Convention on the Rights of the Child. The Act emphasises that the best interests of the child or young person are paramount. Throughout the Act, there is an emphasis on taking the views of children and young people into consideration and including Aboriginal and Torres Strait Islander people in the care and protection of Aboriginal and Torres Strait Islander children.

In the ACT, a child under 10 is not criminally responsible for an offence. A child older than 10 or under 14 years of age can only be criminally responsible if they know that the conduct is wrong (Australian Bureau of Statistics 2009c; South Pacific Council of Youth and Children's Courts 2005, p. 3). The Childrens Court is a closed court; that is, only those permitted under the legislation can attend. The ACT is unique amongst states and territories in that its policing is undertaken through

contracts with the Australian Federal Police rather than having their own state- or territory-employed police force (Australian Bureau of Statistics 2007).

Policies and programmes relating to children and young people are developed within the context of the ACT Children's Plan 2010–2014. It aims 'to make Canberra a great and safe place for children, and to ensure their needs are a priority for government and community. To make this happen, all initiatives, services, and programs in the ACT should be designed to enhance children's health, well-being and development' (ACT Department of Disability Housing and Community Services & ACT Health 2010, p. 6). The Young People's Plan 2009–2014 (ACT Department of Disability Housing and Community Services 2009) provides the framework for policies and programmes relating to young people (aged 12–25) in the ACT. Amongst other principles, it affirms the value of young people, their participation in decision-making in community life and their rights under the *Human Rights Act 2004* and the UN Convention on the Rights of the Child (ACT Department of Disability Housing and Community Services 2009).

2.3 Research Participants and Analysis

Forty-six ACT Childrens Court stakeholders were interviewed or participated in a focus group with researchers between April 2010 and November 2010. These included the former and current Childrens Court Magistrates; legal aid practitioners; Director of Public Prosecutions' lawyer; lawyer from the ACT Government Solicitor's Office; private legal practitioners; Childrens Court Registrars; Advocates from the Public Advocates Office; the ACT Children's Commissioner; out of home care providers, including the Foster Care Association of the ACT; Chief Executive of the then Disability Housing and Community Services (now Director-General of the Community Services Directorate); senior officers and front-line workers in the OCYFS (the statutory care and protection agency in the ACT); the Family Inclusion Network; Department of Justice and Community Services (now Justice and Community Safety Directorate) including Ngambra Circle Sentencing Court,[4] restorative justice and other staff from the Legislation and Policy Branch; and the ACT Police.

With the agreement of the participants, all interviews were recorded and professionally transcribed. In this qualitative study, interviews were imported into NVivo and initially analysed thematically according to the questions asked. As qualitative research, the numbers of people expressing particular view points are not given: the key themes, and where views are common or divergent, are outlined. The voices of

[4] From 25 July 2011, after data collection ceased for this project, this Court was officially recognised in legislation and renamed as Galambany Court. It provides a circle sentencing process, enabling the Aboriginal and Torres Strait Islander community to collaborate with the ACT criminal justice system to address offending in culturally relevant ways for Aboriginal and Torres Strait Islander people.

young people and children and their parents who use the court are missing from this chapter. The boundaries of the national research project, of which this was a part, precluded undertaking the often complex human research ethics applications needed to allow these very important stakeholders to be a part of this project.

2.4 Participants' Views on Current Arrangements

In this section we outline the most commonly discussed subjects where there were strongly expressed views, whether diverse or convergent: the court's purpose and role, the legislative environment and its effect on the court, the strengths of the court in the ACT, the interaction between care and protection and youth justice, representation of people coming before the court, needs for training and changes in court facilities, the needs of Aboriginal and Torres Strait Islander children and issues particular to the criminal and care and protection jurisdictions.

2.4.1 The Court's Purpose and Role

Most participants interviewed for this research project demonstrated great respect for the Childrens Court. They were aware of the difficulties involved in decision-making in the complex areas of child protection and youth justice within the constraints of the adversarial system and limited resources. Whilst able to identify areas for improvement and reform, a number of stakeholders acknowledged the commitment of the individuals involved in the work of the court and in the broader services associated with youth justice and care and protection. Participants were cognizant of the ways in which the systems around the court affected the work of the court and how the court's work involved dealing with social issues:

> We have very high expectations on the Childrens Court in the sense that we expect them to be able to address issues that are not legal issues. (Focus group participant ACT Government Department)

There was widespread agreement that in the criminal jurisdiction of the Childrens Court in recent years there are: more young women before the court, a greater level of family violence where the young person is the perpetrator and an increase in mental health issues and multiple drug use in people at younger ages. In care matters the main change noted by many people was the higher level of complexity in families where children were the subject of care order applications. This complexity includes parental mental health problems, drug and alcohol misuse and domestic violence.

Participants considered that the court's philosophy is to balance protection of community/punishment/deterrence with rehabilitation/needs/best interests of young people coming before the Childrens Court for criminal matters. These views are reflected in the *Children and Young People Act 2008* (ACT) which promotes both

the best interests of the child and the need for rehabilitation together with the rights of victims and the interests of the community. Most stakeholders in the youth justice area considered that the court and all other key players were focused on reducing recidivism in young people. Some stakeholders felt that the court appearance was an opportunity for effective intervention in a young person's life. There was general agreement that the purpose/philosophy of the court in care and protection proceedings is to determine the best interests of the child when the issue has not been able to be settled by other means. A number of participants expressed the view that they had a better understanding of what was in the child's or young person's best interests, or how it should be determined, than the other groups or organisations which may also be involved. The underlying debate or difference appeared to be centred on attachment, permanency and contact between children in care and their parents.

On the one hand, there is a commitment to stable and settled arrangements for children and young people being put into place – sometimes through longer term out of home care – as soon as possible. On the other hand, there is a view that children's best interests are served by maintaining contact with their families and that families should only be written out of the child's life in very rare circumstances. These viewpoints were reflected in suggestions by some participants that certain groups of court stakeholders prioritised parents above children whilst different participants suggested that others ignored the importance of the relationship of children with their parents.

2.4.2 Legislative Environment

Participants recognised that Australia's adversarial system of justice fundamentally affects how decisions are made about children, families and young people in the Childrens Court. Some were concerned about the negative effects of adversarial relationships between parties, which pitted lawyers and families against the Director-General of the Community Services Directorate, and its representatives.

Some stakeholders were supportive of the provisions in the *Children and Young People Act 2008* (ACT) which outlined the need to have care orders for 2 years and then a rebuttable presumption[5] that the care orders continue to 18 years (S. 477). This was because it furthered the goal of stable and settled arrangements for children. However, there were also a number of interviewed participants who believed that it did not allow for flexible responses to the complexity experienced in individual family situations.

Participants noted that the sentencing process and options under the *Crimes (Sentencing) Act 2005* (ACT) are similar to those available for adults. This had been introduced because this was thought to be more human rights compliant. However, there were no provisions for parole and remissions for good behaviour for young

[5] A rebuttable presumption requires sufficient evidence to the contrary to be presented for it to be overturned.

offenders.[6] There was some discussion about whether or not the legislation was as child or young people centred as the previous legislation and whether or not an adult sentencing framework is appropriate for young people.

2.4.3 Strengths of the Childrens Court in the ACT

Most people considered that the case conferencing for care and protection matters, run by the court registrars, was a positive aspect of the court. The main reasons given were that it was less formal and parents had a chance to be heard. It was noted that the majority of matters were settled at conference. An appointment system meant that conferences generally ran to time.

Having a court that specialised in children, with a specialised Childrens Court Magistrate, was highly regarded. This meant that the magistrates and other legal personnel could develop their knowledge and expertise in the needs of children and young people and the service system which surrounds them.

The fact that the ACT is a small jurisdiction was seen by some as a positive in two ways. Firstly, collaborative relationships were facilitated by the size of the jurisdiction. A number of stakeholders mentioned the magistrates' accessibility for discussions about policy and procedure, technical issues and wider service issues relevant to the Childrens Court: there is an 'openness' to look at new ways of doing things. Secondly, the small jurisdiction also means that families become well known to the judicial officers in the court and the professionals in the service system. This provides contextual knowledge of the families. It was acknowledged that this can have its complications: a magistrate or other legal practitioner can know more than is admissible in the matter before them and cannot allow that to influence the outcome.

The particular restorative justice (RJ) system in the ACT was also seen as a strength in the court system for youth justice clients. An important feature of the ACT model is that young people who have committed serious offences can participate in RJ: a victim does not have to make the choice between the young person being prosecuted and participating in RJ. In the ACT restorative justice can occur at every stage of the criminal justice process in the juvenile jurisdiction. ACT Policing, the Office of the Director of Public Prosecutions (DPP) and ACT Childrens Court can refer 'offences' to restorative justice in conjunction with court proceedings. Police can refer in the first instance to the restorative justice unit, and if they do this before charging the young person, referral to the restorative justice unit can be diversionary. Otherwise, it is parallel to the court process. The DPP can refer to restorative justice up to the second mention hearing, and if resolved, the DPP can withdraw the charge and in some circumstances has done so (Director of Public Prosecutions 2008). The DPP's 2009 annual report indicates that the DPP has been 'keen to dispel any notion that a referral to RJ, if successfully completed, would

[6] On 23 June 2011, subsequent to the interviews for this project, the ACT Government announced intended reforms to the youth justice system including introduction of parole.

inevitably lead to the Office offering no evidence on the charges', noting that the 'Childrens Court is able to take into account any RJ outcome in the sentencing process' (Director of Public Prosecutions 2009, p. 10).

This model of RJ was described by its staff as providing a 'tailored or individualised process for justice'. Young people who have committed serious offences can participate in restorative justice. A victim does not have to make the choice between the young person being prosecuted and participating in RJ. Participants in a focus group stated that RJ:

> … recognizes the positions or the interests of the respective arms of the community and of the Territory and of the young person and also the victims. So there's accountability balanced off with rehabilitation.
>
> So it's not a soft opportunity. I think it gives the opportunity as well with respect to it being in parallel but if it was just used as a diversion it would have a limitation on the types of offences that it could be utilised for. And some of the research around restorative justice suggests that it has its strongest impact with respect to person crimes, violent crimes, and so you would actually not be using a justice tool on the most appropriate types of offences (Justice and Community Safety Policy Focus Group)

2.4.4 Interaction Between Care and Protection and Youth Justice

The overlap between the two systems of care and protection and youth justice was recognised by senior staff in care and protection. It was estimated by one participant that 30% of the young people are in the two systems – 'It would be at a minimum I believe'. An added concern expressed by number of participants was that some young people who appeared in the Childrens Court for criminal offences and were not part of the care and protection system needed to have been in care prior to their alleged offences because they were experiencing abuse or neglect. Yet the trajectory for the young person is quite distinct depending on which system they first come into contact with. A participant in the Justice and Community Safety focus group said: 'The child, but for the grace [of God], could fit on either side of the equation'.

The priorities for child protection agencies with limited resources are seen to be the care of babies and young children. Some participants suggested that older children, and in particular adolescents, may not be seen as a high enough priority to have their care and protection needs met.[7] One participant explained her viewpoint on this:

> Nobody is going to take any notice of them unless they're in the criminal system because a 14 or 15 year old can protect themselves. Care and Protection are overwhelmed with the number of babies and toddlers and under 10's they have. Once they're 14 they can walk the streets themselves as far as anybody seems to be concerned I've had Police almost in tears because of the situations they've found people in and so many Police are really

[7] After the data collection period of this research, the ACT human rights commissioner conducted a report into Bimberi Youth Justice Centre (http://www.hrc.act.gov.au), and the ACT Government has announced comprehensive reforms including increased diversionary procedures for young people (http://www.dhcs.act.gov.au/ocyfs).

> young and haven't necessarily dealt with these sorts of things before. (Lawyer employed by ACT Government)

The 'outsourcing' of residential care services was criticised by some participants as they felt that the authorities did not have a close watch on these vulnerable children. (It is an Australia-wide trend to outsource the provision of foster care and residential facilities for children and young people.) It was also suggested that unless the residential services had highly skilled staff, they may find it difficult to respond to behavioural disturbances, calling police to deal with 'outbursts'. This could escalate the young person from needing care and protection into being an offender. One participant provided the following example:

> He [a young person] was placed in a particular placement through care and protection who, it would appear had simply used the criminal justice system as a means of behavioural control. For instance, I within a week of him being placed at this place he was arrested and placed on police bail in relation to an assault which seemed very much like a 12 year old boy throwing a tantrum had behavioural problems to begin with and a charge of damaging property, which was a red plastic bowl. So he was put through the court process for that, when the very reason for him being at that placement was that behaviour. Or at least to a large extent. (Legal aid lawyer)

2.4.5 Representation

Some participants were concerned about both the quality and extent of representation for both families and children involved in care matters and young people involved in youth justice court appearances. There was a strong sense that there was discrepancy in representation between the Director-General of the Community Services Directorate and parents in care and protection matters due to the unequal resources available for legal representation. Families were seen to be battling 'the enormous beast of the court' – the court system and the authorities who were bringing them to court.

Participants reported that there was marked variability amongst court users' understanding of court processes and the implications of those processes. Although some parents and young people were thought to have a clear idea of what was happening, others seemed overwhelmed and to have little comprehension of the meaning of court outcomes. This variability was seen in both the criminal and care and protection areas.

It was noted that Legal Aid had limited resources, and so legal aid funding for cases was capped at a rate much lower than private lawyers – to whom Legal Aid referred – could gain from private work. One lawyer suggested that the hourly rate paid by Legal Aid to represent a family, child or young person was less than half what could be earned privately, and yet 'if you're dealing with kids, it takes a different skill set and it takes a lot more time'. It was suggested that for this to change, government would need to agree that families who contested care proceedings should get representation. These would only be a small percentage of families who go

through the court: most matters are settled by conferencing. (In 2009–2010, 16 or 6.7% of applications went to a contested hearing.)[8]

There were variable views expressed about the effectiveness of child representation although it was agreed that this representation was vitally important. Participants noted that under the legislation, the child representative has to make it clear whether they are representing the child's best interests or acting on the child's instructions. Sometimes the child representatives are seen as representing the interests of the parents, and sometimes the parents' and child representatives were seen as supporting the views of the Director-General in this highly contested area. Concerns were expressed about the skills of some child representatives.

2.4.6 Training Needs

Most participants identified the need for training of all personnel in each other's roles and ways of working. It was an experience shared by most participants that other 'players' in the Childrens Court did not fully understand what was their role, the resources available and the constraints on that role. Specific training needs identified related to young people are the following: how to work with young people, the evidence base for intervention with young people and knowledge about child development. A number of the lawyers noted that there was no specific training on care and protection matters by the legal profession. Whilst many of the above suggestions about training were directed to legal professionals so that they could better understand the psychological, biological and social context for children and young people, it was noted that case workers and other nonlegally trained people needed more training on legal processes.

2.4.7 Court Facilities

The main message regarding facilities was the lack of privacy in the waiting area. The concerns were that:

- Effective representation and communication was compromised. For example, young people gave instruction to their representatives under chaotic conditions. This could be in the same area as care and protection workers were communicating with families.
- Young people not involved in the proceedings met up at the court with their mates and discussed their criminal activity over the weekend.
- Families and some young people could find this environment intimidating. It was not regarded as child friendly, with the exception of the case conferencing room

[8] Information provided by Office for Children Youth and Family Support.

where chairs and desks were set up in a horseshoe configuration and participants sat in this oval arrangement facing each other rather than a formal courtroom.

Another concern raised was that of young people on remand being held in the court's holding cells waiting for their court appearance. This was the subject of a research project undertaken by the Public Advocate (Public Advocate of the ACT 2010). The court practice is that young people on remand and returning to court from the Bimberi Youth Justice Centre are heard first in the court. However, some participants referred to situations where there were numbers of cases to be heard and young people on remand waited in cells for a number of hours or waited for the court transport unit to return them to the Youth Justice Centre. The use of technology was raised as a possible alternative for young people where their matters are only going to be mentioned in court or the case adjourned. However, another response to this was that there would be a limited number of situations in which this could be used, as there would need to be provision for private consultation between the young person and their legal representative.

2.4.8 Aboriginal and Torres Strait Islander Children and Young People

The over-representation of Aboriginal and Torres Strait Islander peoples in the youth justice and child protection systems was identified by most participants as problematic. More workers in care and protection with appropriate cultural backgrounds to work with Indigenous children and young people were identified as a key need. Another need identified was appropriate legal representation for families and for young people in the criminal justice system:

> I think some of those issues around representation are concerning. Again, you'd want skilled legal practitioners who understood those issues, both Indigenous issues and the issues of children. I think that's an issue at times. And I think that's the same with Juvenile Justice, it's the same issue in terms of appropriate representation where sometimes their matters have been stood over because they haven't been able to get that appropriate representation, so a person is remanded, remanded again for another week or two. (Two participants, care and protection focus group)

A significant development has been the referral by the court of specific cases of criminal matters of Indigenous young people to the Ngambra Circle Sentencing Court (now the Galambany Court). At the time of the interviews, a process was in place to train panel members and embed policies and procedures for the Ngambra Circle Sentencing Court. In care and protection, the development of Indigenous cultural plans for children was seen as a step in the right direction though there was awareness that the expertise to make sure that the plans were appropriate was not always available. There was concern expressed that in some care proceedings with Indigenous children, parties skirt around the issues, try hard not to be seen as critical and do not address the situation that the child is in, and as a result, children may remain at risk.

2.4.9 Other Issues in Youth Justice

Participants recognised that young people who had been charged with offences also had significant welfare and wellbeing needs. The Act provides the court with a rehabilitation focus. However, as many young people are enmeshed in serious and complex life situations, it was acknowledged that rehabilitation may take significant time and resources.

Participants identified a range of options police have to deal with young people's offending, including diversionary options (cautions, referral to agencies, referral to restorative justice). They also noted situations where there were very few options other than charging the young person. The Bimberi Youth Justice Centre was often used for accommodation and/or to ensure the safety of the young person. Magistrates may have no alternative but to remand the young person in detention. Many participants expressed the view that remand and/or sentencing to the youth detention centre had little deterrent effect on criminal behaviour but may provide a sense of security and structure for the young person which they do not otherwise experience.

It was noted that family violence and other criminal activities may overlap with mental health issues, and there is a lack of care options for affected young people. Participants suggested that police may charge a young person who has committed very serious offences, yet if they were an adult with mental health concerns, they would be admitted to the psychiatric facility of the hospital; police may be reluctant to take a child or young person to the adult mental health facility due to concerns for their safety. There was recognition of a need for a secure facility (mental health or drug and alcohol treatment) for young people:

> They can't take a child – well, they can take a child to [Adult Psychiatric facility], but that is an absolute last resort because the Police know what happens in [Adult Psychiatric facility], so that's their mindset. They've seen some pretty terrible things happen to children in [Adult Psychiatric facility], and so that's their mindset because at the [Adult Psychiatric facility] you have adults moving around with children and adults with big problems and there are children in there and they're very vulnerable and nurses are not security guards and doctors are not security guards, so they bring them before the courts hoping they will go to [Youth Detention Centre] or something while somebody assesses them. So it's a very ad hoc approach. (Lawyer employed by ACT Government)

For young people, the more time between an event and the consequence, the less connection they may have to it. The time delay between being charged and being sentenced can be very disconcerting for some young people. They may have matured significantly since the time of the offence and the sentencing. There are conflicting views amongst stakeholders about whether rehabilitation can and should begin prior to the finalisation of matters in the court. Some argue that it is only when the court matter is finalised that rehabilitation work can begin with the young people, and others believe that it is possible and that young people can benefit from this work prior to finalisation.

The issue of bail conditions was raised by nearly all participants concerned with young people in the criminal justice system. Young people facing charges on a range of offences may have conditional bail imposed. The young person may be

obliged to fulfil as many as 10–12 court-ordered conditions. Many of these will be aimed at rehabilitation – school attendance, seeing a counsellor, residency directions, curfews, who they can associate with, etc. Many of these conditions are imposed to keep the young person safe, provide structure for their lives and reduce the risk of reoffending. It was suggested that young people who offend often have many disadvantages in their lives, including impulsivity, and they may find it impossible to keep all the bail conditions. Consequently, they may face court again due to breaking bail conditions.[9]

2.4.10 Care and Protection Specific Issues

The Director-General funds professional/clinical assessments of children's situations, whether they are done internally in the OCYFS, or by external consultants. This system was seen by some to contribute to inequality between the Director-General and the families involved in court proceedings, even if the quality of the reports is very good. It was thought by some that families on low incomes are disadvantaged because it is difficult for them to find funds for assessments themselves. Because there is no provision for funding of assessments by the court itself, the Director-General is required to pay for assessments if the court requests it. It was noted that this was in contrast to the Family Court which has the resources to order its own assessments of children's needs, thereby avoiding the situation where a party to a proceeding is involved in obtaining the specialist assessment.

Contact was also a contested topic and reflected underlying differences about permanency and attachment. The legislation provides for contact to be determined according to the care plan that follows the granting of orders. This means that the Director-General can change contact arrangements as circumstances arise, and the Court is not involved in this. This is designed to limit the unsettling effects on children, families and carers of coming to and going from the court. However, it also means that parents and others may not have the contact arrangements they wish and do not have the option of ready access to the court if there are disagreements between the Director-General and the family.

The lack of support for families after the children are removed and orders are made was a raised as a concern. It was noted that the resources appear to follow the child, not the family. When parents are not supported to deal with complex needs like mental health, drug and alcohol issues and poverty, other children can be born to these families and the same process can occur:

> …then the court makes a decision and these people are just dropped off and left to their own devices and asked to turn up for their contact with their kids once every two months, or whatever it is, and that's the end of it and there seems to be no, I mean the Childrens Court

[9] After completion of the data collection for this research, the ACT Government announced the implementation of an after-hours bail service for young people (http://www.dhcs.act.gov.au/home/publications/annual_reports/2010_-_2011).

> is very much about the kids and that's what it should be but there are the families that have lost those children when they're removed and that leaves a gaping big hole in their lives and it seems that once the orders are made that there's no one there to help them pick up the pieces. (Lawyer employed by ACT Government)

2.5 Attitudes to Reform

Everyone was interested in improving the court processes for children, young people and families, although the degree and level of reform varied between participants. Both magistrates were keen to facilitate changes to enable better outcomes for young people, children and families. One magistrate had extended the availability of circle sentencing to Indigenous young people, which had previously only been available for adults. The other magistrate was undertaking the required processes to establish a problem-solving drug and alcohol court for young people in the ACT.[10]

A number of people identified the adversarial framework of Australia's legal system as being a constraint to effective decision-making for young people, children and families. They pointed to the possibilities of problem-solving or inquisitorial approaches to decision-making as offering a better way of doing this business. Particular models such as the Scottish Panel System, drug courts, the European inquisitorial tradition and an increased role for family group conferencing were identified with a specifically responsive regulation framework. As already noted, the Family Violence Court list was mentioned as collaborative and interdisciplinary and was held up as a possible model for care and protection. However, there was limited motivation for wholesale change to the current system; rather, a recognition that other models are worth noting to continue the process of improving the Childrens Court.

Other needed improvements which were identified included:

- More privacy in the waiting room facilities, to enable young people and families to interact confidentially with legal representatives and case workers.
- More security in the waiting room of the court.
- Better resourcing for legal representation for children, young people and families so that they can spend more time with clients.
- Training for all stakeholders in the issues which relate to their work in the Childrens Court.
- More resources for early intervention for families, carefully managed family group conferencing prior to court action and support for families after children are removed from their full-time care to minimise further harm to those families and other children.
- More options for young people both for diversion and disposition. In particular therapeutic accommodation which can attend to mental health and drug and alcohol needs.

[10] This Youth Drug and Alcohol Court programme was implemented from 1 September 2011.

- Less turnover, full staffing of care and protection and youth justice agencies.
- Further attention to the community needs of Indigenous young people. The circle sentencing court and its strengthening project were seen as a way of progressing this.

There was less interest in finding alternatives to the criminal business of the court. However, there was interest in increasing diversionary and therapeutic accommodation options so that some young people do not need to be before the court for welfare, mental health and drug and alcohol and other complex needs.

Subsequent to the data collection period of this research, there have been changes: The ACT Government issued a discussion paper promoting more diversionary options for young people (ACT Department of Disability Housing and Community Services 2011) and an inquiry into the Youth Justice in ACT recommended, amongst other things, more diversionary approaches and greater use of restorative practices (Roy et al. 2011) which are being followed up by ACT Government.

2.6 Discussion

There are two key tensions underlying the responses of participants. The first, relevant to the care and protection function of the court, is about permanent care decisions for children. All participants acknowledged the need for individually based decisions about children's wellbeing and safety. One group emphasised that the best interests of children were promoted by ensuring that parents had every opportunity to maintain a continuing relationship with their children. There were some in that group who thought that the Office for Children Youth and Family Support (OCYFS), through the Director-General, exercised undue power over parents' contact with their children. There was another group of participants, generally those associated with the OCYFS, who thought that parents' right to contact was unduly emphasised by other parties at the expense of the best interests of the child. This is a complex area where research is continuing and where knowledge is continually expanding.

The second key tension is the extent to which young people who offend need to be treated as offenders or as young people in need of care and protection. The legislation tries to balance the two and, in practice, the balancing is often limited by options for diversion or suitable care and accommodation. It was recognised that many young people who offend have suffered disadvantage and sometimes neglect and abuse. They may have been or currently already under the care of the Director-General.

From analysing the participants' narratives, it is apparent that the Childrens Court functions in two very distinct and only occasionally overlapping ways: care and protection and youth justice. Most of the participants are engaged with one or the other of the court's functions, and their understanding of the role and philosophical underpinning of the court is from that particular perspective. There is no doubt that the court deals with a wide range of children and young people. But what sticks in the minds of participants are the situations where insurmountable problems exist, and the way to find solutions to what many term 'societal issues' is not apparent. Many

participants were supportive of a shift from the adversarial model currently embedded in the Australian tradition for care and protection matters. There was less enthusiasm for alternative models for dealing with criminal matters which come before the Childrens Court. Particular events (an offence) bring a young person to the attention of the court, and the focus is on the offence. Many young people are in considerable need, and often the youth justice system is used to dealing with highly problematic situations. However, the focus is on the 'deed', and whilst the 'needs' are looked at, the lens in which the young person is viewed is through youth justice.

The participants in this project are open to change providing the Childrens Court Magistrate is integrally involved in the design of change and that reforms are seen as: promoting the best interests of children and young people, providing a just and fair process based on human rights and the rights of the child and attending to the community's needs for responsible behaviour in its citizens as well as the needs of young people. The participants were limited in their knowledge of systems and structures which could provide a different way of doing things: this was the key constraint on possibilities for change identified in the ACT.

2.7 Conclusion

This research indicated that in the ACT, there is immense goodwill and commitment to making systems work fairly for children, young people and families to promote the wellbeing and safety of children, young people and the whole community. It was, however, a system that felt it was under enormous pressure with few or little options for dealing with children and young people experiencing severe social distress in their lives. The court was being asked to deal with 'societal issues' that the court had no control over.

The divide between care and protection and youth justice gave the court 'two faces' – one dealing with child protection issues and the other with criminal matters. Except for the Childrens Court Magistrate, all other participants in the court came from one or the other perspective. This meant that there was little enthusiasm for radical reform of the court as the Scottish hearing system or European inquisitorial model was seen as appropriate for only care and protection matters.

The conundrums that have bedevilled Children's Courts in many jurisdictions are also experienced in the ACT: The question remains whether an adversarial system is the best way to make decisions about the care and protection of our vulnerable children and young people? And what is the best way to respond to children and young people who have been deeply traumatised and are now engaged in criminal activities as a consequence? Many practitioners in the court system are very aware of and concerned about the sheer complexity of the lives of children, young people and their families.

There is a need to hear the voices of children, young people and their families in relation to their experiences of the Childrens Court: this is an area for further research attention.

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Chapter 3
The Children's Court in New South Wales

Elizabeth Fernandez, Jane Bolitho, Patricia Hansen, and Myvanwy Hudson

Abstract A specialist Children's Court has been in operation in New South Wales, the most populous state of Australia, since 1905. With this longevity, some strengths have emerged including a body of specialist workers with a strong sense of the purpose and philosophy of the court. Yet challenges to both the operation and function of this court persist. This chapter draws from 45 semi-structured interviews and 10 focus groups to examine the problems and prospects of the court as viewed by those at the coalface: specialist magistrates, care and crime solicitors, nongovernment advocacy groups and officers in government. Features of the New South Wales court include the Children's Court Clinic, which provides specialist clinical assessments in care and protection matters, and a Youth Drug and Alcohol Court, which offers a specialist pathway for some young people in the juvenile justice system. One of the greatest challenges in New South Wales is the inability of the system to navigate its vast geography to offer every young person the same access to specialist court officers, functions and programmes. As well, court workers spoke unanimously of

E. Fernandez (✉) • J. Bolitho
School of Social Sciences, University of New South Wales,
Sydney, NSW 2052, Australia
e-mail: e.fernandez@unsw.edu.au; j.bolitho@unsw.edu.au

P. Hansen
School of Social Work, Australian Catholic University,
25A Barker Road, Strathfield, NSW 2135, Australia

M. Hudson
School of Social Sciences, University of New South Wales, Sydney, NSW 2050, Australia
e-mail: myvanwy.hudson@unsw.edu.au

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the complex social disadvantage faced by the children and young people coming before it, of the overrepresentation of Aboriginal youth, and of the intersections between care and crime matters. However, court workers shared a sense of interest in and support for further court innovation and reform.

Keywords New South Wales • Children's Court • Juvenile justice • Youth justice • Magistrates • Care and protection

3.1 Introduction

New South Wales (NSW) is the most populous State of the Commonwealth of Australia with a population of 7,284,600, of which over 70% live in the conurbation of Newcastle, Greater Sydney and Wollongong (Australian Bureau of Statistics 2010). The remaining population is distributed along the coast with very few cities existing in the hinterland and beyond. In December 2009, there were 700,537 children under the age of 18 years in NSW. NSW has amongst the highest numbers of children of any Australian state or territory on Care and Protection Orders: 9.4 per 1,000 children on such orders (15,339 children) as of June 2011 (AIHW 2012). The rate of Aboriginal and Torres Strait Islander children on such orders for the same period was 68.8 per 1,000 (10.3 times more than non-Indigenous children). In the system, there were an average daily number of 434 young people in custody of which 204 were of Aboriginal or Torres Strait Islander background (Indig et al. 2011). NSW Children's Court data show that in 2010, 805 young people were sentenced to detention, 2,484 were placed on a bond, 1,383 on a probation order, 977 dismissed with a caution and 882 had a variety of other outcomes (New South Wales Bureau of Crime Statistics and Research 2011).

3.2 The Structure and Legislative Context of the NSW Children's Court

The first Children's Court in NSW was founded in 1905 under the *Neglected Children and Juvenile Offenders Act* (Blackmore 1989) in recognition that children needed separate, closed courts with specialist magistrates, to protect them from the stigmatisation associated with the adult court system. This approach was consistent with the 'child-saving' philosophy which prevailed at the time (Seymour 1997; Crawford 2005).

The Children's Court remains as a separate Magistrate's Court for children's criminal and care and protection matters. The head of the Children's Court is the President, and there are 15 specialist magistrates appointed for periods of up to 5 years (*Children's Court Act 1987)* distributed across seven specialist Children's

Courts. With a significant geographical distance between rural areas of NSW and the metropolitan centres, other Magistrate's Courts (or local courts) also hear Children's Court matters. Recently, a rural circuit for specialist Children's Court magistrates was initiated to assist courts in remote areas in responding to children's criminal and care and protection matters (Marien 2009). A significant feature of the Children's Court in NSW is the Children's Court Clinic, a specialist assessment unit established under the *Children and Young Persons (Care and Protection) Act 1998* to provide independent clinical assessments of children, young people and their families, to assist magistrates in their decision making concerning care matters (McLachlan 2002).

The role and scope of the Children's Court is affected by legislative trends in the two jurisdictions. Most recently, the care and protection jurisdiction witnessed procedural and organisational changes following the Wood Commission of Inquiry (2008), which proposed amendment to the *Children and Young Persons (Care and Protection) Act 1988* to reduce the number of children being taken into care, limit the power of the Children's Court to make contact or visitation orders, simplify the practice and procedure of the court, increase the use of alternative dispute resolution, develop a code of conduct for all legal representatives practising in the care jurisdiction and enhance the court by the appointment of a District Court Judge as the senior judicial officer (Wood 2008, Executive Summary, p. ix). The criminal jurisdiction of the Children's Court in the current context is defined primarily by the *Children (Criminal Proceedings) Act 1987*, the *Young Offenders Act 1997* and the *Bail Act 1978*.

3.3 Overarching Trends and Concerns

In the New South Wales (NSW) study of Australia's Children's Courts, a multi-informant qualitative study was conducted, using in-depth interviewing and focus groups. A purposive sample was drawn from a population of NSW members of the Children's Court and key stakeholders including the President of the Children's Court, specialist magistrates, solicitors, caseworkers from government and nongovernment agencies, policymakers working in areas relating to the Children's Court and clinical practitioners (such as psychologists and social workers). In total, the sample of 76 respondents consisted of 12 magistrates, 19 legal practitioners, 20 nongovernment organisation (NGO)/community practitioners, 17 government practitioners (such as statutory caseworkers from the Department of Family and Community Services (DFCS)), three policy stakeholders, two academics and three clinical specialists (such as psychologists). A total of 45 individual interviews and ten focus groups were conducted. In order to capture the demographic diversity of NSW, 17 respondents were from regional/rural areas, five respondents were Indigenous, 60 respondents were female and 16 respondents were male. The method of data analysis used for this research was a thematic analysis underpinned by a 'grounded theory' approach (Charmaz 2000, pp. 521–522).

3.4 Role, Scope and Effectiveness of the Children's Court

With regard to the care and protection jurisdiction of the Children's Court, most research respondents emphasised the 'paramountcy principle' enshrined in the *Children's Court (Care and Protection) Act (NSW) 1998*, stating that the purpose of the Children's Court is to adjudicate upon the 'best interests of the child':

> The care jurisdiction is one which obviously emphasizes the safety and well-being of the children. Statutorily, the paramount purpose of the legislation is to ensure the safety, welfare and well-being of the children. So whenever you do a care matter, whatever the exigencies are within the matter, the paramount force often is that you've got to ensure the safety of the children and their well-being. (Magistrate 5)

With regard to the criminal jurisdiction, the majority of respondents suggested its purpose is to provide an appropriate legal avenue for children and young people in contact with the law that is appropriate to their age. For example, magistrates noted that the Children's Court functioned to

> Provide specialist judicial determinations and restrictions of young person being charged with criminal offences and in respect of them, to apply the specialized rules and procedures and outcomes that are available to juveniles and that are not available to persons over the age of 18 years. (Magistrate 6)

> Children need to have justice provided to them, and they need that justice being provided in a way that takes into account the developmental circumstances, their particular vulnerabilities and their particular interests. (Magistrate 4)

The Children's Court provides an appropriate space for the resolution of care and protection and criminal justice matters relating to children and young people. In the criminal justice jurisdiction, a number of respondents commented on the challenge facing the court in addressing both the rehabilitative and justice needs of those who come before it. For example,

> I think the Children's Court tries to fulfil two functions that are sort of competing against one another. One is the legal function of adjudicating and managing an individual charge. The other is looking at what are the best interests of that child and, in doing that, you might need to look far beyond that case. (Policy Worker 1)

In the care jurisdiction, research respondents highlighted its essential role as an impartial part of the child welfare process that provides a forum for the voices of all parties to be heard. They identified the particular importance of the Children's Court as a non-bureaucratic and independent part of the child welfare process. However, the location of the Children's Court under the direction of the Attorney General's Office was perceived to increase the bureaucracy of the system and jeopardise independence and efficiency. The need for the Children's Court to operate autonomously outside the welfare system was stressed.

A number of strengths were identified in the current functioning of the NSW Court. In both jurisdictions, a perceived strength was a sense that the calibre of workers is high and that the specialism the court afforded allowed for this. For example,

> There is a reasonable degree of expertise amongst specialist Children's Court magistrates and that gets applied … a number of experienced practitioners which mean that things are conducted well. (Magistrate 4)

For the most part, magistrates were identified as possessing the knowledge and skills to manage highly complex cases and displayed understanding of the vulnerabilities and needs of children and young people with due consideration of the research evidence on child development. Commenting on the care and protection jurisdiction, it was noted:

> I think there's been a bit of an increase in understanding around children's development…. It's shown that the judicial officers are capable of taking in information around the welfare of the child, or the best interests of the child, and making decisions that are in line with the latest evidence and information. That's really good. (Practitioner 1)

There was a sense that the NSW Children's Court operates professionally and collaboratively. One magistrate commented:

> Probably the most important thing is the collaborative attitude of a lot of people working in both of those areas to promote the welfare of children. (Magistrate 9)

Aside from informal collaboration, effective court functioning was attributed to formal collaborative systems in operation. For example,

> We have some pretty active interagency consultative groups (for example) the Care Working Party …We deal with pretty important issues pertaining to the court and care jurisdictions, both from high level policy type issues which we want to discuss and get feedback about … but also right down to just the day to day nuts and bolts type problems which are arising in the conduct of cases in the court….Other courts don't have that kind of consultative process so I think that's another big plus for the court. (Magistrate 1)

In sum, the effectiveness of the Children's Court was conceptualised in terms of holistic approaches to protective care decision making, appropriate sentencing and provision of a continuum of services for young people appearing in court under the criminal jurisdiction. However, such outcomes were seen as being contingent on how the legislation is applied by individual judicial officers and practitioners, resources available, geographical considerations and orientations of magistrates and other stakeholders.

3.5 The City/Rural Divide

A primary factor affecting case processing and the effectiveness of the Children's Court is whether a matter is heard in a metropolitan-regional centre or in a rural area of NSW. There is a significant difference in resources available in these areas in terms of specialist courtrooms, availability of specialised staff including legal representatives and magistrates and access to training. Additionally, clients in rural areas can experience delays as local magistrates adjourn matters to be heard by a specialist magistrate via the rural Children's Court circuit.

A specific concern expressed by stakeholders was inequities in access to legal representation and the effect this might then have on court outcomes. For example,

> I think legal representation is an issue and it's one that's particularly problematic for Aboriginal kids in remote areas or rural areas …. I think more generally Legal Aid Commissions do the best with the resources that they've got but there are problems in terms of the legal representation for young people given that they're not in the same position as adults to necessarily be able to afford private legal representation. (Academic 1)

Respondents also noted specific concerns around equitable access to appropriate mental health planning. For example,

> One legal diversion option is S.32 of the Mental Health and Forensic Provision Act (1990), the option to put offenders on a treatment plan if they suffer from intellectual disabilities or mental health issues. However, this section states that a psychiatrist/clinical psychologist must write a report for this option to be viable. Young people do not have the money to commission such a report, and there are limited psychiatrists/psychologists available to do pro-bono work. (Crime Solicitor 1)

From the court's perspective, this potentially affects both process and outcome. There is also evidence of some potential intersectional discrimination. One magistrate stated:

> It affects the court process in terms of, for example, Aboriginal Legal Aid. In their service they can't get funding for Section 32 reports in the Criminal Procedure Act, so they're having to switch clients with Legal Aid who have got the funding and have them represent them to get a medical report. (Magistrate 7)

Overall, there was a sense that the court would benefit with further support around the needs of the young people appearing before it in terms of mental health. As one magistrate noted:

> We need more clinical and therapeutic support for young people in the criminal jurisdiction as well as the care jurisdiction…there'd be a whole lot of supports that we could build in. We don't have specialist domestic violence officers. We've had the mental health liaison with us for a little while, but there is still a lot more that could assist us in our daily work considering the very, very large volume and the serious nature of the matters that we're dealing with. (Magistrate 3)

A number of respondents suggested that increased mental health services to vulnerable parents may result in fewer applications to the Children's Court for Emergency Care and Protection Orders and for Protective Care Orders and increased scope to consider restoration from care. Further, earlier and increased intervention from mental health services could result in particular matters being less complex and taking less of the court's time to address.

3.6 Communication and Court Processes

Respondents suggested that a lack of understanding of process and outcome underscored many court experiences, and this related to both the nature of being a young person as well as a genuine lack of knowledge about the courts. However, the experience of the court was mediated by levels of knowledge and

experience of the justice system, quality of representation and the communication skills of court staff. A number of magistrates spoke about the importance of communication:

> I've put a lot of effort into ensuring that that happens and explaining the reasons why the court is taking its action. My philosophy is: No person should leave the court room that I've presided in with any sort of question mark over their head as to what happened and why does it happen. (Magistrate 6)

A potential issue is that the volume and complex nature of cases heard in the Children's Court leaves many magistrates with less time to explain outcomes to children and/or parents, resulting in the latter's poor understanding of court decisions. This is particularly problematic when children and parents already face barriers to understanding court processes and outcomes. The understanding that children and parents have of court processes and outcomes will vary depending on their cognitive ability, the explanation provided by magistrates, the explanation provided by their legal representation and their level of anxiety and confusion on the day of the court hearing. Inadequate explanation of decisions and processes by magistrates can also disadvantage children and parents for whom English is a second language or who have limited educational background. Children and parents of low socioeconomic status were also seen to be vulnerable in this area, as they were less likely to be able to afford a private solicitor with time to explain the legislation, language used in the court and the decisions or orders made.

3.7 Accessibility

Respondents commented on the constraints disadvantaged parents face in getting legal representation. Parents do not always get a legal aid grant in the care jurisdiction because they must pass a merit test as well as a financial means test. The merit test limits the availability of legal advice for parents in care matters and has led to an increase in parents self-representing in court. In addition, respondents alluded to difficulty that parents experienced in accessing support services that could prevent further contact with the Department of Family and Community Services (DFCS, the Statutory Department with child protection responsibility) and the Children's Court. Parents of refugee background are particularly disadvantaged by these circumstances as they are likely to face cultural and language barriers to understanding the systems that affect their lives in addition to managing trauma-related mental health problems.

A number of respondents also commented on the importance of eliciting the views of children and young people and noted the challenges the court faces in this regard. The inclusion of the voices of children and young people may vary with the age of the child or young person and their ability to express their viewpoints. As one respondent commented:

> I think the fact is that children and young people and families are so isolated from the processes that happen at the courts. I think they're completely left out of this system which

> is governing so much of the lives of families that are involved in the Children's Courts. The timeframes, the adjournments, the administrative systems are just set up. It's sort of isolating. You look at children, you look at young people and families, they're completely oblivious to what is going on in the court system. From arriving, the layout of the court, to sitting in court and listening to what is going on and actually understanding the language that is being used. I think there are processes that are put in place around supports and Children's Courts Clinics and all that sort of stuff, but I think that's really alienating for families. (Non Government Agency Worker)

Similarly with regard to care and protection matters, respondents who work with children in the care and protection system report:

> There's a huge sense of unfairness and injustice in that they haven't been heard, and people aren't listening to them. As far as I know, children have a great ability to be able to speak what they want and how they want certain things. If you have conversations with kids, they're actually very realistic about their parents and what their parents can and can't do, and whether they want to live with them or not… it's just about making them part of the process. (Practitioner 2)

These excerpts highlight that whilst good communication is seen to be important in the courtroom, the court process is difficult for many young people, and appropriate support in communicating their views during the process is essential.

3.8 Clientele: The Overlap Between Care and Crime

Respondents in this study were asked to comment on the nature of the clientele who come before the courts, both children and young people and their families. The majority of respondents suggested that the young people appearing before the courts for criminal matters consistently displayed social disadvantage across a range of indices such as poverty, housing, lack of education and family breakdown. There was no sense that these characteristics had changed greatly in recent times. Stakeholders were clear that there was a substantial overlap or nexus between the care and criminal jurisdictions of the NSW Children's Court:

> Not all, but a lot of the children in the criminal jurisdiction have had some brush with the DFCS in the past in relation to them being at risk of harm, in relation to their parenting or how they have been parented. (Magistrate 2)

Further, it was highlighted by several of the research respondents that the juvenile justice system is working with cases that are framed by welfare issues. The following excerpt illustrates this point:

> These are kids with really serious welfare issues, who the DFCS (Statutory Department) either can't or won't work with. Can't so much because of lack of resources or because that person has got really challenging behaviour; you can't just put them in some placement. Or sometimes won't, because the kid is about to turn 16, or because of some idea of 'oh well this kid can go home if they want to, there's no child protection issues at home, why don't they go home', or because of some idea of 'well, juvenile justice is looking after them now, we don't need to worry. (Crime Solicitor 2)

Some respondents commented upon the entrenched nature of social disadvantage faced by many young people appearing and the complexities in decision making when care and criminal matters were being heard simultaneously:

> We see, unfortunately, children who we knew in the care jurisdiction and who were, say, removed from their parents and placed in out of home care a few years ago. A few years later we start to see them appearing in the criminal jurisdiction…. It does bring a whole lot of complexities because the way the legislation is worked out is that there is the care legislation and then there is the criminal legislation and sometimes we have issues that come up. For example, in bail applications, we're nearly always dealing with other welfare issues and in crime and sentencing so it's quite complex because we'll thoroughly know in fact that there is a huge overlap in the way in which the structure of the court is and the jurisdiction. You can't actually use your knowledge you know from one jurisdiction and the other because that's not fair, it's very important that you approach each matter in isolation because that's what you're meant to be doing. It does make it very complicated. (Magistrate 3)

These views are reflected in the recent Australian research literature (Cashmore 2011; McFarlane 2010; Marien 2012; Wood 2008). The Wood Report noted that 28% of males and 39% of females in juvenile detention were young people who had been in care (p. 556). McFarlane's (2010) study of 111 Children's Court criminal files found over a third of the sample (34%) of young people appearing in the court 'were or had recently been in out of home care and another 23% were classified as "extremely likely to be in care"' (p. 346).

In this context, significant concerns were raised by respondents about resources and the coordination of services. They believed that children and young persons in the system may be better served if a case-management approach was taken where care and protection and juvenile justice services were coordinated. This overlap between care and crime potentially adds weight to the idea supported by many stakeholders that the court should be empowered to monitor the provision of services. It was a matter of concern that some young people do not access appropriate support services until they have committed a crime.

Many respondents alluded to the systemic disadvantage faced by Indigenous young people and families. With reference to the care jurisdiction, the view was expressed that there was a lack of understanding of Indigenous family structures and a tendency to apply ethnocentric views of parenting in assessing care matters. However, a perceived strength of the current court is the Nowra Care Circle Pilot, a community-based response that promotes the participation and self-determination of the Indigenous population in that region. As endorsed by two of the respondents,

> I think that it is a very good way in which you can improve the participation of Indigenous people and young people in the system. I mean out of everything I've seen in the last say 10–12 years, I think that's actually the best way to actually improve the participation and the outcomes for those kids. (Government Solicitor, Care jurisdiction 1)

> In order for these systemic disadvantages to be addressed, there needs to be changes at a structural level. This will require a long-term approach to change police attitudes and practice. Moreover, more community based (and less adversarial) responses need to be implemented. (Magistrate 4)

There was unanimous support from respondents for increased consultation with Indigenous communities about the barriers facing them and their youth. It was noted by most respondents that any effective change would need to be based on building relationships with Indigenous young people and families over time, and directed by the voices of Indigenous communities. The following quote is demonstrative:

> I think the more we hand that power back and offer support, the better for all involved, but we need to do it carefully, sensitively and appropriately. (Academic 3)

3.9 Justice Approaches

Respondents in this study were prompted to comment on the relative merits of different Children's Court models such as the inquisitorial approach. Some respondents critiqued the adversarial model of the Children's Court not only in relation to its suitability for working with Indigenous families and young people but also in relation to the broader population. For example, in care matters it was noted that this approach can deter parents from agreeing to Emergency Care and Protection Orders out of fear that the DFCS (the statutory department) will later use this agreement as evidence for a removal order. Respondents alluded to a lack of transparency and communication with parents about case plans and the lack of trusting and collaborative relationships between parents and DFCS caseworkers. The following excerpt captures this issue:

> Caseworkers used to be very clear and upfront with families, whereas now they don't build relationships, so they don't have those conversations. Everyone goes to court trying to find the evidence. (Practitioner 2)

To better assist parents in meeting restoration requirements, and also for the purpose of including the perspectives of children, young people and parents in court processes, respondents working in the care jurisdiction were supportive of more therapeutic, case-management and early intervention models. Some respondents spoke of the recent reticence on the part of the statutory agency to engage in early intervention to prevent escalation of care and protection matters and consider reunification as a permanency option. A few respondents highlighted the progression away from early intervention and family support that assisted families to care for their children:

> You've also had six years of this going on where they haven't done the early intervention, they haven't assisted those parents. (Care and Protection Solicitor 1)

> The focus seems to be on the long term to the detriment of the family, and there is sometimes a lack of importance placed on the connection with their natural family. (Care and Protection Solicitor 2)

> So that's been the huge shift across. So where we used to be involved in voluntary undertakings, or undertakings to the Court, with structured supervision orders, or plans where children remain in the house ..... actually when it goes to Court, it's the removal or long term orders. So it's shifted into a very different way of working.(Practitioner 2)

> Restoration in the Children's Court is getting rarer by the day. (Practitioner 3)

In the criminal jurisdiction, the attitudes of stakeholders to other models of justice were cautious. Whilst respondents were generally supportive of restorative justice and therapeutic jurisprudence, there was a sense that despite the difficulties of an adversarial approach, this was the best system within which to frame court decisions. Respondents were more interested in innovations that would support the current Children's Court system, rather than moving to, for example, an inquisitorial approach.

3.10 Specialist and Therapeutic Courts

Following on from the concerns raised about the adversarial model, there was support amongst the research respondents for more specialist and therapeutic courts. In particular, there was support for courts to take a case-management approach so that young people are supported in making changes, are included in court processes (increasing their understanding of court processes) and can view people in authority as persons that can help them. The Youth Drug Court was identified as an example of this. There was wide support for legislating the Youth Drug Court as this provides young people with an intensive, long-term approach that is effective in reducing recidivism. As stated by one of the research respondents,

> In a therapeutic court the young people, to a very large extent, speak for themselves, not through their lawyers. We do some very, very informal court settings… with us sitting around the bar table with the young people coming along and just having a round table discussion. Those discussions end up being very frank and in language that they can really involve themselves… They see that the whole system can work to help them, and that the legal system can be part of their healing and part of their therapy, as opposed to something that is just there to either punish or bewilder them. It's a completely different approach. (Magistrate 3)

3.11 Facilities

The challenges associated with different court facilities were a major issue raised by the research respondents in relation to meeting the purpose, role and scope of the Children's Court, and a key issue separating practice in metropolitan and rural areas. In rural areas, children's matters are heard in the local Magistrate's Court alongside matters for adults. This means that children wait for their matter to be called alongside adults and at times are held for lengthy periods of time in docks or cells due to a lack of other places for them to wait for their hearing. This practice was seen to undermine one of the fundamental purposes of the Children's Court, to treat children and adults separately and to recognise children as a vulnerable group that need specialised treatment before the law.

Families and young people in rural areas are also disadvantaged by poor audio-visual (AV) equipment facilities. Such facilities are either not available or unreliable.

Consequently, children, young people and parents may have to travel great distances to appear in court, when this could have been avoided with AV technology.

Whilst many respondents spoke favourably of technological innovations such as audiovisual linkup, a number were more cautious:

> The other thing that I'm not a hundred percent sure works well for adolescents is the whole AVL thing because I think it actually takes away…it gives a very one dimensional view of what is going on, and you're not able to pick on those non-verbal cues as well. (Justice Health Worker)

There were also a number of practical concerns:

> As far as technology goes, we seem to have in NSW in the justice and attorney general area a whole suite of incompatible equipment. We have fantastic screens in all the courtrooms, yet sometimes the DVDs and things that the police are playing on their computers, and whatever, have messed up, and we end up all huddling around a police computer. Yes, there are technical difficulties. (Magistrate 3)

> One of my constant bugbears is the use of audio visual links. In theory, they are a good idea, because it's crazy to have a kid taken out of a detention centre, brought to court, hang around most of the day in a cell, for what might be five or ten minutes in court. And sometimes that means being transported really long distances to do that. That's got to be counter-productive, particularly if they can be engaged in programs and things. But often the people I think at the detention centres, are not as expert as they could be in operating the systems. Often there's competition for the use of the links, and often the video link stuff presumes that the lawyers have had a chance to speak to clients beforehand. (Magistrate 4)

The problem of facilities also applies in metropolitan areas. Whilst there are separate Children's Courts in metropolitan areas of NSW, respondents highlighted the lack of suitable waiting areas, conference rooms and interview rooms in all of the Children's Courts except for the newer and more custom-built Children's Court in the heart of Sydney. Thus, there is little privacy for solicitors to meet with their clients. This also creates safety concerns when there are cases that involve domestic violence or when one of the parties to a case has a history of violence. One lawyer noted:

> There are really practical problems like….when you're in court they call all the care cases when you're waiting in a room and it comes over a PA system in your room, and I've been sitting with kids in a room, 'oh yeah, that's the Smith family, oh DoCS have taken their kids away have they', and they recognize names. The care jurisdiction should be in a totally separate court. I know why it was done the way it is, I know there's not enough … but I just think it's outrageous that care families…and I know often they're the same families, they still should have a totally separate area, and there should be more space for the little kids to be safe and play, and not near the big 17 and 18 year olds that we have in the criminal section. (Lawyer 6).

3.11.1 The Children's Court Clinic

The Children's Court Clinic, located in Sydney, provides clinical assessments for the Children's Court in care and protection matters. Whilst the Children's Court Clinic is a NSW statewide available service, a lack of financial resources limits its

ability to attract clinicians to provide reports, particularly for cases in rural areas. There are long delays for reports prolonging decisions about children and their care. Children's Court Clinic reports are highly influential in Children's Court cases such that hearing dates will not be set until the report is received and the care plan formulated and filed in court. As one magistrate noted,

> High impact. Very important. Probably should be an assessment in every matter, but you can't allow that to happen because there's not enough time, money, or clinicians available to allow that to happen. But high impact. Clinician's reports, the cases that they are used in are, to a very major extent, primary pieces of evidence that they produce. (Magistrate 5).

Respondents were generally positive about the status of the Children's Court Clinic reports with many respondents affirming their importance as impartial, objective assessments on which decisions can be made.

> By and large the quality of reports from the Clinic is very high and does have a significant impact in the cases where there is a report because quite often it will provide a clear way forward (Magistrate 4).

> The things that I like about it are that it's independent. I really like the way that the report is a report ordered by the court and it comes to the court. I think that people, everyone, including parents, and legal representatives, are really well able to understand that notion of independence, so I think that works incredibly well. As I say to you, I'd like it to be available both in the criminal and care jurisdiction, as it was, I think, for a while. (Magistrate 3).

> It was a huge bonus because it stopped the state being able to word up an expert that was their employee and, therefore, had a particular bent towards their case, and the Children's Court Clinic brought essential individuality and impartiality. (Magistrate 12).

However, the time delay in the court receiving reports is seen to be particularly problematic:

> The lack of resourcing of the Children's Court Clinic is a crime. It frustrates the court process because I think at times it is essential to have an independent assessment but that isn't available because of lack of resources for them. It means that either I don't get that independent assessment at all, or there is a delay of months while the huge workload that they've been dumped with, with the lack of resources, is flowing through. Bring on more resources for them. They're essential. (Magistrate 12)

> It's an ever expanding figure. It used to be six weeks, it's now, I think, 8 weeks, sometimes longer in the country. I don't know what it'd be now. But see that's at a point where there's already been some process within the court for a care matter. They might have gone for a month. Then someone's asking for a clinician's report, let's say another two months, then at the end of that the parties will say, well, I want to respond in affidavit evidence to what that says. So they go another month, and then a hearing day is allocated because that's when everything is ready to go, and everyone has answered everything. Then you look at it and say: How long is it before we can get a hearing done? Well, we get a hearing date in three months time, because everything else is logged out before then. All of a sudden you're looking at seven or eight months from when a child has been taken. Well, that's not in their interests. It means that someone taken at age 2 from their parents, is effectively having their lives changed by…well you're going back to mom and dad, or you're going to that foster carer… they're ongoing for months and months into the future. That can't be good. So there needs to be more clinicians. If anyone that you interview says anything different to that I would

> be greatly surprised. They do a great job in the context of what they're able to do. But you can't make a silk purse from the sow's ear, and if there's not enough of them and they're not adequately financed, then that problem is going to be an ongoing problem. It's too slow. They need to get the reports done quicker, and that's not their fault. The fault is that there is not enough of them. Too many cases, not enough of them. (Magistrate 5)

3.12 Court Workers and Training

With regard to magistrate training, the *Children's Court Act 1987* stipulates annual training for magistrates. Other sources of ongoing 'training' included the in-court research officer who provides magistrates with the latest developments in law and research and the 3 months initial training to which all Local Court magistrates are subjected. Magistrates also believed that collegial support and the opportunity to debrief would be beneficial, particularly for magistrates who sit in single-magistrate courts in regional areas, considering the disturbing nature of some of the cases heard. Both care and crime solicitors mentioned their training through Legal Aid Commission and Continuing Legal Education through the College of Law and the Aboriginal Legal Service Annual Conference.

There were mixed opinions concerning the role and expertise of police prosecutors in the Children's Court. Court workers in rural areas were generally positive about police prosecutors, usually having built a relationship over time with one particular worker. In the city, views were more diverse. Whilst police prosecutors were often seen to 'do their best', their legal knowledge was at times perceived to be lacking (particularly noticeable when pitted against more experienced litigators), and prosecutors were seen to be pressured due to time and resourcing. Overall the level of expertise of police prosecutors was seen to be highly variable and this, in turn, was seen to affect both the court process and potential court outcomes, for example,

> Police prosecutors, if they present their case well are also invaluable. Just like a solicitor is invaluable if they present their case well, but if they don't then that is hopeless. …But police prosecutors I think often are ill prepared, haven't had a chance to look at their brief. I am sometimes concerned about their level of legal training and their knowledge of their function as an officer of the court in presenting their cases fairly. So I think something needs to be looked at training police prosecutors (Magistrate 2).

> It is all relative to the level of expertise. There are some very poor police prosecutors. They don't assist at all. Like a solicitor who appears for an insurance company that thinks it's their money that they're dealing with when they're dealing with a client. Police prosecutors in children's matters often do not deal with matters of cross examination of witnesses, cross examination of the young people, with sufficient compassion towards the young person. Now it's not their job to be compassionate, but we're often dealing with young people, 13 and 14 year-old people. 13 and 14 year-old people don't need to be overborne by a physically imposing police prosecutor in a courtroom. That's not what the system is about, nor should it be. Their job is to ask questions and get responses. Just to get the evidence about what the young person is saying. A number of them have that expertise, a number of them deal with those matters with quite appropriate skill. A lot of them have got no idea. So,

> they're necessary, police prosecutors are necessary. There's got to be someone who brings cases to a court. But they need to be made more aware of human frailty and human strengths, and that comes down to an ability to examine and cross examine in a court appropriately. Some of them need lessons. (Magistrate 5).

Respondents also emphasised the need for all DFCS caseworkers to receive more training on the difficulties facing parents in meeting reunification plans. In particular, poor education, low income, lack of transport and mental health problems were identified as barriers facing parents. The need for DFCS caseworkers to receive more training in the areas of mental health and intellectual disability was also emphasised strongly by several respondents.

In addition, the research respondents highlighted the need for all personnel associated with the Children's Court, including the caseworkers in the DFCS and NSW Police, to receive more cultural training to improve practice with Indigenous young people and families, as well as young people and families from other minority groups, especially people of Middle Eastern background.

3.13 Conclusion: Ideas for Reform

Whilst participants in this study endorse the Children's Court as the appropriate instrumentality to deal with child protection and juvenile justice matters and expressed confidence in its personnel and associated functionaries, they raised a variety of concerns about its operation, outstanding among which were resources, education and training to enable the system to function adequately for the well-being of the children and young people, their families and the wider community. It is clear that the nature of the work is difficult and complex, that children and young people appearing before it have entrenched social problems and that there is an overlap between care and crime jurisdictions. The pressure on resources was apparent with respect to adequate servicing of rural and remote communities and the stress experienced by Children's Court personnel in dealing with case complexities.

Some courts in NSW operate in purpose-built spaces with adequate and functioning technology, specialist advice and a specialist magistracy. In other courts, there is little or no access to the specialisms and service options afforded to city young people. This means that court process and outcomes potentially differ depending on geography. Inequities in access to resources and services across the rural/city divide in NSW are a key issue of concern and area of frustration for stakeholders. Because of the additional challenges of the country, it is imperative that the AV technology be functional all of the time and in all court rooms in NSW.

Similarly, the rural court circuit should remain activated and strengthened if possible. Other potential service 'circuits' could include a circuit for the Children's Court Clinic as a way to get specialist staff out to the country. An incentive scheme for caseworkers/clinicians could be considered to help persuade some practitioners to work in country settings. There was a consensus that the specialist and

independent advice from the Children's Court Clinic was very useful, but resource shortages were negatively affecting the care and protection jurisdiction. Supporting and strengthening the Children's Court Clinic and exploring the option of extending this facility in crime matters were endorsed.

Throughout this review, several issues emerged relating to the interface between disadvantage, child protection and crime, especially in the vulnerable Indigenous communities. The growing number of children and young people with complex problems and entrenched disadvantage was alluded to in both jurisdictions. This was noted as a particular concern for NGO service providers who encountered significant challenges in responding to the demand for services for children, young people and families. The emerging overemphasis on removal and long-term orders was perceived as inadequate practice by several judicial officers and other stakeholders in view of the instability in care placements and alienation children experience whilst in care (Fernandez and Barth 2010) and the interface between care and crime. The strong consensus among respondents on the need for expanded early intervention and supportive services in both jurisdictions to enable access to a wider range of options in case disposal is to be taken seriously.

The data highlighted the crucial need for mental health services as an early intervention strategy to divert matters from the Children's Court in both jurisdictions and/or to increase referral options available to magistrates in the court. Increased mental health services for parents may alleviate levels of child protection intervention through emergency and permanent care orders whilst supporting better outcomes for young people with mental illness in juvenile justice systems. Research undertaken with practitioners in service systems advocates for effective management of mental illness of parents and young people and long-term and flexible family support and collaboration between relevant systems (Darlington and Feeney 2008).

Stakeholders were generally supportive of existing court-based reforms and supportive of them continuing especially where they give magistrates more options in terms of sentencing. There was support for the NSW Youth Drug and Alcohol Court and the need to expand it, so it is accessible to a greater range of young people, commensurate with the *NSW Young Offenders Act 1997* which advocates a diversionary framework for young offenders with warnings, cautions and youth justice conferences. There was strong support for the fuller and flexible application of diversionary options in the crime jurisdiction. The importance of this is reinforced by Cunneen and White (2011, p. 297) who note that recidivism relates to the level of entrenchment of young people in the juvenile system.

In terms of other new reforms, there was hesitation in moving to a national framework and little sense that this state should move to a more inquisitorial model or to other models such as that seen in Scotland. In terms of governance, there was no clear consensus here, but for some there was an interest in making the court fully independent from the local court. Overall responses from respondents in this study emphasised the importance of having a specialist Children's Court and the benefits obtained for children, young people and families in having a team of specialist professionals in both jurisdictions. In both the care and crime jurisdictions practitioners

wholeheartedly supported the need to continue improvements to the Children's Court and associated systems that will enhance the potential for better outcomes for children and young people. It is acknowledged that there are continuing challenges to be addressed. The disproportionality of Aboriginal children, youth and families and the overrepresentation of families from deprived backgrounds in clientele presenting to the court and the lack of sufficient focus on the needs of specific cultural groups were frequently identified as agendas for future work.

3.14 Update Following the Data Collection

3.14.1 The Current State

Since the data were collected in this study, particular reforms in the care and protection jurisdiction have been implemented. The foundation President of the Children's Court developed nine Practice Notes which define best practice and required procedures for the work of the Children's Court in care matters. There have been further developments in training for many court personnel such as the Inaugural Conference for Children's Representatives conducted in May 2012. The rural circuit for specialist Children's Magistrates is firmly established. A pilot short-term orders project is underway, and alternative dispute resolution procedures have been implemented and evaluated. These planned improvements were strongly supported by many of the respondents in this study. It is hoped that such initiatives will be built on and consolidated. It is, however, regrettable that recently the Youth Drug Court, a specialist therapeutic court endorsed by many respondents in this study as being an effective case-management approach, has been discontinued in the criminal justice jurisdiction.

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Chapter 4
Youth Justice, Child Protection and the Role of the Youth Courts in the Northern Territory

Deborah West and David Heath

Abstract Child protection and youth justice are two domains which have historically been of strong sociopolitical interest in the Northern Territory (NT) of Australia. Within both of these domains, the courts play a central role in the complex systems through which policies become operable. Traditionally, the courts have faced difficult challenges within this context because the remoteness of much of the NT, inconsistent resourcing, cultural diversity and widespread variation in socio-economic outcomes are factors which, through their presence, have contributed to a dynamic policy context that has fluctuated between ideals of care, coercion, punishment and rehabilitation. This chapter explores the role of the courts through both exploration of current and past policies and direct reflection from 44 people who work in child protection and youth justice.

Keywords Children's Courts • Youth justice • Child protection • Northern Territory • Australia

4.1 Introduction

In recent years there have been significant alterations to the child protection and youth justice sectors in the Northern Territory (NT), and the frequent and distributed nature of change has hindered attempts to empirically evaluate the effectiveness of different policies and programmes (Cunningham 2009; Northern Territory Government 2007; Polk

D. West (✉)
Education and Training Development, Charles Darwin University,
Darwin, NT 0909, Australia
e-mail: Deborah.west@cdu.edu.au

D. Heath
Social Work and Community Studies, Charles Darwin University,
Darwin, NT 0909, Australia
e-mail: David.heath@cdu.edu.au

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et al. 2003; Gibson 2000). This chapter explores the context and nature of recent developments in NT youth justice and child protection with particular focus on the role of the courts. Reflection occurs, firstly, on the literature and, secondly, on qualitative data collected from a total of 44 practitioners working in the system who participated in interviews or focus groups. Despite some evidence of recent improvement, practitioners in the study and two recent NT Government inquiries and a review have indicated there has been inadequate progress in some areas and, in some cases, even regression. The diversity in culture, population size and remoteness amongst the NT's widely spread cities, towns and communities as well as the over-representation of Indigenous young people have long been pivotal challenges and continue as central areas requiring attention.

4.2 Geography and Demography

At 1,346,200 km^2 the NT has the third largest land area of Australian jurisdictions. It maintains the lowest population density by far at 0.15 persons per km^2 and a high percentage of the NT population of 210,674 (at 2006 census) reside in one of the small cohort of major towns (ABS 2007). Much of the NT could be classified as remote and ABS (2009a) data show that five of the NT's 11 statistical subdivisions (SSDs) contain less than 7,000 residents each. None of the five least populated SSDs have higher rates of employment than any of the six most populous SSDs (ABS 2009a). Reduced infrastructure in the numerous small communities outside of the major towns and service centres limits service delivery (NT Government 2009d); during wet season months access to and from many communities is solely through air transport. Generally, small remote communities have a limited suite of on-location services, and in many cases residents have to either travel from the community or rely on visiting practitioners and agencies to access medical, welfare, probation and parole, schools and police services.

At the 2006 census, over 51,000 Territorians were aged 14 years old or less. The median age of 31 years was the lowest of Australian states and territories (ABS 2007). In 2009 Indigenous people were estimated to make up 30.2% of the overall NT population (ABS 2009b) and 43.3% of the NT population between 0 and 17 years of age (ABS 2009b). Thirty-four percent of NT residents have indicated that they speak a language other than English at home. This includes 29,000 people who speak one of the numerous Indigenous languages spoken in various regions of the NT and 14,500 who speak at least one foreign language (ABS 2007). The implication of this data is that providing an adequately resourced interpreter service for the linguistically diverse people who encounter the legal system is a major challenge (NT Government 2009d).

4.3 Governance

The NT's status as a territory produces some comparative anomalies with governmental structures and processes in other Australian jurisdictions. A useful synopsis of the system and its historical foundations is provided by the Legislative Assembly

of the NT (LANT) (2009). Following European settlement the NT was administered first by South Australia and then the Commonwealth government. Not until the NT was officially granted self-government under the Commonwealth's *Northern Territory (Self-Government) Act* in 1978 did a locally elected Northern Territory parliament (Legislative Council) became responsible for most 'state'-type functions (LANT 2009).

Self-government remains enshrined under Commonwealth of Australia legislation, and the Commonwealth retains the power to amend self-government legislation and influence NT legislation (Australian Government – Senate Legal and Constitutional Reference Committee (SLCRC) 2000). The NT has a unicameral parliamentary structure with no senate, which partly explains the regular changes in policy and legislation. The Legislative Council has since become the Legislative Assembly and now includes 25 members with the Chief Minister being the internally elected leader of the political party with the ruling majority (LANT 2009). More comprehensive descriptions of NT development include NT Government (2007, 2010) and Human Rights and Equal Opportunity Commission (HREOC) (1997).

4.3.1 Development of Child Welfare, Youth Justice and Related Courts in the Northern Territory

The court system commenced in the NT following Goyder's landing at Port Darwin on 5 February 1869 (Northern Territory Government 2009b; Gray 2006; Mildren 2002), and 'by 1873 the lower courts were well established with Police Courts, Local Courts of Full and of Limited Jurisdiction, Coroners Courts, and Licensing Benches conducting regular sittings' (Mildren 2002: 2). From 1884 to 1911 a 'judge of the Northern Territory' was appointed to exercise the full powers of the Supreme Court, and in 1911 the Supreme Court of the Northern Territory was established (NT Government 2009b; Mildren 1996).

In 1910 legislation was passed that provided the government (via a Chief Protector) with a raft of powers relating to the control of Aboriginal people, including the ability to command Aboriginal people to live on reserves and dictate how they spent their money (NT Government 2010; HREOC 1997). When the Commonwealth assumed control of the NT in 1911, the *Northern Territory Aboriginals Ordinance 1911* was enacted 'which increased the powers of the Chief Protector to assume "the care, custody or control of any Aboriginal or half caste if in his opinion it is necessary or desirable in the interests of the Aboriginal or half caste for him to do so"'. These powers were retained until 1957 (NT Government 2010: 102).

During this period a protectorate approach predominated which primarily centred on placement of Aboriginal children in missions around the NT (NT Government 2010). Although Caucasian children could be subject to state care during this period, the protectorate approach firmly embedded the practice of limiting, or entirely avoiding, contact between Aboriginal children and their families and communities (HREOC 1997). Child protection legislation and policies variously described as

being founded on principles of merging and assimilation were extensively continued in different forms with little actual change until 1972, with the election of a federal labor government under Prime Minister Whitlam government whose policies put greater emphasis on Aboriginal self-determination.

Following the introduction of self-government in 1978, local development of NT juvenile justice and child welfare legislation commenced, culminating in the introduction of the *Juvenile Justice Act NT (1983)* and *Community Welfare Act NT (1983)*. These two acts, introduced as partners (NT Department of Justice 2004; Bonney 1996), were the genesis of formal, partly integrated youth justice and child protection systems in the NT. Prior to 1983 youth justice was vaguely embedded within the welfare sector.

Being the document driving the first genuine implementation of a distinct youth justice system in the NT, it is unsurprising that the *Juvenile Justice Act* was frequently amended during its 22-year history. Significant amendments include the 1990 introduction of parental responsibility provisions, which could see parents punished for their children's offending behaviour; victim-offender conferencing (Bonney 1995); and mandatory sentencing of juvenile offenders between 1997 and 2001. In 2000, the Juvenile Pre-Court Diversion Scheme (JDS) was established as a response to widespread criticism of mandatory sentencing and largely continues under the replacement *Youth Justice Act NT (*2005*)*.

4.4 Key Legislation

In the last decade two major government reviews culminated in the introduction of the *Youth Justice Act (NT) 2005* and *Care and Protection of Children Act (NT)* (2007). These acts are the legislative backbones of the current NT youth justice and child welfare systems and play a significant role in shaping the activities of the Youth Justice Court and Local Court.

The *Youth Justice Act* came into force on 1 August 2006 and applies to youth from 10 years of age (the age of criminal responsibility) to 18 years of age. The *Youth Justice Act* covers the following:

- Police investigation of offences
- Police administration of pre-court diversion
- Court proceedings
- Sentencing principles and sentencing outcomes
- Operation of various community supervision orders
- Operation of detention centres
- Interstate transfer of offenders

In addition to legislating the rights, duties and procedures involving agencies and individuals involved in youth justice, the *Youth Justice Act* contains a number of principles for administration which provide insight into the philosophical underpinnings and fundamental intentions of the Act. Given the central importance of these principles in shaping the expected administration of youth justice in the NT and also

Table 4.1 Principles for administration (Section 4 of the Youth Justice Act)

Youth Justice Act subsection and principle (in abridged form)	
(a)	An offending youth should be held accountable and encouraged to take responsibility
(b)	A youth's needs should be acknowledged and supported to develop social responsibility
(c)	A youth should only be kept in custody for an offence (whether on arrest, in remand or under sentence) as a last resort and for the shortest appropriate period of time
(d)	The age and maturity of a young person must be taken into account in decision making
(e)	Youth must be made aware of their obligations and the consequences of breaking the law
(f)	Youth should be dealt with in a way that supports reintegration into their community
(g)	Balance between the needs of offenders, victims and the community must be sought
(h)	Family relationships should, where appropriate, be preserved and strengthened
(i)	Disruption of a youth's family environment, education or employment should be avoided unless necessary
(j)	Racial, ethnic and cultural identity should be acknowledged, and maintenance of these identities should be supported
(k)	Victims should be given opportunity to participate in the process of dealing with the offending youth
(l)	A responsible adult should be encouraged to support youth through care and supervision
(m)	The youth's sense of time should be taken into account in decision making
(n)	Punishment should be designed to facilitate social responsibility
(o)	Aboriginal young people should be dealt with in a way that involves their community
(p)	Programmes and services for youth should be culturally appropriate, promote health and self-respect, foster responsibility and encourage them as members of society
(q)	Where alternatives exist, criminal proceedings involving offending youth should be avoided or discontinued
(r)	Where possible, youth and adult criminal justice proceedings should be kept separate

their applicability in comparing to other jurisdictions, the principles are listed in abridged form in Table 4.1.

The *Care and Protection of Children Act* commenced on 7 May 2008 and contains directions regarding the following core principles and processes:

- Procedures for the investigation of notifications, assessments, inspection of places where children reside, relocation of children, aftercare options and preparation of long-term care plans for children deemed to be in need of protection

- Application of Aboriginal child placement principles
- The paramount importance of the best interests of the child in legal decisions
- Guidelines for court procedures where family matters jurisdiction is invoked
- Application and administration of child protection-related orders
- Transfer of court orders to and from other states and territories
- Screening for child-related employment
- The appointment of a Children's Commissioner

Individual child protection cases in the NT frequently feature multiple agencies, locations and cultures and may also be subject to different court orders at various times in the process (NT Government 2011c). Consequently, it is recommended that the *Care and Protection of Children Act* be referred to for further information, especially in relation to interagency collaboration and in relation to the orders and specific conditions available to the courts. Given the place of the NT's Youth Courts within a complex systemic structure, it is argued that critically appraising the options available to the court in light of the operational and relational context of the multiple agencies that are responsible for carrying out the directions of courts is crucial. The legislation sets out much of this context.

4.4.1 Current Policies

Diversion, flexibility, collaboration with families and respect for the needs of victims and the community are four policy cornerstones of the current strategy, and each will be discussed in the following paragraphs.

The NT operates a Youth Diversion Scheme (YDS) that is administered by NT Police. The primary aim of the YDS is to limit the exposure of youth to formal criminal justice and court proceedings via warnings and referral to diversionary programmes (AIHW 2008b; Bates 2001). Section 4 of the *Youth Justice Act NT* (2005) states that 'unless the public interest requires otherwise, criminal proceedings should not be instituted or continued against a youth if there are alternative means of dealing with the matter'. Some serious offences disqualify diversion as an option (NT Police, Fire and Emergency Service 2009).

Diversion is one of the few policies where empirical evaluation exists. In a sample of 2,744 police apprehensions involving people 16 years or younger at time of offence, Cunningham (2007) found that 39% of youth who faced court reoffended within one year. In contrast, 21% of youth who participated in a diversionary conference reoffended within a year.

Current policy statements observe that flexibility is required by courts to deal with young people and the complex circumstances that often surround the reason for their court appearance (NT Government 2009a, c). For example, the *Youth Justice Act* (2005: 42) contains a comprehensive list of 15 broad sentencing options available to the court upon a charge being proven against a youth, with further variations appearing within most of the 15 sentencing types.

The involvement of a wide range of stakeholders in both systems places emphasis on interagency communication and greater support for the families navigating the complex systems (NT Department of Health and Families 2009a). This has resulted in the establishment of Family Support Centres, Interagency Collaboration Panels, an Information Sharing Code of Practice and designated Lead Agencies to co-ordinate cases where multiple services are involved (NT Department of Health and Families 2009a, b, c, d).

The NT's youth justice system contains restorative justice provisions that seek to concurrently serve the needs of victims and offenders (Cunningham 2009). One example is victim/offender conferencing which occurs at both diversionary and court levels. Restorative justice is platformed on a belief that supporting offending youth to comprehend the harmful impact their actions have caused to victims can act as a powerful deterrent (Cunningham 2009; Bates 2001). Conversely, some victims are seen to derive benefit from the opportunity to understand the youth's circumstances and motivation.

4.4.2 Major Stakeholders and Their Roles

Table 4.2 highlights the primary roles performed by key agencies to allow readers to contextualise the agencies mentioned in the results and discussion sections of this Chapter.

Table 4.2 Agencies and roles

Agency	Roles
Youth Justice Court	Hear most criminal justice cases where youth are defendants
Local Court (family matters jurisdiction)	Hear applications for orders relating to child protection
Supreme Court	Hear appeals
	Hear serious offences where youth are defendants
NT Police	Investigation and prosecution of criminal offences
	Administration of youth diversion scheme
NT Department of Health and Families	Investigate and follow up child protection notifications
	Manage Family Support Centres
	Provide services to children in care
NT Department of Justice	Administer youth detention
	Community corrections
Youth Justice Advisory Committee	As an expert reference group, provide advice to government
Community Youth Development Units (and other programme providers)	Work with youth in communities
	Administer and evaluate programmes
	Feedback in relation to policy development

4.4.3 Research and Evaluation

Most NT data are contained in broad scope statistical reports that tend to lag a year or two behind to allow for collation of information. For example, the Australian Institute of Health and Welfare Report *Juvenile Justice in Australia 2008–2009* was released in April 2011 but does not contain standard data from the NT and WA. This means that, at the time of writing, the most current data relating to some key variables was four years old.

4.4.4 Youth Justice

In terms of youth justice, Indigenous young people and males are over-represented in the NT criminal justice system. Of the 304 young people who were subject to either community supervision or detention in 2006–2007, 279 (91.8%) were male (AIHW 2007). In terms of Indigenous young people, 261 (85.9%) of the 304 young people under supervision in 2006/2007 were Indigenous (AIHW 2007).

Data also illustrate that the youth justice system in the NT is typically constituted of a small number of young people across a vast catchment area. Table 4.3 presents data adapted from AIHW (2008b) which illustrate the average daily number (ADN) of young people under both community supervision and detention over a 4-year period.

4.4.5 Child Protection

A primary source of NT child protection data is the *Child Protection Australia* report produced by AIHW. The AIHW (2008a) reports that in 2007–2008 there were 1,275 finalised investigations of child protection notifications in the Northern Territory of which 756 (59.3%) resulted in a substantiation. The Northern Territory rate of 11.9 children per 1,000 children being subject to a substantiated notification was the highest amongst Australian states and territories. In the NT, Indigenous

Table 4.3 ADN of young people under NT juvenile/youth justice supervision 2003/2004–2006/2007

	2003/2004	2004/2005	2005/2006	2006/2007
Community supervision	136	160	158	131
Detention	16	19	19	29
Total	152	179	177	160

children were almost six times more likely to be the subject of a substantiation than non-Indigenous children (AIHW 2008a).

4.4.6 Systemic Evaluation

Perhaps the most comprehensive systemic evaluations are contained in two recent Board of Inquiry reports mainly relating to child protection (NT Government 2007, 2010) and the Review of the Northern Territory Youth Justice System released in September 2011 (NT Government, 2011c). These inquiries were wide-ranging and contain a wealth of data gathered through interviews and submissions involving various individuals, families, community groups, practitioners and other stakeholders. The reports starkly illustrate numerous issues of concern and a significant proportion relate to the inadequacy of both policy and service delivery. The first report in 2007 (co-chaired by Rex Wild QC, a long time director of Public Prosecutions in the NT, and Patricia Anderson, a well-known Alyawarr woman who has performed research, community development, advocacy and policy roles with pivotal local and national Indigenous health organisations) preceded a federal intervention into Indigenous communities as well as the NT Government's Emergency Response. In particular the authors of the reports expressed a need for:

- Government leadership
- Increased resourcing for an overwhelmed child protection system
- Improved staff awareness of Indigenous culture in service organisations and government departments
- Increased numbers of appropriately trained Indigenous people at all points in the systems
- Comprehensive child and adolescent mental health services
- Less emphasis on custodial sentences
- Building a strong and equitable core service platform in Aboriginal communities
- Improved family support services and youth centres
- Improved Indigenous education and employment opportunities and outcomes
- Significantly improved housing infrastructure
- Multidimensional strategies to combat alcohol misuse
- Genuine involvement of communities in implementing new policies and programmes

During the present project (specifically on the 29th of March, 2011), the NT Government announced a Youth Justice System Review. In introducing the review, the NT Attorney General Delia Lawrie (Northern Territory Government 2011a) indicated that the review would emphasise programmes and policies relating to vulnerable young people. Unlike the two inquiries discussed above, the Youth Justice Review would not be carried out under the *Inquiries Act*. Chaired by former Member of the Legislative Assembly (MLA) Jodeen Carney, the review was subsequently released in late 2011.

Table 4.4 Recommendations from the 2011 review of the NT Youth Justice System (NT Government 2011c)

Recommendations	
1	That a youth justice unit, with statutory authority, be established within a government department and that it have responsibility for administering and coordinating services and responses to young people in, or at risk of entering, the youth justice system
2	That a new, comprehensive youth justice strategy be developed and implemented
3	That the administrative arrangements order be reviewed and that the number of ministers responsible for aspect of parts of the youth justice system be reduced to mirror the existence of the youth justice unit and ministerial responsibility
4	That resources be provided to the youth justice unit for the purposes of collecting, coordinating, interpreting, analysing and disseminating whole of government data and statistics on youth justice issues, and that a territory-wide and nationally consistent set of systems and measurement indicators (including recidivism) be developed to provide information for decision makers on a range of youth justice issues
5	That resources be increased for police diversion to include the establishment of Youth Diversion Units in Katherine and Tennant Creek, that eligibility for diversion be expanded and that additional community based programmes be established that have a measurable rehabilitative value
6	That the number of youth rehabilitation camps be increased and include the establishment of one short-term therapeutic camp programme in greater Darwin area and one in Central Australia and a longer-term therapeutic residential programme in the Top End and one in Central Australia, and that the youth rehabilitation camps be regulated by legislation
7	That additional resources be allocated to the Family Support Program and existing Family Support Centres
8	That the capacity of the Northern Territory workforce be strengthened to include training of workers across the youth justice system including youth workers, court support workers and community youth justice workers.
9	That all programmes delivered for young people in, or at risk of entering, the youth justice system have built in evaluation processes, that an external monitoring committee oversee progress of the youth justice unit, that the youth justice unit's activities are included in the department's annual report and that government report on the recommendations of this review by 30 June 2012, again by the end of 2012 and annually thereafter

Whilst the recent child protection-related inquiries have typically contained a large number of recommendations, the Youth Justice Review contains nine focused recommendations based on analysis of the extensive submission and consultation process that formed a major part of the review. The recommendations largely focus on the allocation of resources to specific programmes and locations and the establishment of a new youth justice unit. Given the alignment between the recommendations and the focus of the present project Table 4.4 contains the full list of recommendations.

In recent years there has been a rapid improvement in the combination of quantitative statistical data produced by agencies such as the ABS and AIHW and qualitative data based on consultation with, and submissions from, workers at the operational

coalface of the system found in reviews, inquiries and research reports like the present one. Whilst such developments are useful, the fundamental challenge remains in terms of how best to move forward with a response to data which have consistently illustrated the broad and tangled range of operational difficulties faced in areas that frequently occupy the political spotlight. In this complex context, the present project took place, with a group of participants working at a variety of levels passionate about sharing their experiences and views about moving forward.

4.5 Methodology

4.5.1 Participants

A purposive, snowball sample of 44 participants took part in the study, with 26 participating in individual interviews and 18 participating in one of the two focus groups that were held. The two focus groups were conducted with Department of Health and Families staff ($n=6$) and Youth Justice Advisory Committee members ($n=12$). The 21-question national interview schedule was utilised for each method.

Interview participants were stationed in a variety of locations across the Northern Territory including Darwin, Katherine, Alice Springs and Nhulunbuy. Further, most participants indicated their role was not confined to their principal office location and that they travelled to other regions, towns or communities. Many participants commented that they had experience working in multiple roles in the NT. In broad terms current roles of participants included magistrate, policy officer, child protection worker, case manager (youth justice), youth worker, police officer, diversion programme facilitator, Youth Justice Advisory Committee member, Indigenous legal aid, defence lawyer, public prosecutor and Family Support Centre staff member.

All participants provided informed consent for the study which received ethics approval from the Charles Darwin University Human Research Ethics Committee.

4.5.2 Data Collection and Analysis

Interviews and focus groups were conducted either by telephone or in person and lasted between 25 and 65 minutes. Focus groups lasted approximately 120 minutes. All responses were digitally recorded and then transcribed verbatim into a word processing programme.

Once transcribed, individual responses were manually coded into themes and further divided according to the primary location of the participants. To preserve anonymity and confidentiality (due to the small size of the NT jurisdiction), responses from individual focus group participants were coded identically and aggregated with individual interview data.

Interviews and focus groups produced a large amount of raw data and for this chapter only the most common themes can be discussed in the results section. It is an ongoing responsibility and intention of the researchers to continue to analyse and disseminate project data through reporting on individual themes and questions.

4.6 Findings

This section provides a summary of findings reported within the thematic structure of the national question schedule.

4.6.1 Purpose of the Children's Court/s

Participants tended to conceptualise the purpose of the courts in terms of systemic aims as opposed to the courts as discrete entities. In terms of child protection, the principle from the *Care and Protection of Children Act (2008)* that the best interests of the child are paramount in decision making was strongly supported. Participants employed principally in the youth justice system widely acknowledged that victim and community needs meant that the best interests of offending youth are not necessarily paramount. A number of participants converted this observation to a goal of reducing youth offending, and individual and community harm. Restorative justice initiatives, community courts, family involvement and strong diversion programmes (e.g. victim-offender conferencing) were identified as strategies to align both systems more closely. Adherence to the UN Convention on the Rights of the Child (1990) was seen as a central task for both systems.

4.6.2 Children's Court Today

Participants were asked about what does and does not work in current court systems and about how the two main Children's Courts (Local Court and Youth Justice Court) fit within the broader child welfare system. Unfortunately, each positive comment was generally accompanied by a caveat, e.g. if a programme was working well, it was difficult to access.

In terms of what works, the youth diversion scheme administered by NT Police was overwhelmingly the most commonly cited item, with over 50% of respondents describing its various benefits.

Mechanisms for improved communication between agencies, communities and families via Family Support Centres, Community Courts, the Interagency Collaboration Panel and the Information Sharing Code of Practice were seen as improved under the newest legislation. Nevertheless, participants consistently warned that the child protection and youth justice systems struggle to integrate

when both are involved in cases. This was seen as unhelpful to the effective and timely functioning of the courts. As one participant stated:

> The Youth Justice Court would like to have Child Protection Officers there all the time so that when a kid appears before them they can say to the Child Protection Officer: 'Do you know this kid?'. At the moment they have a Community Corrections Officer, and if you say to them: 'Are they known to Child Protection?', they wouldn't know. They would have no idea at all. (Policy Officer A)

Although the legislation was generally seen as positive, there was observation of a lack of resources to support the flexibility of the legislation. Participants were especially concerned about the lack of bail support programmes and accommodation, access to rehabilitation programmes, lack of supervisors for good behaviour bonds and community work orders, lack of proper detention facilities except in Darwin, absence of separation between youth and adult court facilities and processes, under-resourcing of community corrections and widespread excessive workloads in the child protection system.

Overall, there was little criticism of court staff (defence lawyers, prosecutors and magistrates) in terms of their professional ability and motivation to achieve positive outcomes for young people; however, the effectiveness of the courts was seen as largely dependent on the broader system assisting the court by functioning well.

4.6.3 Personnel

Participants were asked about the training that different roles in the system required and whether more training was needed. Although a greater professionalism system wide was nominated, Community Corrections was seen as a critical point where professional staff with tertiary qualifications are desperately needed.

Looking at more specific training, in a nonmutually exclusive format, over 50% of participants nominated cross-cultural practice and working with youth as key target areas. Training in restorative justice approaches was also commonly cited. Despite this clear identification of training needs retaining staff after they have been appropriately trained was seen as problematic. As one participant stated:

> One of the things that has come out of the inquiry in the Northern Territory recently is the absolute lack of training that is given to front-line staff, and because there is an incredibly high rate of turnover of staff, people are coming from different jurisdictions and they simply don't understand what occurs, and don't understand the roles of various individuals. (Lawyer A)

4.6.4 Infrastructure

There were two dominant themes regarding infrastructure and physical facilities which arose, and these related mostly to youth justice. The first issue was simply that there are two main courts (Local Court and Youth Justice Court) often dealing

with the same children but different caseworkers, lawyers and other involved people. Participants articulated that this poses problems in terms of interagency communication, integrated care planning and ensuring youth actually understand processes and can therefore make a meaningful contribution.

The second key issue was that separation of the youth and adult court facilities was described as unsuccessful by participants in all regions. Adult and youth offenders were observed by participants as frequently in the same building, same room and same waiting area throughout the process. Most participants reported that courts and magistrates generally tried to allocate specific times for youth cases to minimise the problem but felt actual separate infrastructure is required.

4.6.5 Clients/Cases

Participants were asked if they were aware of any specific characteristics or patterns in the types of young people appearing before the courts. Participant views reflected earlier data about the disproportionate number of Indigenous people in both child protection and youth justice contexts. About one quarter of participants also mentioned that, for some, offending is a rite of passage, a way of being with friends and family.

Some participants, especially from Nhulunbuy and Katherine, observed that resources and culture in individual NT cities, towns and communities are so different that trying to generalise about the young people who come into contact with the courts is difficult and perhaps not helpful.

4.6.6 Case Processing

Case processing was a major topic for discussion. In a general sense, systemic pathways for youth were seen as basically non-existent and were variously described as ‘frustrating’, ‘fragmented’, ‘siloed’ and ‘fractured’. Barriers to integrated and well-planned case processing were identified at most points in the system. Table 4.5 displays key issues at various locations in the system.

4.6.7 Legislation

Whilst there were some minor issues raised with specific points of the legislation, the prevailing vision was of an absence of political will demonstrated through a lack of resourcing to provide the legislation a sound operational platform. Many of the resourcing issues were highlighted in Table 4.5. Another pivotal theme was that

Table 4.5 Key issues in case processing

Location	Barriers
Pre-systemic contact	Social inequality, especially in remote communities, contributes to criminal behaviour and child protection issues
Contact with system	Many key services are only available in Darwin and Alice Springs, and some services are only located in Darwin
	Although useful, diversionary programmes can be difficult to access
	Communication between child protection and youth justice is inconsistent, especially when a young person is involved in both systems
	Across the system staff have excessive caseloads
	Lack of bail accommodation means young people might be held in detention when they would not normally
Court	Some sentencing dispositions are unavailable due to lack of resourcing
	Separation of adult and youth processes is not occurring
	Information from agencies involved can be difficult to access
	Staff in agencies like NT Families and Children and Community Corrections are often not provided with enough time to provide thorough assessments
	Cases and applications are rushed through court
Post-court	Despite having a demanding and difficult role with excessive caseloads at a key point in the system, Community Corrections staff are 'lowly paid' and there is high staff turnover
	Trying to tailor effective programmes to individual people in remote communities is difficult from a logistical and budgetary point of view
	Programme and policy evaluation is limited and good programmes frequently have funding cuts seemingly without logical reason (e.g. court support programme run by Mission Australia)

expectations about the resources required to make changes are unrealistic. As one participant explained:

> The issue is, everybody expects that when they get there, the legal system, or the criminal justice system, will be able to 'fix' them. And it bloody can't! There's no chance! That's quite frustrating: 'Why aren't you . . .? What can't you . . .? Why hasn't this worked?'. Well, it hasn't worked because this kid's had 15, or 16, or 17 years of exposure to dysfunctional nightmares, and we're not going to be able to do anything within 6 or 12 months. (Focus Group Participant)

When asked whether there should be national legislation, participants were divided. Just over 50% of respondents felt that national legislation would be useful, typically using the reasoning that it would be based on (and generate) a greater evidence base and would simplify interstate matters. In contrast, others indicated that the different funding arrangements, demographic profiles and policy priorities would render national legislation unworkable in individual jurisdictions.

4.6.8 Other Reforms

As discussed previously, diversion was consistently regarded as exerting positive impacts since its introduction; however, participants indicated that diversionary programmes needed to be easier to access, especially in terms of increasing programme availability throughout the NT.

Participants also discussed Children's Indigenous Courts, which do not currently exist in the NT. As a result, participants generally directed this question to the topic of Community Courts, which have been used in the NT with varying success. Whilst these were seen as useful by the majority of participants, questions were raised about the availability of resourcing to assist the development and evaluation of Community Courts and broader issues which impact on the ability of the community to engage in the process. One participant commented that actually introducing Children's Indigenous Courts might assist in generating resources and interest. This participant felt the development of similar approaches through Community Courts was stagnating.

4.7 Policy Recommendations, Discussion and Moving Forward

4.7.1 Policy Recommendations

Participants in the project provided a wide variety of information. As a preface to critical discussion it is useful to summarise the findings into policy recommendations based on the participant responses. It stands out that the recommendations triangulate closely with the two major Board of Inquiry reports (NT Government 2007, 2010) and Review of the Northern Territory Youth Justice System (NT Government 2011c). The recommendations are as follows:

- More needs to be done to comply with the legislation. This means separating adult and youth justice processes and ensuring all legislated sentencing options are available for the courts.
- Diversion is seen as a positive model, but programme access needs to be more readily available.
- Community Corrections fulfils a vital function in the system and needs to be resourced accordingly, with professional staff and manageable caseloads.
- Staff turnover is a systemic problem and strategies to improve staff retention need to be implemented, with accompanying data collection processes to ensure strategies can be examined for effectiveness in retaining staff.
- Despite the presence of other stakeholders, young people must be viewed as the primary focus in youth justice and child protection. Young people in the systems often come from diverse cultural backgrounds and isolated areas. Participants urged that staff in agencies need improved training focused on the specific skills and knowledge needed to effectively work with young people in these contexts.

The relatively small system size and logistical challenges posed by remoteness are not excuses for inadequate specialisation of staff, agencies and programmes for young people across the whole NT.

- Tighter links must exist between the youth justice and child protection systems, especially where both systems are involved with individual cases. Among other things, this means investigating whether a single Youth Court would be a more effective alternative.
- A youth detention centre was identified as needed in Alice Springs. (Subsequent to the data collection for this study the Alice Springs Juvenile Detention Centre opened in March 2011 (Northern Territory Government 2011b). This is a 24-bed facility located in a converted section of the main Alice Springs prison. Ongoing information about the development of the centre and its programmes is limited at this stage.)
- Funding should be prioritised to new and existing initiatives that have clear evaluation mechanisms embedded so that the knowledge base of policies and programmes is improved.
- Solutions to specific issues in local areas need to be conceptualised, resourced, initiated and evaluated with genuine input from local community members and practitioners.

There are clear messages about the challenges and opportunities facing the NT courts that deal with children and youth. The first message was that ascertaining reliable information about what works in the current systems is difficult. Programmes change frequently – often before formal evaluation – and system-wide reviews tend to identify widespread concerns which lead to confusion about focusing resources and generating accountability. To this end, recommendations have already been established in two recent Board of Inquiry reports to assist with this process (NT Government 2007, 2010). Speaking years after co-authoring the *Little Children are Sacred* report, Pat Anderson (2009: 3) stated that 'the intervention did not address any of the recommendations of our inquiry', expressing a lack of genuine consultation with Aboriginal people as the biggest failing on the part of government.

A second message was that court operations are a product of the broader system within which the courts sit. Community Corrections was cited as a key agency in the youth justice system on which the Youth Justice Court depends. Yet, Community Corrections was seen as having a shortage of professional staff, low pay, excessive caseloads and high levels of staff turnover. Similarly, the effectiveness of the agencies involved in making initial child protection notifications is dependent on the ability of a system described as 'overwhelmed' (NT Government 2010) to promptly respond to and assess notifications before taking effective action which is, in turn, contingent on the availability of resources and programmes within the wider community sector.

It follows that resourcing problems comes with further risks. Potentially effective approaches contained in the legislation are liable to be dismissed as failures, when in reality the intended approach has not been implemented because of resource deficiencies, whilst the perception is that the approach is being utilised because it exists in the legislation. For example, Community Courts were identified by participants as

a potentially effective method of working with young offenders, although these courts are currently utilised on an ad hoc basis. Participants advocated formal development and evaluation so that impacts of Community Courts can be measured and leveraged before they are dismissed as a misfiring component of a flawed system. It is imperative that systems are designed to consistently regenerate the evidence base in a clear, coherent and targeted fashion.

Practitioners were almost universal in their desire for improved structures which facilitate opportunities and positive outcomes for young people, families, communities and workers. The prevailing emotion of many participants appeared to be frustration. The legislation was widely perceived to provide useful child protection and youth justice frameworks. However, participants felt as though improved government leadership was needed to translate the legislation into clear, well-resourced and consistent policy directions and targets which can then be operationalised in agencies across the NT.

4.7.2 Moving Forward

Despite frustrations stemming from a variety of issues, there is no doubt that significant opportunities exist to further improve the responsiveness of the child protection and youth justice systems to the needs of young people, their families and the community in the NT. Although many tensions exist, it must be acknowledged that improving the system can contribute to improving outcomes and opportunities for young people, which is an extremely worthwhile challenge and an important responsibility. Based on the findings from this project, and recent projects, this task is huge.

To move forward from the system-wide reviews, the next step must be to focus actions on areas that can potentially generate the most significant improvements given the scope of the jurisdiction and locus of control. Rather than trying to fix the system, attention needs to be directed clearly to individual components, including the courts, in a focused way that generates evidence which is too often clouded or missing. There is no doubt that additional resources and political support are required across both child protection and youth justice but this support must be backed up by individual agencies and departments at the operational level.

One of the dominant themes within the legislation is that responsiveness to the needs of the young people of the NT is crucial. This is something that participants clearly supported, but felt needed improvement. Perhaps because of the NT's remoteness or relatively small population there has been an ongoing struggle to offer services, resources, knowledge and expertise that offer the specialisation that young people require in the often complex locational and cultural contexts of the NT. Instead, operationally, there is a paradox where both overlap and gaps are frequent between services for young people and adults and between child protection and youth justice. This does little to promote targeted knowledge growth and management in relation to staff training, agency policies, practice approaches and context relevant programmes that will lead to sustainable improvement.

In simple terms, both child protection and youth justice in the NT are about helping young people, often from remote communities and often from a variety of different cultural backgrounds. This is unlikely to change. Therefore, the strategy moving forward must be based on targeted policies and programmes that are properly and accountably evaluated to ensure that they meet the needs of the target population. In this light, the current discourse of unwieldy and amorphous challenges and systemic failure is transformed into a set of opportunities – the opportunity to learn and grow when programmes and services do not work as well as they might and the opportunity to improve outcomes for young people.

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Chapter 5
The Children's Court in Queensland: Where to from Here?

Clare Tilbury and Paul Mazerolle

Abstract In Queensland, there were major changes to youth justice legislation in 1992, followed by new child protection laws in 2000. Following this legislative reform, public inquiries into aspects of the child welfare system in 1999 and 2004 led to further changes in law, policy and services, with implications for the Children's Court. This chapter outlines the study findings from Queensland, which is particularly challenged by its large size, high levels of Indigenous over-representation, insufficient legal representation and a limited degree of specialisation in the court. Opportunities for reform are identified related to enhancing the status and expertise of the court, leading to less adversarial approaches and more consistent decision-making across the state. It was seen as imperative to increase community understanding about the needs of children and young people whose lives are significantly affected by court decisions and for the court to establish better linkages with programmes and services for children, young people and families that are aimed at preventing or remediating problems for the disadvantaged families who appear before the court.

Keywords Children • Law • Therapeutic jurisprudence • Child protection • Youth justice

C. Tilbury (✉)
School of Human Services and Social Work, Logan Campus, Griffith University, Meadowbrook, QLD 4131, Australia
e-mail: c.tilbury@griffith.edu.au

P. Mazerolle
Arts, Education and Law, Mt Gravatt Campus, Griffith University, Mt Gravatt, QLD 4122, Australia
e-mail: p.mazerolle@griffith.edu.au

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5.1 Introduction

The Children's[1] Court in Queensland has been shaped by a range of legislative changes and policy shifts since its inception in 1907. Significant modernisation occurred in the 1990s, with major changes to youth justice legislation in 1992, followed by new child protection laws in 1999. Public inquiries into aspects of the child welfare system in 1999 and 2003–2004 led to further changes in legislation and services, with implications for the court. This chapter outlines the study findings from Queensland, which is particularly challenged by its large size, high levels of Indigenous over-representation, insufficient legal representation and a limited degree of specialisation in the court. It is timely to consider future directions and possibilities for the court, to maximise its capacity to have a positive impact upon the children, young people and families whose lives are touched by its decisions.

5.1.1 Historical Background

During the nineteenth century, the Queensland child welfare system consisted primarily of orphanages for children under 12 years, industrial schools aiming to provide education and care for neglected children and reform schools for young offenders under 16 years. The *Children's Court Act 1907* established a separate Children's Court, which formalised procedures for treating children separately to adults in court. The role of the court was to assess and classify the reasons for the child's offending behaviour, 'to assess the offender, rather than the offence', and the Magistrate had discretion to admonish the offender rather than enter a conviction (Commission of Inquiry into Abuse of Children in Queensland Institutions 1999, p. 44). Alongside the court, the *State Children's Act 1911* established a government department with responsibility for the administration of matters dealing with youth offenders and neglected and orphaned children. These developments in Queensland were consistent with changes in other countries and jurisdictions whereby the state assumed responsibility for the care and protection of 'troublesome' children under the assumptions that their offending behaviour and deprived circumstances were a reflection of institutional (primarily family) breakdown and that the community's long-term interest required the state to intervene to achieve order and stability, as well as a reformed future for the individual (Platt 1969).

Following an inquiry and the *Report of the Committee on Child Welfare Legislation* (the Dewar Report) in 1963, the *Children's Services Act 1965* established a new government department. The Department of Children's Services had statutory responsibility for children in need of care and protection, those in need of care and control (status offenders) and youth offenders. The new Act in section 18(1) provided a legislative base for dealing with children charged with criminal

[1] In Queensland legislation, the name of the court is 'Children's', not 'Children's'.

offences, a sentencing code, and provisions for the supervision and detention of young people (O'Connor 1992). The Act reflected the ethos of the time that children who were guilty of criminal offences should be dealt with primarily on the basis of their welfare needs. Less emphasis was placed on the offences committed or even whether offences were committed, as children could be held in detention for 'their own good' under care and control orders. Care and protection orders were available for neglected or maltreated children. The effect of both orders was the same: to transfer guardianship from the child's parents or guardian to the Director of Children's Services until the child was 18 years of age. At this time, Indigenous children were subject to the *Aborigines' and Torres Strait Islanders' Affairs Act 1965* whereby, without recourse to a court, the Director of Native Affairs could become the legal guardian of Indigenous children aged under 21 years if, in his opinion, the parents or relatives of the child were not acting in the interests of the child (Crime and Misconduct Commission 2004). This continued until the 1970s, at which time responsibility was transferred to the Department of Children's Services and both Indigenous and non-Indigenous children became subject to the same child welfare laws and processes.

The development of children's rights and other social changes in the late twentieth century led to the separation of 'protection' and 'justice' (or 'needs' and 'deeds') in children's law and administration. Separate legislation for dealing with youth offending and child protection was enacted. The philosophy of the justice model is to hold children who break the law individually responsible for their behaviour and to deter offending through appropriate punishment. This is reflected in the 'Charter of Juvenile Justice Principles' in Schedule 1 of the *Juvenile Justice Act 1992* (title amended in 2010 to *Youth Justice Act 1992*) which states 'the community should be protected from offences' and 'a child who commits an offence should be held accountable…'. While it was no longer seen as acceptable for children to appear before a court and be placed in detention without being charged with an offence, there was also less attention to welfare needs and the social disadvantage that causes youth crime. Thus, with these legislative changes, there was a rebalancing of the needs for justice and accountability with needs of care, protection and rehabilitation. The rise of the justice model in Western democracies came from frustration with the ineffectiveness of offender rehabilitation and an emerging view that 'nothing works' (Martinson 1974; Cullen and Gilbert 1982) converging with an increasing emphasis on just deserts and individual accountability. These international developments around the rebalancing of care and control in youth justice responses permeated the Queensland context (O'Connor and Sweetapple 1988). Legislative reforms to child protection came later with the *Child Protection Act 1999*, which provided significantly more court oversight of decisions about children's welfare than had existed under the old Acts. Previously, protection orders granting guardianship to the state automatically had effect until the child turned 18 years but could be administratively discharged. The new legislation, based on the principle that the best way to ensure a child's well-being is to support the child's family, provides for time-limited protection orders and judicial oversight of case plans at the time an application for an order is made to the court. These reforms also had international parallels, with many

jurisdictions aiming to prevent family breakdown and limit state intervention by supporting parents to provide better care for children. These 'family support' approaches were strengthened by findings from research about the deleterious effects of out-of-home care and the importance of attachment, stability and family connections to children's development (Stevenson 1992; Waldfogel 2000).

Youth justice and child protection legislative reform was followed by two significant, high-profile public inquiries into the child welfare system. The Commission of Inquiry into Abuse of Children in Queensland Institutions (1999) inquired into the care and treatment of children in residential care and youth detention centres in Queensland throughout the twentieth century. The Commission recommended redress for past abuse and neglect in institutions, more active statutory involvement in standard setting and monitoring of current out-of-home placements and improvements to the quality of care in detention centres. Then in 2004, the Crime and Misconduct Commission Inquiry into Abuse of Children in Foster Care found there had been serious, systemic failures in the child protection system over many years and recommended a major overhaul to create a new department exclusively focused on child protection, as well as legislative, policy and funding changes. This included a recommendation to amend the law to require that case plans for children should be submitted to the Children's Court before an order is made.

5.1.2 The Children's Court Today

The *Children's Court Act 1992* created the two-tiered system of Children's Courts which exists today. The first tier of the Children's Court is presided over by a Magistrate and is a closed court. The vast majority of Children's Court matters are heard at this level. The superior tier, the Children's Court of Queensland, is presided over by Judges appointed from the District Court. The Children's Court of Queensland deals with serious cases involving defendants under 17 years of age and appeals from the Children's Court. It is an open court.

The Children's Court exercises criminal jurisdiction under the *Youth Justice Act 1992* in regard to offenders who have not yet turned 17 years. The court also has jurisdiction to deal with any matters conferred on it by any other Act, including the *Criminal Code Act 1899*, the *Bail Act 1980*, the *Penalties and Sentencing Act 1992* and the *Police Powers and Responsibilities Act 2000*. The court has civil jurisdiction under the *Child Protection Act 1999* and the *Adoption Act 2009*. The new child protection and adoption laws provided for significantly more court oversight of decisions about children than existed under the superseded Acts. Previously, guardianship orders automatically had effect until the child reached 18 years, but could be administratively discharged, and adoption orders were made administratively. Current legislation allows for time-limited protection orders and judicial oversight of case plans.

The President of the Children's Court of Queensland is responsible to ensure 'the orderly and expeditious exercise' of the jurisdiction of the court (s.10 *Children's Court Act 1992*) and to provide an annual report to the Attorney-General on the operation of

the court (s. 24). The President may issue directions of general application with respect to the procedure of the court (s. 8). The Chief Magistrate has power under the *Magistrates Act 1991* to allocate functions to particular Magistrates, which includes power to allocate general magistrates to preside in the Childrens Court jurisdiction. The Chief Magistrate has no powers or authority under the Childrens Court Act. There are 87 magistrates appointed to 32 centres, circuiting to another 86 locations across Queensland (Magistrates Court of Queensland 2010). There are 24 judges appointed to the Children's Court of Queensland, presiding in the capital city Brisbane and other larger regional areas in Queensland: Ipswich, Southport, Beenleigh, Maroochydore, Townsville and Cairns and travelling to hear matters as required in rural and remote areas. In making judicial appointments to the Children's Court of Queensland, the Attorney-General 'must have regard to the appointee's particular interest and expertise in jurisdiction over matters relating to children' (s.11(2) *Children's Court Act 1992*). Magistrates are not required to have a particular interest or expertise to preside over a Children's Court.

There is one purpose-built, specialist Children's Court located in Brisbane (Queensland's capital city), which hears matters originating in inner-Brisbane suburbs. This is the only Children's Court with a specialist magistrate who exclusively deals with children's matters. Most Children's Court proceedings are heard across the state at suburban and regional centres when the local Magistrates Court is convened as a Children's Court. This means that most Children's Court matters are heard in ordinary suburban courts, in imposing buildings designed to convey the authority of the law. In such locations, at a designated time, the courtroom will be closed and persons not entitled to be present must leave. But the courtroom itself remains the same as that dealing with adults, and parties to child protection proceedings may be seated in the waiting room along with any others having general court business.

The Children's Court is a busy court, dealing with matters involving thousands of children and young people. In 2009–2010, the Children's Court heard 18,080 charges against youth defendants, the Children's Court of Queensland heard 1,983 charges and the District and Supreme Courts heard 120 charges (Children's Court of Queensland 2010). There were 3,532 applications for child protection orders heard by the Children's Court in 2009–2010 (Magistrates Court of Queensland 2010). Unfortunately, data were not available regarding the number of child protection matters heard in the Children's Court of Queensland.

5.1.3 Previous Research

Previous research about the Children's Court in Queensland has concentrated on youth justice rather than the child protection powers of the court. A brief history of the court was outlined in the Forde Inquiry (Commission of Inquiry into Abuse of Children in Queensland Institutions 1999). O'Connor (e.g. 1992, 1994) examined the operations and impact of the youth justice system including the Children's Court during the 1980s and 1990s, the period when it moved 'from child saving to child

blaming'. O'Connor and Sweetapple (1988) also investigated perspectives on the court from young people who had appeared in court on criminal charges, finding that children routinely misunderstood and misconstrued much of what happened in court, and perceived it as a place of punishment, rather than inquiry. They concluded that the lack of procedural justice in the court, and its failure to acknowledge the social and family circumstances of defendants, undermined its capacity to engender respect for the law amongst the children who appeared before it and that more restorative justice approaches were required in order to appropriately respond to youth crime.

5.2 Approach and Methods

For the present study, interviews were conducted with a purposive sample of judicial officers and other stakeholders to ascertain their views about the operations of the Children's Court, current and future challenges, and opportunities for reform. The youth justice and child protection jurisdictions were included. Interviews were conducted with 22 people, and 7 focus groups were conducted with a further 25 participants. Included were six judges, six magistrates and representatives from police, community services, justice, children's advocacy and legal aid agencies. Interviewees were based in Brisbane and regional centres of Sunshine Coast, Cleveland, Cairns and Rockhampton. A standard list of questions was asked in accordance with the agreed methodology for the national study. The key domains for questioning included probing the aims and philosophy of the court, its operations and effectiveness, and challenges and opportunities for change.

5.3 Findings

5.3.1 Purpose of the Children's Court

All stakeholders referred to relevant legislative principles in stating the purpose and philosophy of the Children's Court. It was generally agreed that a special court is appropriate to recognise the particular needs and rights of children in court proceedings. In relation to child protection, stakeholders indicated the court was part of a broader child protection system in which the main goal was protecting children from harm. Judicial officers defined their role as a decision-maker in accordance with legislation. Overwhelmingly, in both child protection and youth justice divisions, the children, young people and parents involved with the Children's Court were seen to have complex needs related to poverty, lack of education, unemployment, alcohol and substance misuse, intellectual disability, family violence and mental illness. Aboriginal and Torres Strait Islander children and families are significantly over-represented in the Children's Court.

Many participants acknowledged the limited capacity of the court to resolve the problems that lead people to appear in court. While some expressed frustration about this, others argued that the court's purpose is to resolve the consequences, rather than address the causes, of social problems that bring citizens before the courts. They did not regard the courts as being involved in problem-solving, but to arbitrate or make a decision when attempts to solve underlying problems were not successful. While recognising the complexity of underlying family problems that led to matters coming before the Children's Court, judicial officers mostly defined their role in the traditional legal manner, as a decision-maker in accordance with legislation.

In relation to child protection, they sought to make balanced decisions about the best interests of the child by considering the evidence put before them and ensure fairness and transparency when the state intervenes in family life. Some saw the court as having a responsibility to ensure that the statutory child protection agency fulfilled its obligations to both children and parents, but this was not a proactive role in linking children or families to intervention services. Many reflected a concern that becoming too informal and too 'involved' can undermine the judicial role of neutral arbiter. In relation to youth justice, most referred to the court's rehabilitative, preventive and diversionary roles. Reference was made to the welfare needs of young people, restorative justice, and deterring young people from further offending. It was acknowledged that children do not share the same level of responsibility for their criminal actions as adults, although the capacity of the court to 'hold young people accountable' through sentencing was considered important.

5.3.2 Case Processing

As Queensland Magistrates and Judges are generalists involved with both adult and Children's Courts, several interviewees emphasised their dependence on the information provided – expert advice, quality evidence and details of available services or programmes – to reach decisions. In youth justice matters, evidence is presented by police prosecutors, and young people all have a legal representative. The young person may give direct evidence, but not always. Presentence reports which are provided by Youth Justice Officers to the court were mainly well regarded. Judges and magistrates advised they read the reports and generally found them to be thorough, providing the court and legal representatives with essential information. Some reports were considered 'too generic' and not sufficiently addressing the antecedents of the particular young person's criminal behaviour or providing information on how the young person is likely to perform on various types of orders. Advocacy services advised they may present an additional report to the court if not satisfied with the standard of a presentence report to give the court a deeper insight into the young person.

In child protection, advice to the court is received from the statutory department (generally in the form of affidavits from officers involved in the case), family

assessment reports (requested by a magistrate or submitted by one of the parties) and reports from other professionals (e.g. medical evidence). Indigenous child protection agencies – recognised entities for Aboriginal and Torres Strait Islander children – may also make submissions. There is no Children's Court clinic, as there is in some other states, to provide psychological or psychiatric assessments of children and families upon request from the judge or magistrate. Instead, reports are submitted by parties to proceedings. Direct evidence is given by departmental officers, sometimes police, and parents. Rarely do children or young people, even those who are older, give direct evidence. The current Children's Court Rules were considered minimal for child protection matters and requiring more detail pertaining to witnesses, subpoenas, evidentiary issues, discovery, directions hearings, conferencing and methods of preventing unnecessary adjournments. It was asserted that the child protection service often did not fulfil its obligation to act as the 'model litigant' in child protection matters. The model litigant principles direct that the power of the state is to be used for the public good and in the public interest. Therefore, the state should not take advantage of parties who lack the resources to litigate, should deal with cases promptly and without unnecessary delay, and act consistently in handling matters so that cases are properly prepared, with due regard to issues of procedural fairness (Department of Justice and Attorney-General 2010). Some magistrates advised they had addressed issues locally by providing seminars on advocacy and admissible evidence for child protection officers, resulting in significant improvements in the court process and the quality of applications. However, many participants said that withholding information and late filing of documents by the child protection service were common, which disadvantaged parents in particular, as they may not be fully prepared to defend the state's application. Many parents do not have representation throughout the child protection process, furthering the imbalance of power between parents and the state. Parents may therefore be more likely to consent to an order. Limited legal aid also contributes to court delays as with self-represented parties matters take longer to hear.

5.3.3 Alternative Dispute Resolution

There are alternative dispute resolution mechanisms available in both youth justice and child protection divisions of the court. Youth justice conferences were introduced in Queensland in 1997 and became available statewide in 2002. A conference brings the young person and their family together with the victim (if they wish to attend) as well as a police officer. The aim of a youth justice conference is for the victim, the young person and their family to come up with an agreement about how the young person can begin to repair the harm caused by the offence. Referrals to conferencing may be made by the police when a young person admits to an offence as an alternative to court, a court can decide to refer a matter to a conference as an alternative to sentencing, or the court may use the young

person's participation in a conference to assist them in determining an appropriate sentence. Consistent with the benefits of conferencing noted in several Queensland evaluations and reviews, overall the study participants were positive about youth justice conferencing. Judicial officers and other participants said that young offenders interacting with their victims often had a positive impact as it helped them to understand the consequences of their actions. It was not seen by most as a 'soft option', but nor was it always regarded as the most effective way of dealing with all young people. The success of the conference was seen to be reliant on the skills of the convenor and the amount of preparation for the conference. Particular concerns with youth justice conferences included (a) the use of conferencing depends on the magistrate, and because there are some magistrates who have never referred a young person to a conference, this sentencing option may not be available equitably; (b) concerns about the delays that sometimes occurred before conferencing takes place, creating a long gap between offence and consequence for young people; (c) concerns that some young people may not be clear about what is going on in the conference; and (d) ensuring that the conferencing outcome does not impose a harsher punishment than the young person would have received if sentenced by a court.

There are two forms of alternative dispute resolution in child protection proceedings. Under s. 59 of the *Act*, a child protection order cannot be made unless the court is satisfied that the child's case plan has been developed or revised in a 'family group meeting', a copy of the child's case plan must be filed with the court and the plan is assessed by the court as appropriate for meeting the child's assessed care and protection needs. Dissatisfaction was expressed about the quality of child protection case plans submitted by statutory departmental officers to the court. This was related to perceptions about inexperienced child protection service departmental officers not being adequately supervised; case plans containing actions 'they have no intention of complying with'; including services that are unavailable; or suggesting interventions that are not evidence based. Some magistrates pointed out they had a legislated requirement to consider the appropriateness of case plans, but not to monitor their implementation.

A court-ordered conference is required when an application for a protection order is contested. These give parents, legal representatives and the child's advocates the opportunity to agree on a settlement that would make a trial unnecessary. Court-ordered conferences are convened by specially-appointed officers from the Department of Justice and Attorney-General. All parties, except the child, must attend and can be legally represented. A representative from the recognised entity for an Aboriginal or Torres Strait Islander child may also attend. Following the conference, the chairperson files a report of the conference outcomes for the court, after which proceedings are resumed. Overall, participants were positive about pre-court conferences. However, there were some particular concerns. For example, participants argued it is critical to ensure parental understanding of agreements reached in pre-court conferences as they felt some parents consented to agreements without fully understanding their implications. The lack of legislative definition of court-ordered conferences means much practice is at the convenor's discretion, and

there was concern that both family group meetings and conferences may not conform to best practice in alternative dispute resolution. They suggested the introduction of practice standards and accreditation for convenors of family group meetings and pre-court conferences, similar to those operating in the Family Court of Australia.

5.3.4 *Aboriginal and Torres Strait Islander Children and Young People*

There is significant Indigenous over-representation in both the youth justice and child protection systems in Queensland, with Indigenous children comprising 46% of children on community-based youth justice supervised orders, 61% of children in youth detention and 37% of children subject to child protection orders (Australian Institute of Health & Welfare 2011a, b). The provision of targeted, community-based support services for these children, young people and their families was not considered by participants as sufficient to address the social disadvantages that cause over-representation.

Youth Murri Courts operate in some areas for Indigenous children charged with offences. Interviewees were generally positive about the benefits of the Youth Murri Court. Several commented on benefits arising from the involvement of Indigenous Elders and the pre-sentence, bail-type programmes attached to the court in some locations. These are typically run by dedicated Indigenous staff and tailored to the cultural needs of offenders. One concern raised was the lack of continuity with Indigenous representation and the variations in practice in the Youth Murri Court in different locations. There is no Indigenous Elder or community justice group representation in the Children's Court of Queensland.

5.3.5 *Voice of Children and Young People*

The principle of children being able to have a say in decisions that affect their lives is becoming more recognised in Australian policy and practice, following Article 12 in the United Nations Convention on the Rights of the Child, that children have a right to express their views in all matters concerning them and that weight should be given to those views according to their age and maturity (United Nations 1989). Adequate funding was seen to be required for legal representation in both youth justice and child protection cases. This work, it was argued, is more complex and requires more time to complete, without adequate compensation for the additional work (compared with other legal aid work).

In respect to youth justice court processes and procedures, interviewees generally maintained that most young people did not fully understand court

processes or decisions, even when legally represented. Using formal, legal language was identified as a contributing factor, along with time-limited contact between the lawyer and the young person. However, several stakeholders thought that older and repeat offenders were likely to be aware of their rights. Despite judicial officers explaining decisions and their implications, it was thought that many still did not fully understand the full implications of court orders, particularly what can happen if breaches of orders occur. The concern here is threefold: that young people need to understand the sentence they receive in order to comply with its conditions, they need to comprehend the justice process in order for it to have its intended positive impact upon their future behaviour, and they need to perceive the process and procedures as fair, as then they are more likely to accept the decisions and authority of the court.

The Charter of Juvenile Justice Principles in the Act includes right of access to advocacy services. While most young people charged with offences are legally represented, the quality of legal representation was described as variable. Expertise was particularly lacking in defence lawyers, especially in regional and rural areas of Queensland. Legal practitioners require accreditation to work in the Brisbane Children's Court, although not elsewhere in the state. Some interviewees supported specialist training and accreditation in children's law and developing a career path for lawyers specialising in representing children and young people. Concern was raised about capacity to provide enough accredited lawyers, particularly to adequately service regional areas. Lack of specialised prosecutors was also thought to undermine consistency in outcomes for children. In the Brisbane Children's Court, where the same police prosecutors appear, the prosecution was considered to be more informed and having a better understanding of the issues. Prosecutors outside Brisbane more often deal with adult matters, so have less understanding of youth justice matters, such as appropriate penalties and bail programmes. Many participants said that public advocacy was also needed to counteract media reports about perceived leniency in youth justice sentencing and to raise community awareness about the social causes of youth offending.

Interviewees identified the importance of legal representation for children in child protection cases, enabling older children to give direct instructions to a lawyer, in addition to separate or 'best interests' representation. The Charter of Rights for a Child in Care in the *Child Protection Act* expressly provides a right for children to be consulted about, and take part in, making decisions affecting them. However, many participants were concerned that in reality children's voices are often not heard in court and decisions are generally made for them, without their input, giving rise to anger, frustration and confusion on the part of children and young people in care. Direct representation is uncommon, and separate representatives do not always communicate directly with the child they represent. It seems anomalous that whereas young people in criminal proceedings are considered capable of giving instructions to lawyers, most children and young people involved in child protection proceedings do not have similar access to a legal advocate.

5.3.6 Structure and Leadership

The appointment of a District Court Judge as the President of the Children's Court of Queensland represented a significant upgrading in the status of the court. It was designed to improve the status and credibility of the court and to indicate the importance of decisions being made about children (*Hansard*, 18 June 1992, p. 5928). However, the two-tier structure for the courts was seen by many participants as a barrier to reform in the court, because its effect is to disperse leadership between the Chief Magistrate and the President. Unlike other areas of law where matters may be routinely referred to the higher courts, in child protection especially, very few matters reach the Children's Court of Queensland. In practice, different Presidents and Chief Magistrates have taken different approaches to their roles, with greater or lesser degrees of communication between the two levels of the court. Some judicial officers expressed the view that there should be a greater level of information sharing. If the two levels of the court have little knowledge about the operations of the other level, there is no comprehensive understanding about the nature of justice dispensed to children, young people and families, and little communication about problems and opportunities for change. This is seen to impede the development of best practice.

5.3.7 Development of Child Protection Case Law

A related issue is that in the child protection jurisdiction, there is virtually no jurisprudence or case law. The vast majority of child protection matters are heard at the Magistrates Court level and are not reported, and appeals are rare. This means there is little analysis or review of decisions, or opportunities for judicial officers and others to examine reasons for decisions in cases other than those they are directly involved with. There is concern that a single magistrate with limited experience in child protection matters can make decisions with significant consequences for parents and children that can result in parents losing custody of their children for long periods of time. Also, in practical terms because of legal aid constraints, rights of appeal are minimal. The comparison was made to relatively minor criminal offences for which legal representation is almost certain and where an application could be made for a hearing in a higher court before a jury.

5.3.8 Challenges

Opinions about the effectiveness of the Children's Court were varied. Many interviewees expressed overall positive views about the court and the constructive role it plays

in dealing with complex issues, while acknowledging there is room for improvement, whereas others saw the court as having to deal with the failures of other social service systems and were pessimistic about the court's capacity to effect positive change for children and young people. Regardless of the level of optimism about the effectiveness of the court, the need for more intervention and treatment programmes and preventative services for children and at-risk families was raised by most interviewees. The main factors identified as not working well with the court overall were:

- Limited specialisation and skills in the magistracy and judiciary in relation to children's matters, leading to inconsistent decision-making across the state
- Children and parents with complex or multiple needs (mental health, intellectual disabilities and substance abuse) who were falling through gaps in the system
- Limited access to services and support, particularly outside south-east Queensland

Most stakeholders commented that the child protection workload of the Children's Court had increased significantly in the last decade with legislative changes such as the introduction of a wider range of orders in 2000, requirements on magistrates to review child protection case plans in 2004 and adoption orders including step-parent applications coming before the court in 2009. Specifically in respect to child protection, the following issues were raised:

- Limited funding for parents' legal representation, parents who are not aware of their rights, and parents who are intimidated and powerless in court proceedings
- Inadequate case planning and poor quality evidentiary material presented by departmental officers
- Lack of child participation and understanding of court processes, even though children generally know that decisions about their future, including placement away from family, will be made by the court
- Unsatisfactory court processes and delays, including late filing of affidavits and documents, last-minute adjournments because one party is not ready to proceed, no capacity to pay witness expenses and the state contravening its responsibility to act as the model litigant
- Lack of positive working relationships between stakeholders in the court and lack of understanding of roles of different players. This was attributed to under-resourcing of the statutory department, lack of established processes for working with at-risk families and little understanding of the implications of 'systems abuse' in out-of-home care, leading to a failure to recognise the importance of ongoing relationships between children and their parents

In the youth justice jurisdiction, stakeholders pointed to positive working relationships between stakeholders and respect for different roles, the success of the Youth Murri Court, access to good youth advocacy services in Brisbane and the intensive supervision and support provided to young people through the conditional bail programme. However, some concerns were raised, as follows:

- There have been instances of inappropriate use of custodial remand due to lack of accommodation options and bail programmes. Typically a greater percentage

of the incarcerated youth population is on custodial remand, rather than sentenced. The limited availability of appropriate accommodation and lack of bail programmes to support young people remaining in the community significantly contributes to high custodial remand rates.
- Some magistrates do not adhere to sentencing principles in the *Youth Justice Act* to use detention as a last resort and for the shortest appropriate period.
- There is a lack of resources across the state, including resources to implement diversionary options for dealing with young people.
- Some stakeholders were concerned that children could avoid taking responsibility for their actions, if punishments were insufficient.
- On the other hand, most judicial officers argued strongly that concerns about lenient sentences were most often made by people who were not fully aware of all the facts and circumstances of the case.

Cutting across both divisions of the court, concerns were raised about the impact on young people of the separation of 'child protection' and 'youth justice' in legislation and organisational arrangements. There were three areas of concern indicating greater collaboration between child protection and youth justice systems may be needed: (1) criminalising the behaviour of children with welfare needs (e.g. children who are homeless or suspended or excluded from school frequently come to the attention of police), (2) child protection officers who fail to attend court when a child in care on their caseload is appearing in a youth justice matter, and (3) child protection officers who recommend a young person be held in custody due to a lack of placement options, without due regard to the likely detrimental effects of detention on children. This was linked to arguments for more independent advocacy for the rights of children and young people. Some interviewees suggested that the Children's Commissioner could play a greater role in advocating for the interests of children and young people in both the child protection and youth justice systems.

5.4 Directions for Reform

Based on the findings from the research, three aspects of Children's Court operations have emerged as the main directions for reform. These relate to legislative change, adopting a more specialist or therapeutic approach and increased access to integrated services for children, young people and families.

5.4.1 Legislation

Generally participants did not think major reform of substantive laws in child protection and youth justice was necessary. In fact, many participants commented on the amount of legislation, and ongoing amendments, as being challenging for stakeholders, making the job more complex. Most participants regarded effective implementation of the law as the source of many problems in the Children's Court.

For example, legislative provisions regarding family support, family group meetings and children's participation in decision-making were regarded as adequate, but not properly implemented or resourced, inhibiting access to justice. Thus, the availability and quality of services was identified as the major barrier to reform. Organisational cultures within government and nongovernment agencies, which were regarded as inward looking and defensive, were seen as contrary to the openness, transparency and accountability required for the justice system. The singular concern about current youth justice legislation is that in Queensland 17-year-olds are treated as adults. Many stakeholders have previously made submissions to government seeking to have this raised to 18 years. Concern was also raised that the current age of criminal responsibility, at 10 years, brings children into the criminal justice system at too young an age.

5.4.2 Specialisation and Therapeutic Approaches

The Children's Court is specialised to the extent that, children are seen as having special needs and rights of their own requiring a separate court forum, but not specialised in terms of drawing upon a specialised knowledge base in children's law, children's development, child maltreatment or youth offending. Therapeutic jurisprudence has been developing in many areas of the law involving complex social and personal problems, where it is considered that underlying social and psychological needs are part of the reason that people are appearing in court (Wexler and Winick 1996). The therapeutic approach proposes that, for some individuals, responding to the needs that are the cause of their problems is more appropriate and effective than traditional adversarial methods or actions aimed at deterrence, adjudication or punishment (Freiberg 2002). The principles and processes of such courts involve less adversarial and formal court proceedings, considering corrective or preventative solutions rather than legal solutions, integrating treatment with sentencing, ongoing judicial monitoring of clients, multidisciplinary involvement and collaboration with social welfare providers. It would seem that many aspects of the therapeutic approach would serve to address many of the concerns raised about the Children's Court and increase its level of specialisation.

The lack of specialisation in Queensland Children's Courts was a strong theme in interviews, especially compared with other states. It was argued that Children's Court work requires a different set of skills from adult jurisprudence. Interviewees suggested that police, prosecutors, legal practitioners, child protection officers, youth justice officers, magistrates and judges all require expertise in their own fields and an appreciation of the disciplinary knowledge of other stakeholders. Increasing the expertise, skills and knowledge of judicial decision-makers and lawyers in understanding the causes and remedies of underlying problems is an essential part of therapeutic jurisprudence. Professional education for magistrates and judges was suggested around consistent interpretation of the *Youth Justice Act 1992* and *Bail Act 1980* regarding 'detention as a last resort', child development and the impact of poor environments on children,

and communication skills. According to the Chief Magistrate, 'The quality of decision-making in the Magistrates Court is dependent on the knowledge and expertise of its magistrates. Ongoing professional development is crucial to the maintenance of the court's high standards' (Magistrates Court of Queensland 2010). Not all participants agreed that judicial officers with specialised knowledge of children's issues are necessary, because they believed the role of the court was to make decisions based upon evidence from departmental officers and other experts with relevant qualifications about children's development and welfare. Other interviewees maintained that increased specialisation is both possible and necessary for both magistrates and lawyers, in the interests of children. The level of specialisation of the court is related to its perceived low status. Many stakeholders had the view that amongst lawyers and judicial officers, children's law is not a pathway for career advancement and many practitioners seek to avoid the area. This could be remedied through both judicial leadership and professional development activities.

In practical terms, the size of the state and its decentralised population were seen as barriers to increased specialisation, as resources dictate that local courts must be generalist. Given that the Brisbane Children's Court is currently the only specialist Children's Court, it is a challenge to ensure that all children have equal access to justice and services, regardless of their location in Queensland. While some regional courts deal regularly with children's matters (weekly), most courts have less than ten children's matters each year, so their capacity to build up expertise is limited. Mechanisms to encourage consistent judicial practices across the state may be needed, for example, in relation to variations in youth justice sentencing and child protection case plan reviews by magistrates. Standardised practice would foster more consistent responses for dealing with children and therefore reduce variability in outcomes for children in similar situations. A child with an interested judicial officer, competent legal representative and effective departmental officer was thought to be more likely to have a positive outcome. This was particularly the case for children and young people involved with the Brisbane Children's Court and some regional courts where a magistrate assumes responsibility for meeting with other key stakeholders (such as police, child protection departmental officers, youth justice departmental officers, legal representatives and Indigenous recognised entities) to establish effective processes for dealing with children and address any difficulties if they arise. Whether this occurs at present is solely at the discretion of individual magistrates.

5.4.3 Integrated Responses to Children and Families

A key element of therapeutic jurisprudence is providing access to social services to address underlying problems. Most interviewees noted the need for integrated responses to deal with child and family issues in the belief that courts cannot remedy situations that are caused by social disadvantage and a social services system

that cannot adequately respond to need. Many of the court's clients are from socially disadvantaged, vulnerable families. Compared to other specialist courts, the Children's Courts were regarded as poorly resourced in terms of the services they can offer children. Integrated responses to multiple needs recognise the impossibility of separating broader child and family social welfare needs from a child's criminal behaviour or child protection needs. There were particular concerns about homeless children, children excluded from school, children with cognitive impairments or mental health problems and children in unsatisfactory out-of-home placements or family situations.

The need for an integrated, multidisciplinary team consisting of trained professionals with expertise in child development working together to assist the child was identified. Many interviewees supported the court undertaking an oversight or case management role, so that the same judicial officer follows a child's matter through from first mention to disposition. This model would be more challenging in regional areas where services are often more limited or non-existent. Other interviewees suggested some magistrates would be concerned about taking on a case management role as they would see this as contrary to their core role of dispensing justice as the neutral decision-maker. This points to the tension between hands-off, diversionary approaches and hands-on court-ordered interventions that are monitored by the court.

There was considerable support for interdisciplinary approaches, bringing together welfare and justice. Providing better prevention services or intervening earlier with children, young people and their families was believed more effective than tertiary-level interventions by the courts. For example, in addition to a Youth Murri Court, more intervention programmes designed and run by Indigenous community groups were suggested. Services for Aboriginal and Torres Strait Islander families were needed, along with provisions to ensure Indigenous recognised entities were involved in a meaningful way in decision-making and interventions. A more therapeutic approach would also mean addressing the disproportionate representation of Aboriginal and Torres Strait Islander children and families appearing. This might take the form of special alternative dispute resolution arrangements for Indigenous children and the development of judicial tools, policies and strategies to monitor effectiveness and impact. Custodial remand is likely to remain an ongoing challenge, requiring integrated responses across family support, child protection, youth homelessness and youth justice systems to assist young people to either stay living with their parents or find suitable out-of-home care.

5.5 Conclusion

This study examined the contemporary status of, and challenges faced by, Queensland Children's Courts from the perspectives of judicial officers and other key stakeholders. As outlined, the challenges facing the court in relation to both child protection

and youth justice are considerable. They are related to important issues of effectiveness and quality: achieving the right balance of legal and welfare responses, ensuring the interests and voices of children and families are represented in court, ensuring consistent decision-making and resources across the state and recognising the gravity and serious impact of court decisions on the lives of children and families.

Ultimately, future directions for reform in the Children's Court in Queensland will reflect a confluence of issues and considerations. These are related to community expectations for responding to youth offending and child abuse and neglect, and concomitant political interest and will. Community education and public advocacy would promote efforts to ensure that children, young people and their families are dealt with respectfully, with understanding and empathy for the circumstances that lead them into court. In order to take a more therapeutic way forward, there are important matters to consider, including access to the emerging evidence about effective and fair responses to youthful offending and child maltreatment, the structure and operation of the court and the adequate financial resources. Opportunities to deliver justice and foster meaningful change in the future life pathways and individual well-being of children and young people are worthy priorities for a Children's Court which has a special role to play in encouraging a more civil society and just community.

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Chapter 6
The Children's Court of South Australia

Daniel King, Andrew Day, and Paul Delfabbro

Abstract This chapter provides an overview of the history and development of the Youth Court in South Australia. Drawing on interviews conducted with judicial officers and Court stakeholders, we highlight some of the changes that have taken place since the Court's inception, as well as how the Court currently understands its role and positioning within the broader justice and welfare systems. Key discussion points of these interviews included the Youth Court's guiding principles and how they impact on Court procedures and responses to young people in the system, as well as the challenges that limit, or create difficulties for, the effective operation of the Youth Court. It is concluded that the Youth Court system attempts to balance both welfare and justice approaches to dealing with young people, but these approaches are sometimes hindered in practice by inadequate procedural, structural and resource-related factors. Limitations of the Court and its processes are often difficult to evaluate in isolation from the broader system in which the Court is positioned. Further evaluation of the Youth Court system's processes and their general effectiveness is needed in order to develop a more empirically driven 'what works' mentality in the field. There is also a need for increased dialogue and sharing of information between state jurisdictions to enable a greater collaboration and development of ideas on tackling the current and future challenges of the Youth Court system.

Keywords Children's Courts • Juvenile justice • Young offenders • Child protection • South Australia

D. King (✉) • P. Delfabbro
School of Psychology, University of Adelaide, Adelaide, SA 5005, Australia
e-mail: daniel.king@adelaide.edu.au; paul.delfabbro@adelaide.edu.au

A. Day
School of Psychology, University of Adelaide,
Geelong, VIC 3220, Australia
e-mail: andrew.day@deakin.edu.au

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6.1 Introduction

South Australia is a state of Australia located in the southern central part of the country. With a total land area of 983,482 km^2, it is the fourth largest of Australia's six states and two territories. Over 1.6 million people are resident in South Australia, equating to less than 8% of the Australian population. The majority reside in the state capital, Adelaide, which is where the Youth Court has its principal registry. It is here that Court documents are lodged, files are managed, cases are listed, and inquiries can be made regarding Court hearings. The Family Conference Team and the Care and Protection Unit are also located at the same site, although the Family Conference Team has an additional office base at Port Augusta, a regional town over 300 km from Adelaide. All South Australian country Courts function as Youth Court registries.

6.2 Origins of the Youth Court

The origins of the South Australian Youth Court can be traced back to the Way Commission in 1885 which recommended the adoption of a welfare model that was originally developed in 1869 in the State of Massachusetts, USA (see King et al. 2011). The Way Commission recommended (a) that all inquiries before justices into charges against juveniles be conducted at different times from other cases and that these inquiries should be held in a separate building; (b) that a parent be required to attend these proceedings; (c) that an officer of the department responsible for the care of children be required to attend; and (d) that children who had been arrested were to be held in premises attached to the department rather than in police cells. These recommendations were all intended to protect minors from the full force of adult law and were formally enacted in 1890 with the establishment of the first Australian Children's Court in South Australia.

The South Australian Children's Court has experienced multiple philosophical shifts and structural changes since its inception. As early as the beginning of the 1900s, a number of calls were made, both by magistrates and commentators outside the judicial system, for reform. The proposed changes were intended to introduce a more benevolent approach to handling youth crime, including showing more concern for the causes of children's offending, and replacing punitive measures with those that were designed to overcome deficiencies in children's upbringing and environment. Calls were also made for the introduction of specially trained magistrates; persons of judicial authority with specialist knowledge of juveniles who could show greater sympathy in responding to offending behaviour. At a 1909 congress in Adelaide (http://trove.nla.gov.au/ndp/del/article/10710264), an advocate for this change, Dr Helen Mayo, stated that specialists in children's affairs were essential and that the State should assist by providing the necessary training programmes. Another proposed change was the introduction of a formal system of probation (Seymour 1988), including the introduction of probation officers who were trained to deal with

youth matters and who could undertake supervisory duties, provide Courts with background information about the youth, and provide counsel to the judiciary. These proposed changes were all implemented in subsequent years.

Despite its many innovations, the first Children's Court in Australia was not without problems and limitations. The new Court had succeeded in removing juveniles from the jurisdiction of the police and the higher Courts, but many felt that it had facilitated the prosecution of a new cohort of children who previously would not have appeared in Court at all (i.e. a 'net-widening' effect, especially for those who committed trivial offences). The system was intended to provide Courts with relevant background information about children when hearing matters and use this information in determining whether some young offenders may be treated more leniently. However, many children who passed through the new Courts often experienced the same treatment as they would have from the pre-existing Court system.

In the decades that followed, a number of issues concerning the procedure and operation of the Children's Court were criticised (Dickey 1987). In particular, there was uncertainty as to what minimum qualifications Children's Court magistrates should possess in order to properly administer the Court in accordance with the guiding principles of the prevailing 'child-saving' philosophy. The child-saving philosophy itself was problematic due to its imprecise definition, and it was often interpreted by magistrates as the need to adopt a more 'paternal and understanding' manner when dealing with juveniles, which, in practice, did not always translate to a consistent and fair process of justice (Seymour 1988). However, a number of Acts were passed that increased the state's powers and guided the administration of welfare-based strategies, including specific reforms to the state's level of authority concerning child protection issues. For example, the *Children's Protection Act 1899* stated that it was an offence for a near relative or other person having the care, custody or control of a child to neglect to provide food, clothing and lodging for the child. Any child found by a Court to be treated in this way could be removed to an institution. This legislation was the foundation of modern state care systems but presented a major dilemma of how best to manage the significant number of children who were bought under guardianship into the care of the state. Similarly, the Court frequently encountered significant differences in opinion between the bench (i.e. magistrates) and the welfare authorities about the duration of custodial terms and whether these should be judicially determined or left to the discretion of those who administered the Court orders.

An important legislative reform in the area of child custody was the *Adoption of Children Act 1925.* This introduced a system of legal adoption of children in South Australia for those under the age of 15 years. The *Maintenance Act 1926*, which consolidated the *Destitute Persons Act 1881–1886* and *State Children Act 1895–1918,* was also influential. This Act made provision for granting assistance to mothers for the maintenance of their children. A child could no longer be removed on the grounds of destitution unless the child was considered to be 'uncontrollable'. An uncontrollable child was defined as 'one who has acquired or is likely to acquire habits of immorality, vice or crime and whose parents or guardians appear unable or unwilling to exercise adequate supervision or control'. This legislation was later

revised in the *Juvenile Courts Act 1965–1966*, which permitted a juvenile Court to commit a child to an institution or to the care of the Minister if a complaint charging a child with being neglected or uncontrollable was proven.

In the late 1960s, the juvenile justice system underwent several major changes. One prevailing problem was the long delays in the Court process, as well as the significant expense associated with these. The system was heavily criticised for its ineffectiveness in responding to youth crime, mainly as a result of the period of time that lapsed between the offence and the Court hearing. Many felt that this delay made the consequences of crime significantly less salient, and thus meaningful, to the young offender. In addition, the system appeared to lack an appropriate means of handling first-time and less-serious offenders. In 1968, the South Australian Social Welfare Advisory Council (ASWAC) published a report that recommended the implementation of Juvenile Aid Panels as part of a larger Juvenile Crime Prevention Scheme. The scheme aimed to (a) reduce the number of offences committed by juveniles, in particular, avoiding the prosecution of children for minor offences; (b) encourage the reporting of offences so as to ensure that juvenile offenders were detected and remedial action was taken as early as possible; and (c) ensure that first-time offenders and their parents were warned about the possible consequences of the offenders' behaviour without the necessity for Court action, except in more serious cases. The recommendations of the ASWAC report were a catalyst for the development of the *Juvenile Courts Act 1971*, legislation that would allow much greater flexibility in dealing with young people in the juvenile justice system.

A major outcome of the *Juvenile Courts Act 1971* was the establishment of Juvenile Aid Panels to deal with truants and 'uncontrollable' children. Children who appeared before these panels had no formal charges brought against them, had no convictions recorded and no penalties imposed. The panel would deal with the matter directly or would recommend that a matter be referred to a juvenile Court. Although this approach was intended to be more appropriate in handling less serious offences than the traditional Court system, the Aid Panels attracted major criticism from advocates of the due process model of justice. It was argued that fewer cautions were being issued and that more young people were brought into the system on the assumption that the Aid Panels would deal with them. The Act was repealed eight years later by the *Children's Protection and Young Offenders Act 1979.*

In the 1970s, the area of child protection underwent significant legislative changes (Seymour 1997). In 1972, the *Community Welfare Act 1972* was introduced. This legislation repealed the *Social Welfare Act 1926–1971*, *Aboriginal Affairs Act 1962–1968* and *Children's Protection Act 1936–1969*. Under the new Act, a child committed to state care could be placed with approved foster parents, in a hospital or in a mental hospital. Consistent with the welfare approach being taken to managing young offenders, the interests of the child were considered of paramount importance in making placement decisions. The Act also made a number of provisions for financial and other forms of assistance for families and persons in need. Further amendments to the Act included (a) the removal of Minister's power to manage property of Aboriginal people and communities (1973), (b) the notification requirements in relation to suspected neglect and abuse (1976), (c) the removal of the definition of

'Aboriginal' (1981), and (d) the administration of the Act to take into account 'the different customs, attitudes and religious beliefs of the ethnic groups within the community' (1982).

Although South Australia was the first Australian state to establish a separate Court for juveniles and the first to embrace a welfare approach to the treatment of young offenders, it was also the first state to retreat from that welfare model. In 1979, the *Children's Protection and Young Offenders Act 1979* was introduced. This legislation placed much greater emphasis on due process and 'just deserts' (Wundersitz 1997). With regard to youth offending, the Act stated that (a) where appropriate, the need to ensure that the child is aware that he must bear responsibility for any action of his against the law and (b) where appropriate, the need to protect the community, or any person, from the violent or other wrongful acts of the child. In this revised form, this legislation was seen as a departure from the welfare-oriented approach of the previous legislation, placing a stronger emphasis on general deterrence and protection of members of the wider community. With respect to child protection, the Act stated the following guiding principles: (a) the need to preserve and strengthen the relationship between the child and his parents and other members of his family, (b) the desirability of leaving the child within their own home, and (c) the desirability of allowing the education or employment of the child to continue without interruption.

6.2.1 The Youth Court

The origins of the current Youth Court can be traced back to the findings of a 1991 Parliamentary Select Committee which was formed to respond to calls that the existing juvenile justice system was inadequate (Moore and Wilkinson 1994). It was claimed that the penalties being handed down by the Children's Court were either too lenient or lacked relevance and, in some cases, not properly enforced due to a lack of resources (Abraham 1982). A review of international jurisdictions was undertaken in an attempt to identify new systems and procedures that might rejuvenate the South Australian Children's Court system. The Select Committee identified the New Zealand juvenile justice system, with its innovative concept of family group conferences, as an appropriate model upon which to base reform and made a series of recommendations which formed the basis for three new pieces of legislation that were passed in 1993: the *Young Offenders Act*, the *Youth Court Act* and the *Child Protection Act*. Under this new legislation, the existing Children's Court was abolished and the Youth Court was founded.

The current Youth Court is a specialist Court for those persons aged between 10 and 17 years. The Court has a duty to ensure that parties to proceedings before the Court understand the nature and purpose of the system and to advise them about how and where to obtain legal advice. With regard to juvenile justice matters (i.e. criminal trials for young people), the Court is informed by the *Young Offenders Act 1993*. Matters relating to child protection, including family custody and adoption, are mainly

informed by the *Children's Protection Act 1993*. The Youth Court is a Court of record, but Court proceedings are closed to the public. Neither judicial members nor lawyers appearing in Court are required to wear legal robes. Under Section 24 of the *Youth Court Act 1993,* restrictions are placed on who may be present at any sitting of the Court. The Youth Court Act states that the only persons allowed into Court (and into the waiting areas) are (a) officers of the Court, (b) officers of Family and Youth Services (Families SA), (c) parties to the proceedings and their legal representatives, (d) witnesses while giving evidence, (e) the guardians of the child, (f) alleged victims, and (g) genuine representatives of the news media. Although the media are allowed into Court, the Youth Court Act places restrictions on the reports of proceedings, and nothing may be published which may lead to the identification of a youth.

6.3 Juvenile Justice Matters

The *Youth Court Act 1993* introduced substantial changes to both the philosophy and structure of juvenile justice in South Australia. The Act abolished Screening Panels and Children's Aid Panels and introduced a two-tiered system of pre-court diversion, consisting of police cautioning and family conferencing, which were intended to deal with 'minor' offences. On April 1, 1994, the then South Australian Minister of Health, Family and Community Services delivered a statement to the Parliament's House of Assembly outlining the guiding aims and principles of the new South Australian juvenile Court system. With regard to juvenile justice, these principles included (a) ensuring that young people are held accountable for their behaviour and experience immediate and relevant consequences for their criminal acts, (b) increasing both the severity and range of penalties available at all levels of the system, (c) enhancing the role of police in the juvenile justice system, (d) empowering families to play a greater role and to take more responsibility for their children's behaviour, and (e) protecting the rights of victims to restitution and compensation and allowing victims, where appropriate, to confront the young offenders and make them aware of the harm which they had caused. In the case of child protection, the new Court system aimed to provide for the care and protection of children in such a manner that it maximised a child's opportunity to grow up in a safe and stable environment and to reach his or her full potential. The administration of the Act was founded on the principle that the primary responsibility for a child's care and protection lay with the child's family and that a high priority should therefore be accorded to supporting and assisting the family to carry out that responsibility. Additionally, responsibility for administration of the new system rested with three key agencies: the South Australian Police, the Courts Administration Authority, and the Family and Youth Services Division of the Department for Families and Communities (formerly the Department of Human Services).

Since 1993, there have been multiple amendments to legislation that have had implications for how the Youth Court operates in the juvenile justice jurisdiction. Perhaps the most significant of these amendments was the *Statutes Amendment*

(Young Offenders) Act 2007. An amendment to Section 2A made provisions for specific responses to serious repeat offending by young people, particularly in regard to general deterrence, which represents an ideological shift for the Court's usual focus on responding to the individual. In addition, Section 15A of the Act was amended to grant authority to the Court in deciding whether a youth poses an appreciable risk to the safety of the community to consider whether the youth is a repeat or 'recidivist' offender. The *Statutes Amendment (Recidivist Young Offenders and Youth Parole Board) Act* categorised certain young people as recidivist young offenders and imposed a different set of procedural rules with regard to applying for conditional release.

The current Youth Court system is designed for children and young adults who at the time of the alleged offence were aged 10–17 years, and provides four processing options: (a) informal caution, (b) formal police caution, (c) family conferencing and (d) a Court appearance. Recent Court statistics show that there were 6,862 youth apprehension reports lodged by police in 2007 (Office of Crime and Statistics Research 2010). Of these, there were 2,086 referrals to a caution, which resulted in 2,064 formal cautions being administered. An additional 1,584 cases were finalized by the Family Conference Team, and the Youth Court itself finalized 2,277 cases. The police and specialist Community Programs Unit Managers typically decide which option is most appropriate, although a magistrate may overturn any Court referral decision made by a Community Programs Unit Manager and send the matter back for either a caution or conference. The Court may also exercise a referral role in the case of those youths who have been arrested but not granted police bail.

There have been few systematic evaluations of Australian Youth Court systems, although one evaluation by Wundersitz (1996) assessed the outcomes of the South Australian Youth Court since its inception in 1993. Wundersitz (1996) reported that, from 1994 to 1995, 33% of all cases had been handled by way of an informal caution and a further 23% by way of a formal caution. Thus, 56% of all young offending matters were being diverted from the formal Court process (which was close to the 60% target set out by the Select Committee Inquiry in 1992). Wundersitz (1996) reported that 93% of victims were satisfied with the conferencing process, and 86% of those undertaking conditions were recorded as having been complied with. In relation to the Youth Court's processing of cases, 86% of cases were resolved within an 8-week time frame. However, a number of limitations of the Youth Court system were also identified, including (but not limited to) (1) overrepresentation of Indigenous youths at the point of entry into the system and fewer diversions among this population, (2) the statutory restriction on the family conferencing system to deal only with minor offences (in contrast to the New Zealand conferencing system), (3) delays and difficulties in organising family conferences and (4) the lack of cultural appropriateness and sensitivity of Court proceedings for Indigenous people.

The Court Liaison Unit (CLU) of Families SA is primarily responsible for disseminating information to relevant parties, as well as providing services to young people coming before the Court. Staff are responsible for (a) obtaining relevant and necessary information as requested prior to the Youth Court social worker attending Court, (b) ensuring reports requested by the Court are received by the CLU to be

provided when required by the Court, (c) distributing all departmental reports to the Youth Court and the young person's solicitor and the police, (d) obtaining copies of all young offender orders and non-pecuniary orders, (e) disseminating copies of all orders to the relevant District Centre staff member and (f) undertaking the administration of Community Service Work Orders.

6.4 Child Protection Matters

Although less has been written about the role of the Youth Court in relation to child protection, the reforms initiated in the early 1990s were also driven by concerns about the welfare of children placed into out-of-home care. Children, it was argued, were often not being provided with the stability and security once they had been removed from their birth parents. Instead, many were being subject to multiple placement changes and long periods in care without any reasonable attempts being made to reunify them with their parents. At the time, policy-makers and researchers were growing increasingly aware of an emerging literature on attachment and the importance of parent-child relationships. Out-of-home care did not appear to be providing the level of stability and quality of care likely to be conducive to healthy long-term development. It was further argued that many children often deserved to re-establish a connection with their families once they left care and that the probability of this occurring was very low, given how the system was operating. The intention of the new *Children's Protection Act 1993*, therefore, was to place a greater emphasis on family connections and reunification. The Court was to be given greater legislative discretion to provide opportunities for families to address their difficulties in the shorter term by making available a range of order types and durations.

An object of the *Children's Protection Act 1993* is 'to provide for the care and protection of children, and to do so in a manner that maximises a child's opportunity to grow up in a safe and stable environment and to reach his or her full potential' (Object 3.1). The Act additionally states that 'the administration of this Act is to be founded on the principles that the primary responsibility for a child's care and protection lies with the child's family, and that a high priority should therefore be accorded to supporting and assisting the family to carry out that responsibility' (Part 1). Child protection matters are considered in relation to four key areas of practice: (a) notification, (b) family care meeting, (c) investigation and intervention processes and (d) care and protection orders.

In November 2004, the Hon. Edward Mullighan QC handed down the findings of the *Children in State Care Commission of Inquiry* report. A second inquiry was subsequently undertaken into Children on Anangu Pitjantjatjara Lands, a remote area of South Australia which is populated by traditional Aboriginal communities and not accessible without a permit. These two inquiries (jointly referred to as the *Mullighan Inquiry*) made a number of recommendations intended to strengthen the child protection system in South Australia. The principal reforms of the Act will be phased in from 2011 to 2013, including (but are not limited to) (a) enhanced provisions

to promote child safe environments, including the requirement for a broader range of organisations to have criminal history checks for personnel working with children, as well as the requirement to lodge a statement outlining their child safe environment policies and procedures with the Department for Families and Communities; (b) additional protection for mandatory notifiers; (c) provisions to ensure appropriate mechanisms are available to respond when a young person makes a disclosure of sexual abuse; (d) provisions to clarify and strengthen the role and powers of the Guardian for Children and Young People and the Health and Community Services Complaints Commissioner; and (e) mechanisms to promote the participation of children and young people in departmental decision-making. These amendments apply to all nongovernment and local government organisations that provide services wholly or partly for children.

A major stakeholder of the Youth Court's child protection jurisdiction is Families SA, a division of the state government's Department for Families and Communities. The primary work areas of the division include (a) protecting children from abuse and harm, (b) supporting families to reduce risk to children, (c) providing alternative care for children and young people when home is no longer an option, (d) working with young people who break the law, (e) managing adoption processes, (f) caring for refugee children at risk, (g) delivering services to address poverty and (h) helping communities affected by disaster to rebuild.

This brief history of the South Australian Youth Court highlights a long-standing recognition that the Courts should view children and adolescents as distinctly different from adults and balance the competing needs of (a) sparing vulnerable individuals from the potential harms and stigmatising effects of the Court process while (b) ensuring that the community is adequately protected from more serious young offenders. History has shown that these competing needs are not always easily resolved in practice. It may be observed that the difficulties arising from managing the welfare needs of young people, while ensuring the effective administration of punishment and deterrence, still persist in the contemporary Youth Court system. The purpose of this study was to examine the current challenges faced by the South Australian Youth Court and identify possible reforms and their viability from the perspective of its judicial officers and other key stakeholders. This chapter presents the results of this undertaking.

6.5 The Study Method

6.5.1 Participants and Sampling

To explore current challenges faced by the Youth Court in areas of both juvenile justice and child protection, a series of interviews were conducted with 15 key stakeholders of the Youth Court. Stakeholders were identified by the researchers in consultation with the Children and Young Person section of the South Australian Law Society, who acted as a reference group for this study. Participants included

two judges and two magistrates currently practising within the metropolitan Court in addition to two regional Youth Court magistrates and a former Youth Court judge. Several individuals with significant experience of working within and/or liaising with the Youth Court and its associated bodies (e.g. Families SA, diversionary programmes, legal practice in juvenile justice) were also interviewed, as well as those who were identified as having an interest in the fundamental ideological interests of the Court (e.g. child advocacy, Indigenous rights).

6.5.2 Data Collection and Analysis

Each interview was conducted in person and followed a semi-structured format containing 21 open-ended questions. Interview questions were developed to assess current challenges in areas of juvenile justice and child protection, including those related to the Youth Court's basic aims and philosophy, current procedure and operation, guiding legislation and its overall effectiveness as a Court system. Each interview took approximately 60 min to complete. All interviews were digitally recorded, with permission, and then transcribed. Key points and themes of each interview were then extracted and summarised.

6.6 Findings

6.6.1 Purpose of the Children's Court

The Youth Court's juvenile justice system was viewed by interviewees as being generally less punitive than adult criminal Courts, with a philosophical orientation that takes into account principles of correction, rehabilitation and welfare, in line with international guidelines such as the UN Convention on the Rights of the Child. There was a broad consensus that, although the Court serves an important welfare function for many young people, the Court itself operates (and should continue to operate) separately from the broader welfare system. For example, the removal of Families SA representatives from the bench of the Youth Court in the 1990s was seen by judicial officers as important in ensuring that the Court retained its independence. Interviewees noted that the attempt to balance care and treatment with punishment was inherently difficult to achieve in practice and did not always translate well to adequate judicial responses. For example, some participants explained that the Court's historical roots in, and reliance on, traditional sentencing options (e.g. bonds, bail) meant that the Court was often procedurally similar to adult Courts. There was also a view, expressed by some, that an overly benevolent approach could result in leniency in sentencing, thereby lessening the impact of the crime and failing to encourage positive behavioural change.

Those who were interviewed felt that the purpose of the Court is clearly articulated in the guiding legislation, the *Young Offenders Act 1993* and the *Children's Protection Act 1993*. Broadly, in relation to juvenile justice, this involves the protection of young people from the full force of the law as part of a public concession that young people sometimes make mistakes and errors of judgement that lead to crime. In particular, interviewees cited Section 3 of the *Young Offenders Act* which describes the purpose of the Court as being to provide care, correction and guidance where necessary. Similarly, in regard to child protection legislation, the Youth Court is obliged to act primarily in the best interests of the child and to consider the child's best interest above the competing interests of any and all other parties. It was acknowledged that, in both jurisdictions, children are distinct from adults and hold a special status as vulnerable persons in our society and that this should always be reflected in the Court's dealings.

6.6.2 Resources

The following questions asked interviewees about the resources that were available to the Youth Court. What follows is a summary of views expressed about the personnel of the Court, the structure of the Court and the characteristics of those people who appear before the Court. These can be regarded as the 'inputs' of the Court, which can be distinguished from both 'processes' and 'outputs'.

The architecture and physical layout of the metropolitan Youth Court building, which serves both the juvenile justice and care and protection jurisdictions, is comparable to that of a traditional courthouse. The amalgamation of the two jurisdictions, including a common waiting area inside the Court facility, without any demarcation of the differing roles and operation of each jurisdiction was seen by some to be highly inappropriate. The physical space of the Youth Court was seen to offer little protection to those who entered the building and, at times (e.g. during child removal), the space could become emotionally charged and unsafe. Representatives from Aboriginal legal rights expressed a high level of concern that the design of the Court was unsuitable for Aboriginal young people.

Several resource-driven limitations of the juvenile justice system in remote and regional parts of South Australia were discussed. In addition to the difficulties associated with how the lack of available services and resources in remote areas of the state (such as the Anangu Pitjantjatjara Yankunytjatjara Lands) can negatively affect all aspects of the Court's administration, some interviewees highlighted the problem of consistency due to the rotating schedules of magistrates working in the regional context. The workloads of regional magistrates were also considered to be higher than those of their metropolitan counterparts.

Interviewees were concerned that the Youth Court faces an ongoing challenge in regard to dealing with an emerging, highly complex, cohort of young offenders (i.e. youth with severe mental health issues, drug use problems, are homeless or live in an unstable home, have a history of sexual abuse, etc.). For this group, significant

resource-related difficulties were identified in formulating and delivering an appropriate response. Further, support services (e.g. drug and alcohol counselling) were regarded as already limited and not available once the young person attained the age of majority. Similarly, in care and protection, many youth exiting out-of-home care at the age of 18 years were thought to lack the necessary life skills, experience and support systems to adjust to and successfully negotiate the adult world.

In the opinion of many, one of the most significant recent changes in the profile of young people in South Australia as compared to youth a decade ago has been a marked increase in alcohol and other drug use, including methamphetamine use. Substance use issues among parents and carers were also identified as increasingly prevalent and often implicated in cases of children at risk of neglect and use. In juvenile justice, drug use was also seen as contributing to an increase in crimes such as robbery and theft, as well as more dangerous criminal activity, such as assaults. The link between substance abuse and criminal activity was seen to pose unique difficulties for the judiciary of the Youth Court in terms of their capacity to deliver an effective sanction for criminal activity as well as to address the factors underlying criminal activity.

Interviewees described the current group of Youth Court judicial officers as genuinely sympathetic and interested in providing good outcomes for children and young people. Judicial officers were perceived to be selected on the basis of their qualifications and overall appropriateness to deal with young people. However, some respondents felt that judicial officers should receive a greater level of training in some broader areas relevant to youth issues, such as developmental psychology and developmental criminology. It was the opinion of some that the judicial officers often applied a ‘common-sense’ approach to dealing with children.

6.6.3 Processes

In terms of its practical operation, interviewees felt that one of the main advantages of the modern Youth Court in South Australia is its family conference system. This system of diversion was seen to reduce the burden on the system by enabling less serious crimes to be handled without need of a Court appearance. Other diversionary programmes were also recognised for their positive contributions. A particular strength of the current Youth Court system is its ability to process and respond to matters within a relatively short time frame. A rapid response was considered by all interviewees to be critical and, in some cases, more important than the nature of the response itself.

The Youth Court relies on various forms of evidence and expert testimony to assist in reaching final decisions on Court matters. Interviewees critically considered the range and types of evidence that should necessarily come before the Courts in regard to these matters. It was understood that, in relation to juvenile justice matters, the main purpose or emphasis of Court evidence should be on the identification of criminogenic (i.e. offence-related) needs, such that the Court is better positioned to recommend rehabilitation options. In the care and protection jurisdiction, Court evidence should

aid in decision-making regarding the short- and long-term care of a child suspected to be at risk of abuse and/or neglect. Section 34, or 'Social Background', reports, a common form of Court evidence, offer comprehensive information about a young person and relevant life circumstances, but it was reported that they could sometimes include information that lacked relevance or objectivity. Some concern was voiced regarding the inclusion of anecdote, gossip and unsubstantiated material. Psychological reports were generally regarded as being variable in quality or being too lengthy. Some interviewees argued that it was often beneficial for defence solicitors to obtain independent psychological reports as they were perceived as being of higher overall quality and more objective than those provided by the Department for Families and Communities (now Department for Communities and Social Inclusion).

6.6.4 Outputs

Despite expressing general satisfaction with the operation of the Court, interviewees in this study generally felt unable to comment on the extent to which Court outcomes might be regarded as 'good'. There were few comparisons made with other jurisdictions and little awareness of how other Children's Courts work (including, e.g., Children's Courts Clinics that operate in other states). Several respondents felt that, in regard to juvenile offending matters, rates of recidivism usually provided a useful indicator of how well the Youth Court was operating. However, it was also cautioned that recidivism statistics could be potentially misleading if not correctly presented or if factors such as the type of offence were not properly accounted for. Judicial officers commented, for example, that some offenders committed multiple offences in the lead up to their first appearance in the Youth Court, and this did not necessarily indicate that the Court or its diversionary approaches were ineffective. On the child protection side, there was a great deal of uncertainty as to how to evaluate the Court's operation, as the welfare-related outcomes of each individual child often depended on multiple factors external to the Court itself. In the opinion of many, the core value of the Youth Court was its independence; as such, the Court should not be viewed as merely an extension of the broader welfare system. In fact, judicial officers noted that, in some cases, youths appearing before the Court often required protection from the state welfare system. Other respondents expressed some uncertainty as to the optimal method for evaluating the effectiveness of the Youth Court but felt that it was fundamentally important that the Court was subjected to regular evaluation.

6.6.5 Directions for Reform

The final questions concerned possible areas in which the current Court system might be reformed or improved. This generally led to a discussion about the nature of Children's Courts and the extent to which they are, or wish to be, considered to be adversarial or problem-solving in nature. These are terms which carried different

meanings for different interviewees; however, there was a view expressed by many that the ongoing evolution of the Youth Court should involve a shift away from an adversarial model of justice.

In the area of child protection, the Youth Court system was considered by some to be highly adversarial in both structure and procedure, with an overemphasis on intervening to protect children by removal rather than the Court and its stakeholders working collaboratively with parents to address issues of harm or risk. Recent data reported by the Australian Institute of Health and Welfare (2011) stated that, in 2009–2010, there were 1,815 substantiated cases of notified child abuse or neglect in South Australia. Almost a quarter (24.4%) of all orders that were issued during that time period were guardianship or custody orders. Less adversarial, or collaborative, approaches were suggested as an alternative to the recent shift and trend towards application for long-term Guardianship of the Minister orders (i.e. until the age of 18 years) for children suspected, and subsequently confirmed, to be at risk of abuse or neglect. Interviewees also noted that the lack of avenues for adoption in South Australia was an important side issue.

One suggestion for reform, for example, was that the Youth Court could adopt a case-management approach wherein the Court has the authority to refer the youth to intervention programmes and follow up on progress. Greater cooperation among relevant supporting organisations was seen to be a prerequisite within such a proposed system. Of course, new legislation would need to be introduced if the Youth Court was to adopt more of a 'case-management' approach, although clearly the current legislation does give judicial officers the authority to 'problem-solve'. The judicial officers noted that, while the Youth Court was not strictly a problem-solving Court, it had some discretionary power and capacity to 'case manage' those youths for whom it was deemed necessary to ensure the correction of the individual, such as ordering the youth to attend services and conduct routine follow-ups in Court. Current staffing levels and resources of the Youth Court were argued to be insufficient to adequately support a problem-solving approach. Additionally, it was commented that the Youth Court system deals with complex problems once the level of risk or harm has already escalated to the point that authorities are involved. This makes it more difficult for the Court to achieve its broad objectives of ensuring the welfare of a child.

The introduction of a national framework for both youth justice and care and protection was raised. Some reservation was expressed in regard to this proposal as interviewees cited the need for flexibility between state jurisdictions and the undesirability of obstructing or delaying local initiatives. Variation in state legislation and procedure was seen to be important in enabling experimentation and development of new strategies as the outcomes of independent undertakings and trials could then be shared between states.

Generally, the current legislation was regarded as adequate, although some reform was recommended in relation to specific areas, such as the current age of criminal responsibility (it was felt by some that this should be increased from 10 years to at least 12 years) and fitness to plea in juvenile justice matters (there were some concerns that the current definition of the Act was modelled problematically on the adult definition of mental impairment).

Finally, while the family conference system was referred to as a progressive and humane aspect of the Youth Court system, there was some concern about the role and rights of the victim in this system. If victims are not properly included and involved in the family conference system, then this may lead to frustration and other difficulties. This was reported to be a matter of procedural justice rather than an issue of whether the outcome of the family conference was just and fair. One of the other major issues concerning family conference diversion was the provision of feedback to victims as to the follow-up on the outcome of the sanctions and/or undertakings assigned to the youth. In some cases, victims were not informed of the impact of the conference on the youth in terms of their future behaviour, including reoffending behaviour.

6.7 Conclusion

The Youth Court of South Australia has served as an independent specialist Court for youth matters for over a century, handling both child protection and juvenile offending matters. From the perspective of its key judicial officers and other key stakeholders, the Youth Court system is guided by various values and principles – some of which are enshrined in legislation, whereas others reflect a general ethic of the Court and its staff. These include the need for the Court to possess autonomy and operate outside the broader welfare system (rather than be an extension of it), to resolve matters quickly and without undue delay and to tailor responses to the needs of the individual child in a manner that ultimately serves his or her best interest. These features of the Youth Court distinguish it from traditional adversarial adult Courts based on general deterrence and, procedurally, allow for its matters to be carried out without significant delay. There was broad consensus that the Youth Court system should preserve these basic founding ideals in its ongoing practice and in any future reform. Limitations of the Court and its processes were difficult for interviewees to consider and evaluate in isolation from the broader system in which the Court is positioned. Nevertheless, as highlighted in this chapter, interviewees raised a number of potential areas of improvement in relation to available resources (e.g. structural separation and architectural overhaul of the child protection and juvenile offending jurisdictions), and its processes (e.g. ways in which the Court collects and considers evidence from allied organisations).

One of the major challenges for the Youth Court in both jurisdictions is the increasing number of young people with complex needs (e.g. substance abuse problems, mental health issues, family breakdown) who enter the system. This also represents an area of growing concern for organisations and service providers in the care and protection field (e.g. Families SA, non-government child and family welfare agencies such as Anglicare, the foster carer community, etc.) who currently encounter significant difficulties in managing the high demand for services for children in need. Practical measures such as increases in resources, staffing and facilities may alleviate some of the short-term pressures on these agencies and may provide the Youth Court a greater suite of possible avenues for processing young

people. However, the consensus of interviewees is that the problems faced by the system are not simply resource driven but also driven by limitations in how it is able to respond to certain matters. This was particularly apparent in the child protection jurisdiction where, in the opinion of several judicial officers, the long-term removal of children under guardianship orders was generally seen as an inadequate practice that often only marginally improved a child's circumstances and, in some cases, introduced new concerns. However, in situations involving harm to a child from a parent or caregiver, the Court has very few alternative responses at its disposal.

There was much discussion as to whether the Youth Court system would benefit from adopting more of a 'problem-solving' or case-management approach, similar to the US Drug Court model, to enable a more intensive and collaborative approach to dealing with youth entering the system. It was noted by judicial officers that the Court was currently capable and authorised to adopt this type of approach in some cases, but it was not routinely adopted due to limited time and resources. On the whole, interviewees seemed to endorse the introduction of more case-management options within the Youth Court's toolkit, but it was acknowledged that legislative reform and greater funding and staffing would be required in order to implement this successfully. Freiberg (2011) has recently described how the notion of therapeutic jurisprudence focuses attention on the well-being of all participants in a justice system. Using the example of the mental health Court, Freiberg articulates how multidisciplinary models, such as those required by rights-based and non-adversarial systems of justice, can promote the diversion of offenders away from custody. He goes on to identify some of the key elements of a non-adversarial justice system, many of which would appear to be compatible with those aspects of the South Australian Youth Court system and which were identified as of most value by the interviewees. The development of bench books (overviews of a legal procedure written for a judge) citing behavioural science research is also identified as an effective way of promoting this approach and developing the knowledge of judicial officers.

Another suggestion for change was the greater use of diversionary options, particularly the family conferencing system, which currently handles over 1,500 matters each year (Office of Crime and Statistics Research 2010) and is generally regarded positively in terms of its process and outcomes for all parties involved, including victims of crime. Many felt that the family conference offered the most progressive and humane way of dealing with young offenders, although there was also an opposing (and minority) view that an authoritative and intimidating 'tough-on-crime' approach to handling first-time offenders may reduce recidivism.

In summary, there would appear to be a general sense of confidence in the Youth Court system of South Australia and its ideological approach to dealing with young people, one of the most vulnerable populations in the community. However, there would appear to be a need for more objective and systematic evaluation of the Youth Court system's processes and their general effectiveness in order to develop a more empirically driven 'what works' mentality in the field. There is also a need for increased dialogue and sharing of information between state jurisdictions to enable a greater collaboration and development of ideas on tackling the current and future challenges of the Youth Court system.

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Chapter 7
The Children's Court in Tasmania

Max Travers, Rob White, and Michael McKinnon

Abstract Tasmania is the smallest state in Australia with a population of 500,000. Drawing on interviews with magistrates and other practitioners working in the Youth Justice Division of the Magistrates Court of Tasmania, this chapter considers both practical and policy issues in child protection and how this state responds to child protection and youth offending. During 2010, a dedicated Children's Court was established, and youth matters were listed before a single magistrate. The chapter reports on a wide range of views among magistrates on policy and practice issues.

Keywords Tasmania • Children's Court • Magistrates • Child protection • Sentencing

7.1 Introduction

Young people may come before a specialist Children's Court as a result of being charged by police for committing an offence or as the result of being the subject of an enquiry into their well-being in a child protection matter.

Tasmania is the smallest state in Australia with a population of 500,000. It is an island to the south of Victoria. The two main cities are Hobart (population of 200,000) and Launceston (population of 100,000) This chapter mostly reports the views of the magistrates in Tasmania who, as in any bench, encompass a wide range of views (we interviewed 11 of 12 magistrates in this state). We also interviewed other stakeholders, such as youth justice workers, defence lawyers,

M. Travers (✉) • R. White • M. McKinnon
School of Sociology and Social Work, University of Tasmania,
Hobart, TAS 7001, Australia
e-mail: max.travers@utas.edu.au; r.d.white@utas.edu.au; michael.mckinnon@utas.edu.au

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prosecutors and policy experts. The magistrates court, in collaboration with the Department of Health and Human Services, is pursuing and implementing a reform agenda that has already led to the creation of a dedicated Children's Court in 2010 that will introduce best practice from larger jurisdictions (DHSS 2009).

7.2 History of the Children's Court

7.2.1 A Child-Saving Past

In the nineteenth century, there was a legislative separation in Tasmania between child protection and justice issues. The *Infants Welfare Act* (1935) established a unified system, based on welfare principles. The language of the *Welfare Act 1960* that consolidated this early legislation suggests a nurturing approach to juvenile justice (see, e.g. Section 4: 'each child suspected of having committed, charged with or found guilty of an offence shall be treated not as a criminal but as a child who is, or may have been, misguided and misdirected'). However, the reality may have been experienced quite differently, given the blurring of welfare and criminal interventions. The failures of this welfare-oriented system became most evident when there were reports of abuse by adults who had spent time as wards of state when they were children (Bingham 2006; Mason 2008).

7.2.2 Current Legislation and Policies

The *Youth Justice Act* (1997) represented a significant shift away from the welfare-based approach reflected in the *Child Welfare Act* (1960). It made young offenders responsible for their actions, even though the courts had to balance consideration of welfare and punishment when sentencing and only use detention as a last resort. The *Children, Young Persons and Their Families Act* (1997) was concerned with supporting families and protecting vulnerable children. The central principles were 'that the best interests of the child are paramount, families are responsible for their children and the Government has an important role in supporting families to meet this responsibility' (Cleary 1997, p. 1). In each statute, there was a greater emphasis on diversion, to respectively restorative conferences, and family group conferences. Responsibility is seen as primarily being located within individuals and families, whether this relates to justice or welfare.

7.2.3 Sentencing Options

Section 47 of the Youth Justice Act 1997 contains the sentencing options available to magistrates for young people under the age of 18. These options are listed below (DHHS 2009, p. 51):

- Dismiss the charge and impose no further sentence.
- Dismiss the charge and reprimand the youth.
- Dismiss the charge and require the youth to enter into an undertaking to be of good behaviour.
- Release the youth and adjourn the proceedings on conditions.
- Impose a fine.
- Probation order.
- Community service order.
- Detention order.
- For family violence offences, make a rehabilitation programme order.

In addition to these orders, the court may make one or more of the following orders:

- A suspended detention order
- A restitution order
- A compensation order

Under the *Youth Justice Act* (1997), the court may take 'one or more' of the actions under s. 47 when a young person has been found guilty of an offence. This enables the court to combine sentences as it sees fit. In addition, it can attach orders such as compensation or restitution (DHHS 2009, p. 51). Youth Justice was established as an agency with functions relating to both detention of young people (supervised detention orders) and community-based sanctions (Community Youth Justice).

7.2.4 The Purpose and Philosophy of the Current Juvenile Justice System

The purpose and philosophy of the present system is embedded within the legislation and in the practice of the different agencies concerned with juvenile justice and child protection. In broad terms, there was a consensus in seeing the aim as being to rehabilitate rather than punish, with detention viewed as a last resort:

> The main purpose in relation to criminal matters is the rehabilitation of the young person. That has to be the overwhelming focus that it is not a punishment court but a redirections court. (Magistrate 1)

> I think that the most important function I fulfil is to balance what I think of the competing goals of community protection and punishment on the one hand with rehabilitation and prevention of future offending on the other....(Magistrate 5)

Nevertheless, these general principles left room for a wide variety of views. Some interviewees suggested that the welfare agencies were under-resourced or that more emphasis should be placed on prevention rather than punishment. Others believed that it would be helpful to have more sentencing options that involved punishment, as an alternative to detention:

> One of the problems with youth justice is that you can have a 14, 15 or 16 year old who is pretty world wise and committing quite serious crimes but knows he is just going to get a slap on the wrist when he comes to court. I think there is a need for the criminal court to deal with those matters and be seen to be dealing with them. And probably in addition to the rehabilitative aspect, be prepared to be a bit tough on kids. (Magistrate 6)

Another magistrate explicitly argued against the view that the court should offer its own welfare programmes or introduce diversionary initiatives modelled on therapeutic jurisprudence:

> I am a little bit cautious about sentencing options where the court actually controls the application of the programme. I don't think a court should become a social worker or the deliverer of those type of programmes. The court needs to retain its authority as a decision maker, as a sentencer, as a place where the buck stops. I like the idea that the court says what happens, rather than as a place where you sit down and discuss and try and get a consensus, pat people on the head if they are doing well. I don't really see that as being a very effective role for the court, especially with youth. Because basically I think there needs to be someone that youth come up against who tell them what is going to happen. (Magistrate 9)

The different underlying values also explain why magistrates differ when asked about the need for training. One magistrate with welfare values, who wanted the court to change, felt that there were an 'enormous' number of courses available and that additional training would be of 'massive assistance'. Another magistrate suggested that traditional legal skills were not really needed to work in Children's Courts, and there should be different criteria for appointment:

> I really think you are looking for people that have a lot of empathy with people and good community understanding. It is not black letter law as much as a sense of understanding and an ability to have people skills. In the Children's Court you definitely need to have those people. Not just people who pronounce from above, but people that can have insight into the human behaviour. (Magistrate 10)

By contrast, other magistrates saw their task as no different to sentencing adult offenders:

> Sentencing young offenders in a lot of ways, it's no different to sentencing an adult. There are a lot of competing aims that we just have to balance as best we can in each case. (Magistrate 7)

Similarly, those with a welfare outlook were most likely to identify problems that required some attention, if not radical reform. Other magistrates were, however, content with the existing system:

> While I suppose it's easy in interviews like this to think of problems that don't really exist. I personally don't have any particular concerns about how the system runs now. (Magistrate 5)

Despite having distinctive values and approaches, magistrates hearing cases concerning children agree on the basic principles behind the move to a justice model and the separation of child protection from criminal prosecutions.

7.3 Youth Justice: Current Challenges

The system of juvenile justice established by the *Youth Justice Act* (1997), and operational in 2000, has been operating for 10 years, and there are no plans to change the basic principles or institutional framework. Most of the difficulties in Tasmania result from a lack of resources (DHHS 2008a, b; Department of Justice 2008; Department of Police and Emergency Management 2008; Ellis 2008; Legal Aid Commission 2008) rather than because there are great ideological differences on how to proceed.

7.3.1 The Effectiveness of Diversion

Diversion has been effective in Tasmania in delaying contact with the Children's Court for repeat offenders and offering a more meaningful alternative to court hearings (McCreadie 2000; Lennox 2001; Sayer and Bridge-Wright 2007). The administrative arrangements in Tasmania are unusual in that restorative conferences are conducted both by the police and Youth Justice (Prichard 2004). Mason (2007, p. 3) describes the cautioning or conferencing process as an escalating ladder from informal caution through formal caution to community conference. Section 9 of the Act stipulates that where a police officer is of the opinion that a matter 'warrants more formal action than an informal caution', a community conference can be used. In this circumstance, young people can also be offered a formal caution under Section 14 of the Act. Both measures require admissions that the youth committed the offence. Mason (2007, p. 3) describes formal cautions as requiring a written admission by the youth and the possibility of confronting the victim. The pre-conditions to a conference are described as including signing an admission and the youth 'enters into an undertaking to attend a community conference'.

Sayer and Bridge Wright (2007) summarised the development of conferencing:

> The Police introduced the first formal model of conferencing through their pioneering diversionary conferencing program some five years before proclamation of the Youth Justice Act. This practice continued under the Formal Cautioning provisions after the Act was proclaimed whilst Community Conferences are convened by the DHHS, through a facilitator, under the Community Conferencing provisions (p.11).

That is to say there were, and still are, two different conferencing models operating in Tasmania. Community Conferencing, as defined in the Act, is the responsibility of the Department of Health and Human Services. The 'old' programme of conferencing continues within the police service under the guise of a formal caution (Lennox 2001, p. 2). Whereas an authorised police officer, who has completed a facilitators course and is authorised by the Commissioner of Police, facilitates the formal caution 'conference', independent community-based facilitators, in a similar manner to family group conferencing for child protection cases, facilitate community conferencing.

The establishment of a system of conferencing used by police in administering formal cautions is perhaps a reflection of the fact that police took the initiative in establishing this form of pre-court diversion prior to enactment of specific legislation. It should be noted that the legislation was subsequently written in a way that enabled the continuance of the practice, despite introducing specific community conferencing provisions. Initially, when introduced in Tasmania in 1995, conferences were conducted as a pre-court diversion under the guise of the 'formal caution' model. When the *Youth Justice Act* (1997) was introduced in 2000, police continued to interpret police formal cautions as a conferencing format. Section 10 of the Act, which enables formal cautions, does not specify how the formal caution should be conducted, other than establishing the options for youth undertakings that can be generated by the caution. When combined with Section 9 of the Act, which suggests victims should be given the opportunity to attend the formal caution, Section 10 enables the construction of a conference with the police officer as facilitator (Prichard 2004, p. 65). Where a conference is facilitated by a police officer under the formal caution model, there is an onus on the officer to engage with the young person in a more holistic fashion compared with the description of offending that the officer may contribute in a community conference.

There are concerns that provision of two types of juvenile conferencing results in excessive penalties in response to minor offenders and that it is not used enough in regard to more serious offenders who might benefit from the process (Travers 2010; Cunneen and White 2011). One magistrate complained that some police officers and local businesses want young people to attend court, even though this cannot address the causes of offending:

> Look, I completely understand that the police are doing what a complainant has asked them to do. Shoplifting must cost Target millions of dollars per year. They have caught this person stealing, what is the police officer to do? And Target probably does not want to get involved in 3,000 instances of community conferencing each year. But really, I wonder what sort of message it sends if they come here to have the court vent its impotent rage at them. (Magistrate 2)

Another magistrate reported that diversion did not always work effectively:

> Yes, probably more could be diverted. We do see a lot of trivial cases where at the end of the day the youth justice recommendation is to release and adjourn after first, second or third shop stealing. If they are going to come to court to get released and adjourned, why not just release them. (Magistrate 7)

The magistrates court, itself, has little influence on conferencing. There is a power to send offenders to conferences or combine this with other sentences, but conferences are mostly used to address the early stages of offending in this state.

There has also been some critical research in Tasmania on the effectiveness of conferences. Prichard observed parental behaviour in 67 conferences in Tasmania between 2000 and 2003 (Prichard 2007). He found that parents sometimes felt personally responsible for the actions of their child. At other times, children formed an extension of parents' self-perception causing the distinction between victim and parent to blur (Prichard 2007, p. 106). In one conference, the mother admitted to

Table 7.1 Median length in days of detention episodes, presentenced and sentenced

Episode type	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Presentence detention	3	10	6	3	4	**32**	3	5
Sentenced detention	64	112	100	53	92	**182**	105	34

From AIHW (2008, p. 78)

aiding and abetting her son's shoplifting, spoke about her difficulty with budgeting and indicated that she had a problem with alcohol. This study suggests that some young people and their families may experience conferences as punitive or stigmatising, even if the objective is to support the family.

7.3.2 Delay

The good intentions behind the youth justice system are continually thwarted in this state through a shortage of resources. This is particularly evident in the way cases are adjourned, so that when the young person is eventually sentenced, the offence may have taken place weeks or months previously. This arises partly because young people are entitled to legal advice but also because multiple offences overload the system:

> One of the problems of dealing with kids is the delays in the system. You can get a child into court quickly after they've committed an offence…but it's what happens then that's the problem. If they get an adjournment then you put the matter off for three or four weeks for them to get some legal advice and a lot of them reoffend. So they come back next time with the lawyers and there is a new matter to address. The lawyer asks for it to be adjourned again. And it will happen and happen and happen.... (Magistrate 1)

There is also the problem that, in some cases, delay leads to the young person spending periods of up to a few months remanded in custody. Remand at Ashley Youth Detention Centre, which is located five kilometres from Deloraine in the northwest of the island (and at some distance from the main population areas of Tasmania), has been a substantial problem for Tasmanian youth justice since the introduction of the *Youth Justice Act* (1997). For the 2004–2005 period, remands accounted for 93% of all admissions with an average length of stay on remand of 38 days (Smith and Douglas 2005, p. 6). The extent of the problem of the length of time young people spend on remand in Tasmania is revealed in Table 7.1, which shows a relatively unique situation for this state relative to other jurisdictions.

Tressider and Putt (2005, p. 5) reviewed figures over the period from 2001 to 2005 and established admissions on remand ranged from 92 to 95% of all admissions. Unlike other jurisdictions where magistrates are not being able to consider lack of accommodation as a reason to refuse bail, Tasmania has no such restriction. Many residents in Ashley are on remand due to a lack of alternative accommodation

rather than the seriousness of their alleged offences (DHHS 2005, p. 10). The Tasmanian Commissioner for Children was particularly critical of this aspect of bail determinations in his 2007 report: 'it is extremely concerning that Magistrates sometimes feel compelled to refuse bail and remand to Ashley because they become aware that the youth has no home and nowhere else to go, sometimes called "welfare remand". This is not the province of the bail officer under the criminal justice system, but the province of Human Services and Housing'. 'In the eyes of the law all people are innocent until proven guilty. The majority of Ashley residents have not been tried and convicted' (Mason 2007, p. 2).

The issue of remand is recognised as a problem among magistrates and the other agencies because in many cases offenders would not be sentenced to imprisonment for the substantive offence. The delays in this state arise from lack of resourcing within agencies. Allocation of a Youth Justice Officer, access to Legal Aid and compilation of bail or presentencing reports all take time and are impacted by a lack of resources. Additionally, a lack of resourcing within the police, whose funding has been reduced in attempts to address a budget deficit (Commissioner for Children 2006), may delay matters being processed by the court.

7.3.3 Resourcing in Programmes

Magistrates in Tasmania were also conscious that a lack of resources in agencies such as Youth Justice affected the nature of programmes offered to young people after sentencing. This was not a trivial problem but reduced the effectiveness of the system, as well as making magistrates look foolish when the orders they made could not be implemented:

> Another bugbear for me is that we make orders and in 6-12 months time that person will come back. I will ask then the Youth Justice worker what happened under the orders I made. And I will hear nothing: "We were not resourced enough". So essentially a penalty has been handed down but that is just words on a piece of paper.... (Magistrate 3)

This magistrate wanted the courts to offer more effective welfare measures through sentencing. There is also the implication that detention may offer the only effective means of punishment.

7.3.4 The Appropriateness of Hearing Rooms

Tasmania does not have a dedicated Children's Court in a separate building from the magistrates court. Although seen as a problem, it is recognised that a specialist court in its own building would be impracticable even in the capital city of Hobart, given the number of hearings needed for the small population. The most pressing challenge is finding the money to renovate the older court buildings in some other Tasmanian cities: Launceston and Burnie.

The court building in Launceston gives the feeling of going back in time. One court room is very long, with the elevated magistrate looking down along a table and the defendant standing behind this. In Burnie, there was no separate entrance to the dock, so young people in custody, some wearing restraints, were brought in through a waiting area.

There was a difference in view on whether it was desirable to create a friendly environment in which the magistrate, young person and others could sit around a table, as happens in restorative conferences. One magistrate had chosen to come down from his elevated chair and hold hearings around the bench table:

> I don't wear a jacket. It is bad enough that I sit up there. Do you know that the best thing about a closed court is that the door does not open and shut? It means that I can sit down with parents and young people at the table and I have done so. (Magistrate 7)

But other magistrates preferred the traditional courtroom:

> I think sometimes you are too high and too far away. But I think there needs to be a physical separation of the magistrate from the offender, and there needs to be some sort of physical representation of authority. I'm not one who thinks that everyone sitting around one table is a good thing. (Magistrate 3)

This debate has, to some extent, been resolved in Tasmania through establishing a dedicated Children's Court run by a magistrate who believes in reducing formality. The layout and formal procedures of this court have not changed. However, after prosecutors and defence lawyers have made their submissions, the magistrate may address the young person in a more conversational, solution-focussed manner than in the traditional adversarial model.

7.3.5 The Need for Bail Hostels

Ashley Youth Detention Centre is the only facility for holding young people on remand in Tasmania, even for short periods. A journey by car to Hobart (the main population centre and capital city, in the South of the island) takes about 3 hours.

Magistrates were well aware of the difficulties this created for defendants:

> There is no specific remand facility in the south so the kids get run over to the adult detention centre though they are not that keen on having kids there overnight. So what happens now is the kid comes into an after hours court, say at 8 o'clock. They will get transported to Ashley, the vehicle has to come down from there, so 11 o'clock pick up, arrive Ashley at 2 am. It is just a (Ford) Falcon but they are cuffed. All youth friendly stuff! Then they are brought back here for 2.15 pm court, so they are in bed at 3 am, have to leave at 11 am, so they are still woken up at 7 am, so you effectively have a person that has had a traumatic experience, four hours sleep, then back into court. (Magistrate 1)

One way of addressing this problem would be for courts to adopt a more generous approach to bailing young people or for better arrangements that give young people legal representation at the initial bail hearings that often take place in the evening. In the absence of secure accommodation outside Ashley Youth Detention Centre, it might also help if some bail hearings could take place using a video-link

as happens on subsequent remands. These issues have been considered in internal reviews, but the problem has not been properly addressed.

7.3.6 Ashley Youth Detention Centre

Arguably, the greatest challenge for any juvenile justice system is reducing the number of young people sent to detention. In Tasmania, this is seen as ineffective in reducing crime and potentially damaging to young people. Nevertheless, there is a consensus among magistrates that detention is necessary as a last resort:

> It is a last resort stuff sending a child into custody. It is a last resort to remand in custody. My feeling is that you do not send your dog to Ashley. But sometimes there is more to it than just how comfortable or positive it is going to be for the child. Something has to be done with a young offender on a rampage. I have to [take him] out of the community. (Magistrate 8)

Ashley Youth Detention Centre, prior to remodelling to suit the needs of the Youth Justice Act 1997, was a home for boys aged 10–16 years. Many detainees have committed serious offences involving violence (Smith and Douglas 2005) or are serious offenders who have exhausted alternative sentencing options (DHHS 2005, p. 10). Most also suffer from multiple and complex needs, such as illicit drug addictions, challenging behaviours and mental health issues (DHHS 2005).

Although a relatively small number of young people spend time at Ashley (between 28 and 35 on average), the centre has been subject to ongoing criticisms such as inappropriate operational procedures, allegations of staff abuse of young people and poor training and attitudes of 'youth workers' (i.e. the security staff) (Hall et al. 2007; Brown 2010).

Magistrates knew about these and other problems, and this may explain their reluctance to sentence young offenders to detention. One newly appointed magistrate had been surprised to discover that there is no detoxification programme for drugs in the detention centre other than going 'cold turkey':

> They told me that Ashley has no facility for detoxification for drug addicted youths and, whilst there was a psychologist, there was no program for alcohol and drug issues to be seriously addressed. (Magistrate 1)

However, it seems important, as in other areas where there are resource constraints, not to exaggerate the problems faced in Tasmania. The same magistrate believed that some offenders did benefit:

> Often it is the case that the young person is doing really well at Ashley. He enjoys the structure of the day, enjoys the interaction and learning experience with teachers. (Magistrate 3)

This is possible because there are smaller numbers of repeat or serious offenders than in most states. Nevertheless, establishing a detention centre that has a lower proportion of remand detainees and can offer more meaningful and effective rehabilitative

programmes offers a major challenge for Tasmania. One magistrate suggested that it would be more cost-effective to invest in youth justice workers or bail hostels than in the facilities at the detention centre.

7.4 Child Protection: A System Under Strain

7.4.1 Philosophies, Processes and Outcomes

Child protection services have to balance two competing objectives, in a similar way to those working in juvenile justice. They seek to protect vulnerable children from harm and have the power to remove them from their families. At the same time, they are required under the *Children, Young Persons and Their Families Act 1997* to maintain and support families when this is possible.

This tension is, to some extent, institutionalised in Tasmania in that separate organisations within the Department of Health and Human Services work with families, whereas others become involved when greater intervention is required. There is also scope for debate and discretion among child protection officers on when and how to pursue legal proceedings that will break up a family.

This also means that outcomes can be understood differently by practitioners. A low rate of court proceedings intervention can be seen as positive, if the main objective is to support families. But social workers are often criticised for failing to intervene. The Department of Health and Human Services has to balance these conflicting objectives, making the most effective use of the resources available.

7.4.2 The Rise in Notifications

A central problem for child protection services has been managing a rising workload created by new legislation. The first stage of investigation in each state allows what is called a 'notification', meaning a concern raised to the Department of Health and Human Services (DHHS) that is seen as potentially serious and followed up. With the introduction of a policy of mandatory notification in 2003, Tasmanian child protection notifications rose considerably. There was a further rise after the *Family Violence Act* (2004), and the accompanying *Safe at Home* policy, a pro-intervention policy for family violence. This is demonstrated in Table 7.2.

In 2004, the definition of abuse and neglect was extended to include a child affected by family violence in the presence of the child. Table 7.3 reveals how the ratio of investigated cases compares with the rest of Australia.

Despite 80% of cases not attracting further action, there has still been a large follow-on increase of court cases heard. In 2003–2004, 153 child protection orders were sought. This figure rose to 357 in 2005–2006 upon the effect of the Safe at Home policy and the amendment to the *Children, Young Persons and Their Families Act 1997.*

Table 7.2 Effect of legislation/policy change on notifications

	Notifications to DHHS	Investigated	Applications to court
1999	422	356	N/A
2000	315	268	N/A
2001	508	396	288
2002	741	641	402
2003	7,248	1,294	153
2004	10,788	1,833	203
2005	13,029	3,824	357
2006	14,498	4,577	314
2007	12,863	3,257	N/A

AIHW(2009, p. 23); Magistrates Court Annual Report (2006–2007, p. 41); Jacob and Fanning (2006, p. 32); AIHW (2009, p. 74); AIHW (2008, p. 72); Magistrates Court Annual Report (2002–03, p. 38); AIHW (2002, p. 49)

Table 7.3 Rates of investigations relative to notifications

NSW	Vic	Qld	WA	ACT	NT	TAS
44%	32%	87%	99%	41%	56%	17%

Reproduced from Jacob and Fanning (2006, p. 37)

In 2006, the rapid changes to child protection and associated increase in notifications (brought about by policy, practice and legislative changes in the years following the inception of the *Children, Young Persons and Their Families Act 1997*) were addressed in the Report on Child Protection Services in Tasmania (Jacob and Fanning 2006). Jacob and Fanning had this to say about child protection notifications:

> The number of notifications is overwhelming the Tasmanian child protection system - the system is processing too many notifications in order to identify those children who require statutory intervention. Only 26.5% of notifications are referred for further investigation and only 7.2% of those notifications are substantiated. Both of these figures are the lowest in the country suggesting the net is being spread too wide. This system does not make sense. (Jacob and Fanning 2006, p. 59)

Further, the report made apparent that the problems regarding notification were leading to an unsustainable child protection system: 'While the vast majority of child protection workers do a difficult job to the maximum of their ability, the system in which they are working is collapsing' (Jacob and Fanning 2006, p. 3).

New Directions For Child Protection in Tasmania: An Integrated Strategic Framework was published to address the problem of a growing workload (DHHS 2008a). The main aim has been to create a new procedure for notifications through what is known as gateway services, requiring family services to take on more of the work in responding to cases where there is a low level of risk. The philosophy behind this is that more should be achieved in maintaining and supporting families. This is meant to address the problem by allowing child protection workers to focus on the cases where children are most at risk.

7.4.3 Family Group Conferences

Where a child is deemed to be at risk and intervention for care and protection of children remains a priority, Section 30 of *The Children, Young Persons and Their Families Act 1997* provides a mechanism for dealing with the matter outside of a court: the family group conference. By bringing together the child's guardians, the child and an advocate, a department employee and the facilitator in a family group conference, care arrangements can be negotiated without referral to the court.

The intent for Section 30 to reduce the reliance on court-based intervention was lauded by Cleary (1997b, p. 2) in the second reading of the *Children, Young Persons and Their Families Bill* for its potential to reduce cost, actively engage families and avoid the overpowering nature of the court process. However, unlike the juvenile justice area, child protection workers are not routinely using Section 30 to decrease the number of matters progressing to the magistrates' court (children's division). Between the inception of the *Children, Young Persons and Their Families Act 1997* and the 2006 writing of Jacob and Fanning's Child Protection Services in Tasmania report, only 367 cases had been dealt with through a family group conference, with most of these referred back to conference by magistrates. Only 2% of conferences were undertaken by voluntary agreement (Jacob and Fanning 2006, p. 73).

Although case conferencing, a planning process between professionals, which unlike the family group conference does not involve the family, is mentioned as a planning option and court action is mentioned as a response option, little reference is made to the family group conference in the Integrated Strategic Framework. Essentially case conferences do not include parents, so may do nothing to empower parents, and if used as an alternative to family group conferencing, may reduce the potential for diversion from court to a family group conference. Despite the Strategic Framework providing little strategic direction suggesting how to increase the use of pre-court family group conferences, it does still list the percentage of children that have had a family group conference held in response and case management as a key performance indicator (DHHS 2008a, p. 64).

7.4.4 Children's Voice in Child Protection Matters

The *Children, Young Person's and Their Families Act 1997* allows for children to have a voice in child protection proceedings relating to their care. Generally, the child's views begin to be heard with the appointment of a separate children's representative by the court when a matter first comes to the court for a 1-month Assessment Order. The representatives are usually lawyers who act as an advocate for the child.

> In protection matters the first thing I always do is appoint a child representative. I think we are mandated by the Act, although some people say that we are not. (Magistrate 3)

The views of the child can be facilitated by the children's representative during the Assessment Order stage regardless of whether a matter develops into a full

hearing for an ongoing care and protection order. The children's representative may facilitate a relationship between the child and a psychologist in order to establish the child's positioning in the matter. This three-way relationship may also be central to the way a child's views are expressed in a full hearing.

> Well, invariably we appoint separate child representatives, we get reports from psychologists…They would be there to object to any questions, but it would very rarely be that we would get to that stage anyway. But they would certainly send a draft of the questions to the psychologist. (Magistrate 3)

Magistrates also have the capacity to speak directly with children prior to any order being signed, whether a matter has been negotiated by the parties or goes to a hearing. One magistrate stressed the importance of personally and directly communicating with children before deciding on any orders:

> I think in most cases before I make an order they [the children] should appear in court. I see them in chambers. The Act says that I have to give the child an opportunity to give me their views. Whether they are represented or not. And I do that, in chambers. I ask the child to come in with their representative…It has usually come to me at a stage where it is put to me that the order is proposed…and I say OK but first I want to speak to the child and they usually come in and I make sure they understand what is proposed. I give them the opportunity to say what they want. They will say they understand, and they are fine with it. Then I decide. (Magistrate 11)

The views of this magistrate highlight the importance of obtaining the child's views without these being contaminated by the different parties.

7.5 Possibilities and Future Directions for Tasmania

The tenth anniversary of the implementation of the *Youth Justice Act* (1997) led to the Department of Health and Human Services commissioning a review of the legislation (DHHS 2009). There was a consultation exercise, and submissions were obtained from magistrates, from other practitioners and from some members of the public. There were, however, no calls for radical reform or for changing the underlying principles.

Interviews with magistrates do reveal different philosophies that might support different reform agendas. In this concluding section, it seems worth contrasting the reform agenda currently supported by the majority of magistrates, with the welfare-oriented approach advanced by some practitioners and academics. There is in practice a middle ground in which it is possible to make greater links between child protection and youth justice, without this requiring radical legislative changes.

7.5.1 A Reform Agenda Within the Court

The appointment of a new Chief Magistrate in 2009 has made it possible to pursue a reform agenda that has already established a dedicated Children's Court in which

a smaller number of magistrates hear all cases, and there is greater monitoring of programmes informed by therapeutic jurisprudence. It seems unlikely that more resources will be directed at agencies, given the financial problems of the state.

When we conducted the interviews, debates were taking place about the desirability of a dedicated court. Some magistrates favoured this change:

> We are jacks of all trades at the moment. In a small state like Tasmania I suppose we have to be. But I think the ideal would be to have a small specialised Youth Court that deals with all these matters by a dedicated one or a few magistrates. (Magistrate 4)

> We need a dedicated Children's Court, more conferencing supervised by a magistrate similar to our other diversion systems, more emphasis on parental involvement, and the parents must attend sitting at bar table. (Magistrate 9)

Other magistrates felt this was a bad idea for practical reasons:

> I'm generally not in favour of specialist magistrates in Tasmania because I do not think the market is big enough. If you have one magistrate dealing with all of the youth matters then there's potential for a lack of cross-fertilisation of ideas. He becomes wrapped up in his own little youth justice world. That is my own view. In Victoria you have 10 magistrates doing youth justice so that is a different thing. (Magistrate 10)

One magistrate even felt that there was no need for separate hearings or legislation:

> In some ways, I am querying whether you need to have a Children's Court, particularly in a small jurisdiction like Tasmania....Would it work just as well if the magistrate had a whole range of options, including options he currently has for children? And children when they get to court might also get some adult penalties. (Magistrate 5)

Although there continue to be a range of views, a dedicated Children's Court was established in Tasmania during 2010, in the sense that a single magistrate in Hobart hears all cases in the Youth Justice Division.

7.5.2 Other Current Concerns in Tasmania

7.5.2.1 Review of the 1997 *Youth Justice Act*

The Department of Health and Human Services undertook a major review of the *Youth Justice Act* (1997) in 2010. This involved submissions from various academic and nongovernment parties, discussion forums with young people and departmental review of current operations. A major missing element in this review, however, was close consideration of how the systems of welfare and systems of justice ought to overlap in ways that serve the best interests of the child. Protection of the rights of young people as witnesses and participants in the juvenile justice process is an ongoing concern.

7.5.2.2 Child Protection

The chronic shortage of resources and trained personnel in the area of child protection continues. New procedures and gateways are being developed, but time will tell

how successful these are in channelling children into the appropriate child support services offered by the Tasmanian government and its non-government partners. The punitive nature of the *Safe at Home* policy requiring the police to intervene in cases of domestic violence may also be reflected in how family relationships are construed and how use of the court is conceptualised (and operationalised) by child protection workers. The relationship between children and parents is bound to be influenced negatively and positively by the mechanisms of conflict resolution adopted, including and especially family group conferences and the Children's Court.

7.5.2.3 Indigenous Young People

The number of Aboriginal youths at Ashley averaged out at between 20 and 30% of the Ashley population for the period between 2001 and 2006 (Hall et al. 2007, p. 61), a major over-representation. The *Youth Justice Act* (1997) has several sections making special provisions for Aboriginal youths, but suitable pre-court and detention alternatives as well as positive community-based programmes need further development if the numbers are to come down.

A programme for Aboriginal youths has been operating on a Bass Strait Island, Clarke Island (Lungtalanana), for a number of years. Essentially the focus of the programme is to divert youths at risk away from at risk lifestyles. Although there is no direct legislative mechanism enabling magistrates to sentence Aboriginal youths to Clarke Island and Clarke Island is not gazetted as a detention centre, during the past decade, a number of Ashley detainees have been moved from Ashley to Clarke Island whilst on detention orders.

The Magistrates Review 2009 raised the potential to consider Clarke Island as either an option for a deferred sentence or supported bail programme. Currently, magistrates may use the Bail Act and grant bail on the condition that youths go to Clark Island. However, in practice, this situation rarely arises. In addition to its potential as a detention alternative for Indigenous young people, one magistrate referred to the Clarke Island programme as the type of option, not currently available to magistrates, that would be desirable as an alternative intervention for young people in general.

> The Aboriginal centre set up a program on Clark Island. I don't know how that is going, but remember when it was set up thinking it was an excellent concept because a lot of these kids need role models, need to be challenged, they need to be taken out to the bush for a while and basically set some challenges and achieve them. I would have thought it is not rocket science, it is basic parenting. But we don't have anything like that as far as I can see. (Magistrate 5)

7.6 Conclusion

Adequate assessment of the Children's Court in Tasmania needs to consider the long-standing tension between 'needs' and 'deeds' as reflected in the bifurcation of the system into justice and protection components. Yet, in practice, the participants are essentially the same young people, who share the same types of social backgrounds

and family contexts. The history of connection and separation between welfare and justice considerations needs to be acknowledged, as does the simultaneous status of children as both victim and offender.

Institutionally, there needs to be greater cross-fertilisation of ideas and practical intersections between juvenile justice and child protection. In part, the development of quite separate domains of professional expertise – for example, juvenile justice with criminology and child protection with social work – has contributed to distinct differences in language and approach. However, both core concepts (as demonstrated in the UN Convention on the Rights of the Child) and shared organisational dilemmas (as indicated in questions over how best to deal with children who are 'at risk' in so many different ways) illustrate the potentials and the needs for a more unified – and child-centred – approach to children and youth issues.

Further development of the principles, practices and creative institutionalisation of restorative justice would perhaps provide one avenue whereby unity of purpose and satisfactory outcomes for children and young people across diverse systems might be achieved. Likewise, and especially in respect to the Children's Court, notions of therapeutic justice ought to lie at the centre of much of what the court does, given the nature of the clients who end up in the court.

Philosophically, there has already been a move to adopting principles from therapeutic jurisprudence in the new dedicated Children's Court. Perhaps in the future there could be more recognition of the overlap between youth justice and protection. This is acknowledged in the comments by one magistrate that:

> Ideally, there would be more youth justice services could do, there is just enormous inequality in the situations that some of these children are in. Here we are in a very nice situation economically and personally, and it seems to me that most of the kids in more serious trouble are also from situations of real inequality. That seems to be a constant to me. If that inequality was addressed, then I think that offending would be too. It's easy to say that, isn't it, but under that little phrase it's a massive cultural and economic set of problems. (Magistrate 1)

Even if we cannot address these larger problems, the case of Tasmania illustrates that more could be done in reducing delays and investing in more child protection and youth justice workers, refurbishing courtrooms and establishing bail hostels. The argument that no resources are available is not really compelling. It may reflect the limited influence or political power of children, even in relation to adult offenders. In the meantime, it is important to monitor and report these problems and for those concerned about these issues in the wider community to support the reform agenda within this magistrates court.

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Chapter 8
The Children's Court of Victoria

Allan Borowski and Rosemary Sheehan

Abstract Victoria, located on the mainland in south-east Australia, enjoys a relatively low youth crime rate and the lowest youth detention rate in Australia. The number of substantiated child abuse cases is 5.7 per 1,000. The Children's Court of Victoria has two major divisions, the Criminal Division and the Family Division (which deals with child protection matters). The court is embedded in an adversarial legal system. The age jurisdictions of the two divisions are 10 years to less than 18 years and birth to less than 18 years, respectively. In child protection matters, the threshold for statutory intervention is a high one, namely, significant harm. The Victorian study involved data collection in both metropolitan Melbourne and regional locations. Individual interviews were conducted with 20 magistrates, while six focus groups were conducted involving 60 practitioners associated with the Children's Court. Among the study's most salient findings were concerns about the excessively adversarial nature of the Family Division, the court's heavy workload, satisfaction with the court's structure but concern about its overlap with other tribunals and the need for further training of magistrates, child protection workers who appear in court and lawyers. Further findings pointed to the inadequacy of court facilities, the challenges of an increasingly complex clientele, an environment in the Family Division often experienced as a hostile one by child protection workers in particular, the difficulty the court's clientele experiences in understanding its processes and support for extending the Children's Koori (Indigenous) Court. Among the reforms supported by study participants were ones that would permit ongoing

A. Borowski (✉)
School of Social Work and Social Policy, Faculty
of Health Sciences, La Trobe University, Victoria 3086, Australia
e-mail: A.Borowski@latrobe.edu.au

R. Sheehan
Department of Social Work, Monash University,
Caulfield 3145, VIC, Australia
e-mail: Rosemary.Sheehan@monash.edu

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case monitoring and case management and the use of alternative dispute resolution approaches, especially in the Family Division.

Keywords Children's Court • Child protection • Juvenile justice • Judicial decision-making

8.1 Introduction

Victoria is located in the south-east of Australia and, geographically, is the country's smallest mainland state. It is bordered on the north by New South Wales and on the west by South Australia. The island state of Tasmania is to the south of Victoria across Bass Strait. Victoria's population was 5.65 million at the end of September 2011 (Australian Bureau of Statistics 2012). Young people aged between 10 and 17 years of age numbered 548,340 in 2009–2010, or just under 10% of the state's population (Sentencing Advisory Council 2012:12). More than 70% of Victoria's population (over four million people) live in Melbourne, the capital city of Victoria, which is located in the south of the state. Close to a further 20% of the population live in other cities and towns, thereby making Victoria Australia's most urbanised state.

There are 1.2 million children and young people aged 0–17 years in Victoria. They comprise 22.5% of the state's population. About 20% of these children are from a culturally and linguistically diverse background, and a small proportion (1.1%) are of Aboriginal background (Department of Education 2011).

In comparison with Australia's other states and territories, Victoria has a low youth crime rate and the lowest detention rate (including both remandees and those young people under sentence) in Australia. Victoria Police data show that crimes committed by 10–17-year-olds represented just under 10% of all crimes committed in 2009–2010. The rate of substantiated child abuse was 5.7 per 1,000 in 2009–2010, down from 6.5 per 1,000 four years earlier (Department of Education 2011).

The British first attempted to settle Victoria in 1803. In 1835, John Batman 'purchased' land on the western shore of Port Phillip Bay from the local Aborigines and chose a site for a village. In 1837, the township of Melbourne on the banks of the Yarra River was surveyed and named. In 1851, the separate (from New South Wales) colony of Victoria was proclaimed. And later in the same year, the Australian gold rush began.

In response to the large number of children who had been abandoned or neglected during the gold rushes of the 1850s, Victoria introduced the *Neglected and Criminal Children's Act* in 1864, the first legislation to deal with vulnerable children. The Children's Court of Victoria was first established in 1906 under the *Children's Court Act* as a separate court within the Magistrates' Court to deal with cases of both child abuse and neglect and, summarily, young offenders (between 7 and 16 years of age) separately from adult offenders. Prior to that time, young offenders were treated the same way as adult offenders and the establishment of a Children's Court was seen as a means of enabling children to escape the 'contamination and stigma of adult courts' (Sentencing Advisory Council 2012:24). It was not until the *Children's and*

Young Persons' Act (CYPA) 1989, legislation which, among other things, separated child protection from criminal matters, that all legislative instruments governing children and young people in need of protection or who had committed offences were brought together under one piece of legislation.

8.2 Child Abuse and Neglect

Child protection did not become a direct state responsibility until 1984. Prior to this, nongovernment organisations (such as the Children's Protection Society) and the Victoria Police assumed this role. By the late 1970s and early 1980s, child protection referrals had increased dramatically, cases were regularly being brought to the Children's Court and an increasing number of children were made wards of the state and often placed into residential care (Scott and Swain 2002:136). *CYPA 1989* was a response to practices that saw children too readily removed from their parents' care and the negligible emphasis upon family preservation (a situation that had particular impact on Indigenous children (Victorian Child Welfare Practice and Legislation Review 1984:84)) and a recognition of the need for government regulation of child protection in Victoria (Department of Human Services Victoria 2003:vii).

The structure of the Children's Court today remains as set out in *CYPA 1989*. Like some other courts and tribunals (such as the Coroner's Court and civil and administrative tribunals, for instance), the Children's Court is a specialist court with exclusive jurisdiction. It is divided into two divisions in recognition of the 'substantive, procedural and dispositional differences' in dealing with child protection and criminal matters and in order 'to ensure that protective issues do not obscure issues of criminal responsibility' (Sentencing Advisory Council 2012:24–25). The Family Division hears child protection matters and intervention orders relating to children and young people up to the age of 18 years, while the Criminal Division deals with criminal matters relating to children and young people between 10 years of age and under 18 years of age.

8.2.1 Reforming the Child Protection System: Legislative Review

The 1989 legislation gave significant attention to distinguishing between children in need of protection and young offenders, to the provision of advocacy for families under investigation (and interpreters where necessary), to conducting proceedings in an open court and to establishing 'on the balance of probabilities' as the criterion of proof in child protection matters (Sheehan 2001). Magistrates could also conduct matters with less formality; play a more active role in proceedings; directly question witnesses, lawyers and other professionals; and call for further information and advice. While the Victorian Child Welfare Practice and Legislation Review (1984) called for panels to hear child protection matters, this was not pursued and the 1989 legislation

confined child protection activity to identifying and responding to critical incidents of child abuse and neglect. The grounds for intervention were physical, emotional and sexual abuse as well as harm to the child's physical development or health but only if there was an unacceptable risk of harm to the child. However, how these terms were to be interpreted was left to the magistrates. Sole responsibility for prosecution of child abuse matters was assigned to the statutory child welfare authority.

In 1993, Justice John Fogarty, in his report *Protective Services for Children in Victoria,* found that the Children's Court was under pressure from an increased number of protection applications, case complexity, lengthy contested cases and an 'unduly restrictive interpretation of significant harm in the legislation' (Fogarty 1993:8). The Victorian Auditor General's (1996) review of the child protection system criticised the Children's Court for its preoccupation with its minimum intervention approach. Furthermore, the National Commission of Inquiry into the Prevention of Child Abuse (1996) in its report *Childhood Matters* concluded that children, families and professionals found the adversarial and highly legalised processes of the Children's Court confusing and, at times, hostile and traumatic.

With major social changes, such as deinstitutionalisation of people with an intellectual disability or serious mental illness and the increase in substance abuse, contributing to an increase in notifications of child neglect and emotional abuse, the *Protecting Children: The Child Protection Outcomes Project* report (Department of Human Services Victoria 2003) confirmed that the legislation's focus on risk and discrete episodes of adult behaviour ignored children who experienced persistent abusive and neglectful behaviours which did not readily meet the intervention threshold of significant harm, most particularly given the absence of a definition of significant harm. This report recommended a lessening of the forensic investigative approach and recourse to courts that was central to the operation of the *CYPA 1989*.

Freiberg et al. (2004), as part of the Victorian Government's reform of the *CYPA 1989* legislation, recommended that the Children's Court adopt a more inquisitorial or case management approach and move away from the adversarial paradigm. The problem-oriented, therapeutic jurisprudence approach was already operating in Australian specialty courts such as drug, mental health and domestic violence courts. However, the *Children Youth and Families Act (CYFA) 2005* in reality offered little change to the Children's Court's operation although it included an additional section to consider 'the effects of cumulative patterns of harm on a child's safety and development' (s.10 (e)). However, the arbitrary timelines around permanent care planning remained in this new legislation, frustrating proper planning for those few children whose parents lack the motivation and/or capacity to care for them. Temporary Assessment Orders were introduced to allow the statutory child welfare authority, that is, the Department of Human Services' Child Protection Service, to investigate and assess 'a reasonable suspicion that a child is, or is likely to be, in need of protection' (s. 228 (1) (a)). So too were provisions for therapeutic treatment for a child between 10 and 15 years of age who exhibited sexually abusive behaviours. But detail about what constitutes sexual offending or what kind of therapy was to be provided was absent from the legislation.

Most recently, the *Family Violence Protection Act 2008* empowered the Children's Court to make orders where children are exposed to the effects of physical, sexual, emotional or psychological abuse *and* economic abuse. *The Stalking Intervention Orders Act 2008* provides for the Children's Court to make an order where it is assessed that children are being stalked. What has been a cause for concern is the extent to which such applications are made to settle differences that arise between children, for example, in the school playground or between family members. Such cases are now referred as much as possible to mediation in order to reduce vexatious complaints and to encourage participant problem-solving.

8.2.2 The Impact of the 2005 Legislation on the Family Division

Despite the changes introduced under the *CYFA 2005,* the Children's Court and the Child Protection Service remain embedded in an adversarial legal system with a high threshold for statutory intervention, namely, significant harm, and the court seeking out discrete incidents of abuse to satisfy itself that the grounds for child protection have merit. The emphasis on individual rights of parents and children remains together with concern for the welfare of the child where suspicions of abuse are confirmed by the Children's Court. The requirement to demonstrate parental incapacity or misconduct commits considerable Child Protection Service time to gathering evidence for formal legal proceedings. The workload of the Children's Court is high and continues to grow, as does the complexity of the cases it processes, the number of hearings needed to decide outcomes and the pressures on court resources in an increasingly litigated arena. The 2005 legislation did not provide guidelines about what constitutes child maltreatment (apart from the child abuse grounds that initiate the application) or about how the Children's Court should decide significant harm and parental responsibility. These were left to the discretion of the magistrate. While there is general agreement about broad definitions of what constitutes serious physical and sexual abuse, it is difficult to achieve consensus on what constitutes abuse where a child is not seriously or gravely harmed. Although cumulative harm is now included in legislation as a threshold for intervention, it is not defined and, thus, parameters for deciding it are absent.

8.2.3 The Ombudsman's Investigation into Child Protection

The Office of the Victorian Ombudsman's (2009) *Own Motion Investigation into the Department of Human Services' Child Protection Program* and the Victorian Law Reform Commission's (VLRC) (2010) report, *Protection Applications in the Children's Court,* both reviewed the current child protection system. The Ombudsman found that the alignment of child protection with judicial and adversarial processes 'lead(s) more families (to) becoming ensnared in resource intensive and often

counterproductive contested processes' (2009:65) when alternative legislative arrangements for child protection would be more effective. Thus, VLRC undertook a wide ranging examination of legislation and practice in the child protection domain. VLRC (2010) proposed a process that reflected the unique role of the child welfare jurisdiction, one which minimises disputation and works on reaching agreement, as a better way to resolve the child's best interests – especially 'when parties will usually have important ongoing relationships' (VLRC 2010:209). VLRC suggested that the legal process should be problem-solving in its approach and accommodate the kind of inter-professional contributions that decision-makers need to decide about a child's development and wellbeing in order to better respond 'to concerns about child abuse and neglect often in circumstances of acute family disadvantage or marginalisation' (VLRC 2010:312).

8.3 Young Offenders

The *Children's Court Act 1906* served to redirect young offenders into a more benign and informal court where they could be 'guided', 'treated' and changed into prosocial citizens (Wundersitz 1997:271). By the 1960s, however, the Children's Court had become increasingly criticised for its failure to both rehabilitate young offenders and protect their rights. One response was to try to divert less serious offenders away from the Children's Court through the establishment of a police cautioning programme.

Over the last few decades, several legislative changes have had an important bearing on the court's work with young offenders. The Victorian Child Welfare Practice and Legislation (Carney) Review (1984) recommended an increase in both the minimum age of criminal responsibility from 8 to 10 years and the defintion of 'children' under the Act to move from under 17 years to under 18 years, respectively. It also recommended an increase in the noncustodial sentencing options available to Children's Court magistrates. *CYPA 1989* increased the minimum age of criminal responsibility from 8 to 10 years, expanded the noncustodial sentencing options (e.g. youth attendance orders as an alternative to a custodial sentence), provided a hierarchy of sentencing orders (a sentencing tariff), established diversionary sentencing principles, empowered the court to sentence 10–14-year-olds to a period of detention and provided for court hearings to normally be open to the public (Youth Parole Board and Youth Residential Board Victoria 2011:xi).

It was not until 2005 that the upper age of dealing with criminal matters in the Children's Court was increased to under 18 years through amendments to the *CYPA 1989*. This brought Victoria into line with most other Australian jurisdictions (the upper age is still under 17 years in Queensland) as well as the definition of a child contained in the UN Convention on the Rights of the Child. This change was incorporated into the *CYFA 2005*.

The 2005 legislation also made group conferencing (first introduced in Victoria in 1995) available as a presentence option (rather than a pre-court diversion

strategy as in some other jurisdictions) where young defendants were either found guilty of, or pleaded guilty to, offences serious enough to warrant a supervised community order. Additionally, the legislation introduced new procedures (CAYPINS) for the enforcement of unpaid penalty infringement notices issued to children and young people.

Another important development was the passage, in late 2004, of legislation establishing the Children's Koori Court of Victoria as a Criminal Division of the Children's Court: the *Children and Young Persons (Koori Court) Act*. (A Magistrates' Koori Court for adults was introduced under the *Magistrates' Court Act 2002*.) This court was established in response to the over-representation of Indigenous youth in Victoria's juvenile justice system. With the introduction of the *Children, Youth and Families Act 2005*, the Children's Koori Court became governed by this legislation. This low-volume sentencing court began operating in Melbourne in late 2005 and in Mildura – in regional Victoria – in 2007. It engages Indigenous Elders and other members of the Aboriginal community in the court hearing process, but the presiding magistrate is the sentencing authority.

A further division of the Children's Court, the Neighborhood Justice Division, was established in 2007 (Sentencing Advisory Council 2012:25).

A potential shift in the direction of the state's response to young offenders was signalled in 2010. In that year (and after data collection for this study was drawing to close), a Liberal (conservative) government was elected to office in Victoria. The new state government proposed the introduction of statutory minimum terms of 2 years for 16- and 17-year-olds who committed serious violent assaults, a proposal that was referred to the Sentencing Advisory Council. The introduction of this 'reform' would require additional legislative change given a 2011 ruling by Victoria's highest court, the Court of Appeal, that general (cf. specific) deterrence was an irrelevant consideration in sentencing children. The Sentencing Advisory Council (2011) recommended that the 'gross violence offences' that would attract the 2-year statutory minimum sentence be added to the death-related indictable offences that are currently excluded from the jurisdiction of the Children's Court. The Victorian Government is yet to reach a final decision on this issue.

8.4 The Victorian Study

The Victorian part of the national study of Australia's Children's Courts included individual interviews with 10 dedicated specialist magistrates who practised in this court at Melbourne and a further 10 generalist magistrates in seven regional locations. The study also involved six focus group interviews with 60 practitioners associated with the courts, including specialist assessment clinicians ($N=7$), nongovernment youth justice service providers ($N=9$), Victorian Aboriginal Legal Service lawyers ($N=2$), university academics ($N=4$), a senior Department of Justice officer ($N=1$), child protection workers ($N=18$) and statutory youth justice workers ($N=19$). Six further focus groups were conducted in two regions of Victoria and

involved 37 statutory child protection workers and youth justice workers. The metropolitan focus groups included 23 participants. As in the other states and territories, the interviews focused on the issues and challenges faced by the Children's Court today and over the next decade and study participants' assessments of, and degree of support for, reforms that have recently been canvassed in Australia and overseas.

The issues that guided the interviews broadly covered (1) the purpose of the Children's Court, (2) its current status, (3) its major inputs, (4) aspects of its throughputs, (5) Indigenous issues and (6) legislative and other reforms.

8.5 Purpose of the Court

The majority of the magistrates and five of the six focus groups believed that the purpose of the Family Division of the Children's Court was to protect the best interests of the child, prioritising their safety, stability and welfare. The magistrates also articulated other aims, including family preservation, providing support to children and families, reducing risks to children and independently monitoring child welfare processes:

> The best interests of the child are the paramount concerns … what services are available for that particular child…how the Court [can] best assist that child. (Magistrate 1)

As far as the Criminal Division is concerned, the primary purpose was seen as rehabilitation. A further aim was to provide support and (referral to) welfare services to young people in order to prevent recidivism.

8.5.1 The Children's Court Today

The study sought to 'assess' the current status of the Children's Court in terms of its perceived effectiveness, its workload and its structure.

8.5.1.1 Effectiveness

Participants' perspectives on the effectiveness of the Family Division of the Children's Court were quite at odds with their views on the effectiveness of its Criminal Division. Study participants considered the Family Division to be too adversarial with the 'desire to win' trumping the best interests of the child, particularly in lengthy contested hearings with multiple legal representatives. Some magistrates and focus groups participants believed that adversarial appraisal of evidence is essential to upholding the rights of children and families. In contrast, one focus group described a court culture where children had to be protected from 'the terrible

monolithic state stealing them from their families' rather than being protected from 'their mothers and fathers who are assaulting them or neglecting them'. This same focus group suggested that the Children's Court went to great lengths 'not [to] upset the parents', indicating that it was more inclined to protect families from 'the welfare' than see the Child Protection Service as having legitimate concerns.

On the other hand, the Criminal Division was seen in positive terms. Respondents pointed, for example, to the timeliness of case processing (once a case actually came to court!), the therapeutic benefit of the court hearings and the low rate of sentences involving detention made by the Children's Court. Interestingly, there was little focus on the Children's Court's impact on recidivism.

8.5.1.2 Workload

The Children's Court was described as 'hugely busy.' (The volume of Family Division cases has increased by 6% per annum between 2002 and 2010, reported the President of the Children's Court). The magistrates considered Family Division work more demanding than work in other courts – time-consuming, emotionally 'intense', 'onerous', complex and often 'traumatic', with magistrates having to make 'difficult decisions':

> … It's not like deciding a contractual dispute about money. It's people's lives. (F-3) [And yet] you've got about half an hour to resolve this issue [when] half a day [is needed] to do it justice. (Magistrate 8)

Magistrates in regional courts also experienced this pressure but commented that there was a high level of collaboration among members of the courtroom workgroup resulting in a less adversarial court process.

The workload in the Criminal Division, while described as high (almost 6,200 defendants were found guilty in 2009–2010 (Children's Court of Victoria 2010)), was viewed as more manageable and less emotionally taxing than the Family Division workload. Nevertheless, case processing could be quite time-consuming, certainly relative to the adult criminal cases heard in the Magistrates' Court.

A theme common to the magistrates was that high workloads can compromise the quality of the judicial process. While true in both divisions, this was especially so for the Family Division.

8.5.1.3 Structure

The current structure of the Children's Court into two divisions was viewed by virtually all of the study participants as appropriate 'as they are distinct [divisions]' (Magistrate 7). As one focus group participant put it:

> The separation needs to be there just to make it clear that the child is not the one at fault when they are in the Family Division [but that] it is something they have done that has brought them into the Criminal Division. (Legal professionals focus group)

Another theme that emerged, most notably among metropolitan magistrates, concerned the significant jurisdictional overlaps between the five courts/tribunals

that administer children's law in Victoria. As well as the Children's Court, there is the Family Court of Australia (FCA), the Federal Magistrate's Court, the County Court which hears Children's Court criminal appeals and the Victorian Civil and Administrative Tribunal (VCAT) which hears appeals of care orders made by the Family Division. The fragmentation, duplication and ambiguity of roles between the Children's Court and the FCA are particularly evident where FCA cases involve child abuse. There is the 'constant referral back and forth' (legal practitioner) between the courts, and some key legal concepts are interpreted differently across jurisdictions.

The jurisdictional overlap between the Children's Court and VCAT resulted in 'two jurisdictions hearing two parts of the same case' (Magistrate 10). Magistrates believed that appeals should be heard in the Children's Court, commented on the differing performance standards of the VCAT members (who are not magistrates) from their own and noted that an appeal to VCAT can divert cases away from the Children's Court and specialist decision-making.

Despite general satisfaction with the two-division structure of the Children's Court, some respondents underscored the large number of children and young people presenting in both divisions either sequentially (children involved in Family Division matters who some time later 'graduate' to appearing in the Criminal Division) or concurrently, reflecting the family dysfunction and social disadvantage among the court's clientele and the inability of the court to respond coherently to these 'dually involved' or 'dually adjudicated' children and young people.

8.6 Court Inputs

The researchers sought study participants' views on the Children's Court's inputs, that is, its human resources (the magistrates and other members of the courtroom workgroup), the court's facilities and the court's clientele.

8.6.1 The Magistrates

The study canvassed participants' views concerning the leader of the courtroom workgroup, namely, the magistrates, in terms of the selection process for magistrates and their role, training and further training needs.

In Victoria, magistrates are selected and appointed by the Attorney General. Factors that appeared to influence judicial appointment were the applicant's reputation and – in some appointments – previous experience of the Children's Court. The latter is a much less salient consideration in recruiting regional magistrates given their generalist responsibilities and the relatively small part played by Children's Court work in their overall workload. Indeed, regional magistrates referred to the multiple roles they filled including serving as a coroner and hearing

Victims of Crime Assistance Tribunal cases and adult criminal matters in the Magistrates' Court:

> I am also involved in … convening work, policy work … mentoring students and I'm on a number of other committees….(Magistrate 13)

Training for magistrates was seen as coming from on-the-job experience (newly appointed magistrates have a mandatory observation period at the Children's Court in Melbourne) and further in-service professional development programmes. Magistrates said they found their peers a great influence in supporting their skill development.

A small number of magistrates and participants in most of the focus groups suggested further training for magistrates in child development and the realities of child protection work. A range of other issues needed to be understood (e.g. cross-cultural training, communicating with children, mental health, disability, sex offences, family dynamics and the rural context) or honed (e.g. skills in the 'courtroom craft' of managing court hearings). A specialist magistrate qualification in children's law as a prerequisite to working in the Children's Court and linking magistrate training to the acquisition of professional accreditation points were proposed by some as methods for ensuring a better fit between the professional qualifications of magistrates and the nature of Children's Court's work.

8.6.2 Other Court Personnel

The other key members of the courtroom workgroup are statutory child protection workers and lawyers in the Family Division and youth justice workers, lawyers and police prosecutors in the Criminal Division.

In the Family Division, regional magistrates and focus groups participants described positive collaboration between child protection workers and lawyers:

> In this region we are blessed with Family Division advocates from the Department of Human Services and local legal practitioners all of whom … have a very good, in fact, an outstanding working relationship. (Magistrate 12)

In contrast, in Melbourne, some lawyers were seen to prioritise the 'battle' with the Child Protection Service (child protection focus group 3) to the detriment of their clients.

Child protection workers were the subject of significant criticism. While magistrates and some focus group participants acknowledged that child protection workers had 'an almost impossible job' (legal professionals focus group), were overworked given high caseloads, with little support and often had to work to very tight timelines, over half also described these workers as inadequately trained and experienced, not sufficiently familiar with the Children Court's processes, poor performers as witnesses in adversarial proceedings and often provided testimony that lacked relevance and cohesion. Indeed:

> … they lack sophistication in their analysis of situations and people. They don't seek professional advice when they should; they are often unprepared .... (Magistrate 7)

For their part, child protection workers underscored the challenge of explaining issues, such as the family environment, neglect and cumulative harm, to the court:

> You can never truly convey to a magistrate how filthy a place is. You can describe it …, you can try and get it across but unless you're there … I almost want to take them with me: "Let's just adjourn for an hour. Come with me to the house before you make a decision to send these kids back". (Child protection focus group 3)

Although a quarter of the magistrates and half of the focus groups raised concerns about lawyers' poor preparation and court performance, varying abilities, lack of focus on the child's best interests and being too adversarial (albeit within an adversarial forum), lawyers appearing in the Family Division were generally viewed in a favourable light. For some child protection workers, the tension between lawyers acting on client instructions, on the one hand, and the legislation's 'best interest' objective that animated the Child Protection Service, on the other, was frustrating.

In the Criminal Division, youth justice workers were seen as reliable and dedicated professionals who produced high-quality reports. The uniformed police prosecutors, with rare exception, were also seen as competent, open and adequately trained and cooperative with the court's rehabilitative philosophy. This was especially the case for the police prosecutors who were party to proceedings at the Children's Court in Melbourne. These prosecutors were especially trained for Children's Court work.

Lawyers were also generally seen as performing well in representing their clients. Nevertheless, the magistrates and the focus groups pointed to instances of poor case preparation and poor court craft, especially among lawyers who appear in the Children's Court only occasionally and whose understanding of its purposes and processes was poor. There was a perception that the Children's Court is a 'training and dumping ground' (Magistrate 3) for less competent lawyers who received less legal aid remuneration than that paid in other jurisdictions.

Just as it was suggested that magistrates have formal training for Children's Court work so, too, it was suggested that there be specialist qualifications for child protection workers and lawyers. Many focus group respondents recommended training for all courtroom workgroup members in order to understand each others' roles, responsibilities and work realities.

8.6.3 Facilities

Since 1999, the Children's Court in Melbourne has been housed in a purpose-built building with separate courtrooms for hearing child protection and youth justice matters. Nevertheless, a major finding was the universal concern about the inadequacy of court facilities.

The Children's Court at Melbourne (located in Little Lonsdale Street in the Central Business District), particularly the Family Division, was described by many study participants as overcrowded and failing to cater to the needs of

children and professionals. This obviated privacy and created an 'incredibly tense environment':

> The overcrowding is just a disgrace … We've got mothers breastfeeding on the floor. We've got lawyers not being able to find somewhere to speak to their clients … They're just standing around for hour after hour. It's really poor. (Legal professionals focus group)

Often located in old and poorly maintained buildings, the regional courts were even more strongly criticised. Although they operate separate court lists and schedule children's matters on specific days, children invariably find themselves co-located with adults given the little space or absence of foyers in these court buildings. This unnecessarily exposes children to adult offenders:

> The issue is separating children from adults and giving them a place where they feel safe, where they don't feel stigmatized, and they are not coming into contact with people who have a potential to contaminate them … through their actions. (Magistrate 18)

The lack of facilities intensified the challenges faced by child protection workers who commented on a lack of safety:

> …there's no facility where we can actually be away from the families when there's a particularly volatile situation. (Child protection focus group 4)

Indeed, security in general and appropriate holding cells for remanded young defendants and young offenders newly sentenced to detention were identified as additional issues for regional courts.

Decentralising the Family Division was suggested as one way of responding to the overcrowding at the Melbourne Children's Court. However, magistrates preferred the 'very good situation here of having everybody under the one roof' (Magistrate 6) – that establishing an additional site would 'fragment' the court, decrease its efficiency and limit judicial collaboration. Given, however, that the Children's Court is 'often forgotten about' (Magistrate 8) in state government budgets, there was little optimism among study participants about the prospects for improvement in court facilities.

8.6.4 The Clientele

A further theme to emerge from the data analysis was the increase in case volume over the last decade and a significant shift in the characteristics of the children, young people and families appearing in the Children's Court.

While the background of criminal defendants has generally remained the same (e.g. low socio-economic status, dysfunctional families), four focus groups noted the increase in young offenders from refugee backgrounds. Further, study participants underscored the increase in the seriousness of presenting offences including armed robbery, affray and aggravated burglary. Drugs and alcohol were seen as important explanatory factors for the increase in offence seriousness.

Study participants also commented on the increasing complexity of Family Division cases:

> Often we'll have families that have family violence issues, social isolation, poverty, sometimes drug and alcohol use thrown in and perhaps even some mental health *concerns*.... (Magistrate 11)

They were families increasingly 'entrenched' in the system. Child neglect cases were also complex:

> Chronic neglect cases are more the order of the day now and sometimes they're more complex than the cases of old that were … straightforward physical abuse cases. (Magistrate 5)

8.7 Court Throughputs

Of Victoria's 548,340 10–17-year-olds in 2009–2010, 14,566 young people (2.7% of 10–17-year-olds) were processed by police. However, 40% of those processed (5,957 young people) were not proceeded against in court either due to a lack of evidence or through diversion (e.g. by means of an informal or formal police caution) or the issuing of a penalty or infringement notice. In the same year, the Children's Court of Victoria dealt with 8,599 criminal cases, and, of these, 82.1% were proven (7,064 cases). Twenty-two per cent of proven cases (1,566) were given some form of supervisory order, while 2.4% (172) were sentenced to a period in detention (Sentencing Advisory Council 2012:12–13). In the Family Division, the number of primary applications (i.e. applications which commence a proceeding in the Children's Court including protection applications by apprehension and by notice, irreconcilable difference applications and permanent care applications that do not flow directly from previous protection order proceedings) either initiated, finalised or pending was 6,871 (Children's Court of Victoria 2010: Table 3, p. 16).

Throughputs refer to the Court's processes – what transpire in the course of child protection or criminal Children's Court hearings. The study canvassed several aspects of the court's processes, namely, its social environment, the extent to which court processes are understood by those who appear in the Children's Court and the court's use of specialist assessments.

8.7.1 Social Environment of the Court

In contrast to the Criminal Division, the social environment, or 'culture', of the Family Division was described in quite negative terms by many of the focus group participants. They commented that the adversarial nature of the Children's Court encourages a culture of bullying of child protection workers by magistrates, lawyers and clients:

> I've been called a coward in court, a bully, in front of the parents and all I'm trying to do is protect this child. (Child protection focus group 2)

This could be quite intense, for instance, when child protection workers were being cross-examined by lawyers who were seen as often working against these workers – like 'oil and water':

> I've heard at least five solicitors say in front of me to their client 'do not trust Child Protection. They will rip your kid out.' (Child protection focus group 2)

Beaulieu and Cesaroni (1999:364) have observed that judicial officers play an important role in shaping the work environment for members of the courtroom workgroup. Indeed, study participants believed that magistrates in the Family Division needed to build much more collaborative and respectful relationships with other professionals.

8.7.2 Understanding Court Processes

Study participants believed that children, young people and parents who appeared in the Children's Court often struggled to understand its processes, decisions and their implications. Magistrates commented that the court's clientele often had limited education, was often distressed and fearful, was confused by legal jargon or may have mental health problems or an intellectual disability. Although seen as their responsibility and despite their best efforts, time constraints often meant that the magistrates had to rely on lawyers to explain court proceedings and outcomes to their clients. This was not always done satisfactorily.

But even if time was not a constraining factor, understanding the court's process may nevertheless remain a problem for those who appear before it. Recent research shows that many high-risk young people have a clinically significant oral language disorder (Snow and Powell 2012). Their difficulties in using and understanding spoken language underscore the complexity of effectively tackling this problem.

8.7.3 Specialist Assessments

Both divisions of the Children's Court often draw upon specialist case assessments to inform magistrate's decision-making. The sources of these assessments include the Department of Human Services' Child Protection Service and Youth Justice section, the Children's Court Clinic, nongovernment child and family welfare agencies and private practitioners.

The reports prepared by youth justice workers and the Children's Court Clinic were held in the highest regard. Magistrates (and lawyers) relied on the Children's Court Clinic for high-quality assessments, without which they would be 'groping in the dark'. Moreover, the clinic's independence from the Child Protection Service was seen as important. However, access to the Children's Court Clinic was a real problem for regional families without the resources to travel to its rooms adjacent to the Children's Court at Melbourne.

The assessments of child protection workers (and family service agency workers) were viewed quite differently. Several focus group participants stated that magistrates and lawyers did not believe that child protection workers could provide expert assessments. Indeed, Child Protection Service reports were identified by just under half of the magistrates and some focus groups as often unhelpful:

> … [They are] driven by word processors, excessive amounts of cutting and pasting [and they] never really get a real feel or understanding of the family or the child in that family.... I don't find them very helpful. (Magistrate 13)

8.7.4 Indigenous Issues

Given their over-representation in all of Australia's juvenile justice systems, the study sought participants' views concerning the role of the Children's Court vis-a-vis Indigenous children and families and young people. In their responses, the study participants focused almost exclusively on the Children's Koori Court.

The Children's Koori Court was seen as an effective response to Indigenous juvenile crime – even though the findings of evaluations indicated that it did not reduce recidivism. Its effectiveness was seen as lying in its particular processes rather than its outcomes. For example, five focus groups pointed to the inclusion of Indigenous Elders in the 'sentencing conversation' that takes place around the court's oval bar table, a process that provides a much greater opportunity for engagement with Indigenous young people and their families. A third of the magistrates and three focus groups viewed the Children's Koori Court as strengthening Indigenous identity. The regional magistrates and four focus groups advocated expansion of the Children's Koori Court into additional sites beyond Melbourne and Mildura.

8.8 Directions for Reform

Despite the reforms brought about by the *CYFA 2005*, the current legislation was described by magistrates and some focus groups as too large, too complex, too technical and lacking clarity about key constructs such as 'cumulative' and 'significant' harm, 'parental responsibility', the evidence required to establish sexual abuse, the time limits to decide permanent care for infants and the nature of parental access to their children. The Family Division was also seen as overly adversarial in its approach. Focus groups comprised of child protection workers commented that some court orders could be confusing, while others were avoided by the court (e.g. guardianship orders that give decision-making about a child's life and welfare to the Secretary of the Department of Human Services Victoria) even when there might be good reasons for using them. However, legislative reform was not necessarily a top priority. Improved court facilities were seen as important as were appropriate support, family accommodation and mental health services for families and children to underpin the court's decisions.

8.8.1 Legislative Reform

Nevertheless, the study participants suggested a number of legislative changes. Most notably, changes that would permit ongoing case monitoring and case management were seen as important for both divisions in order to ensure that Children's Court decisions and recommendations were implemented and the accountability of service providers was enhanced – something akin to the therapeutic jurisprudence approach that is typified, for instance, by the Youth Drug Court.

In relation to the Family Division, a number of magistrates and focus groups proposed a more inquisitorial system and the greater use of alternative dispute resolution approaches, including the expansion of group conferencing. At the same time, a few magistrates believed that changes to the adversarial system might compromise the court's independence and integrity. Magistrate 4, for instance, observed that 'If it's not adversarial, my only concern would be, then, who's the gatekeeper? Who's the independent party?'

8.8.2 Other Reforms

Other suggestions for reform focused on unified courts, a national Children's Court framework, services for both the court's clientele and those on which it is dependent, and overall levels of resourcing. Study participants also mentioned features of other jurisdictions that may usefully inform future deliberations about the operation of the Family Division and also offered some suggestions for additional types of court personnel.

The magistrates generally supported the development of a 'unified court' to deal better with 'all aspects of family life' and resolve cross-jurisdictional issues. Such a court would combine all family issues (including child protection, criminal matters, family law court orders) and agencies (including housing, mental health, drug and alcohol, and parenting) and offer service coordination with 'all of the agencies under one roof'. This is the approach of the Collingwood Neighbourhood Justice Centre, situated in the inner city of Melbourne. It is a court established in a suburb which has a mix of public and private housing and pockets of significant social disadvantage. However, support for such a reform was not universal. In the absence of a unified court, the magistrates saw improvement in the interface between the Family Court and the Children's Court as being of great importance.

A national Children's Court framework that would obviate jurisdictional differences and standardise dispositions was also supported by most magistrates and focus groups. Some study participants believed constitutional barriers, implementation difficulties and cross-jurisdictional conflicts would make a national framework unviable. However, several magistrates felt that greater coordination and communication between the states and territories could be achieved without a national framework.

Magistrates were especially critical of the inadequacy of the resources and, in turn, the services available to the Children's Court's clientele as well as those on

which the court itself was dependent. They underscored the dearth of secondary prevention support services which might help obviate clients of both divisions coming to the court in the first instance as well as those services which might assist and support families and children following their court case (tertiary prevention). The need for additional resources for the Children's Court, for example, to improve facilities and increase the number of magistrates, was raised by more than half of the magistrates and all of the focus groups.

Focus group participants also identified elements of other jurisdictions that may usefully inform deliberations about the future of the Family Division. Reference was made to the use of lay magistrates in England and the allocation of three magistrates to hear each case. They also pointed to the English requirement for lawyers to both be on the 'family list' to represent families or children and to complete certain training to maintain their position on the list. Other approaches which were seen as better promoting the child's best interests included informal hearings (the New Zealand Family Law Court), independent social workers who speak on behalf of children (England) and judicial officers interacting directly with the child (Germany). Closer to home, several focus groups recommended that the processes of the Children's Koori Court be more widely adopted for all young offenders appearing in the Criminal Division.

Although the magistrates in this study did not support multidisciplinary nonjudicial tribunals to process Family Division cases, they did suggest that additional personnel could improve the operation of the Children's Court, for example, a guardian ad litem, travelling regional magistrate, court social worker, judicial registrars and in-house child protection legal counsel. No additional types of personnel were seen as necessary for the court's Criminal Division.

8.9 Conclusion

The findings of this study point to some clear, concrete directions for change in the Children's Court of Victoria. They also point to a preference for a shift in the court's orientation in both divisions. And they also suggest some areas for further research.

The findings point to the need, for example, to improve court facilities, to provide training to sharpen the skills of the members of the courtroom workgroup, for more magistrates, to address the jurisdictional overlaps in Victoria and for a greater investment in both secondary and tertiary prevention programmes and services for the clientele of the Children's Court.

The findings also point to a preference for a shift in the court's orientation in relation to both divisions. There was support for an ongoing case monitoring and case management role, a shift that would represent an important departure from a common construction of most courts as essentially people-processing organisations. The intent is to ensure that Children's Court decisions and recommendations are implemented in order to achieve the best outcomes for children and families and

young criminal defendants. In the case of the Criminal Division, there was support for the notion of the Children's Court as a therapeutic jurisprudence-informed problem-solving court rather than simply a people-processing specialist court. For the Family Division, the rolling back of its adversarial orientation was deemed to be of considerable importance, turning away from a system that encourages disputation rather than collaboration and cooperation in the highly complex 'business' of protecting children.

The issue of the understanding of court processes and decisions for the proper administration of justice is a common theme in juvenile and criminal justice systems. This study found that such understanding is also an issue for families appearing in the Family Division (and, most likely, the Criminal Division too).

The study's participants had wide ranging views about the complexity of their professional work and their approaches to carrying it out. What they reflected in their responses was a great commitment to their work as well as a range of suggestions about reforms that would provide the Children's Court with greater flexibility in its approaches. What was clear, however, was that, on balance, a broader understanding to deciding a child's best interests is legislatively desirable and that, where possible, collaborative frameworks for decision-making will provide more effective outcomes for family members and those who work with them.

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Chapter 9
Youth Justice and Child Protection: The Children's Court in Western Australia

Caroline Spiranovic, Joseph Clare, Mike Clare, and Brenda Clare

Abstract This chapter provides a summary of three key findings from an evaluation of the Children's Court in Western Australia (WA). The key findings emerged from an analysis of interviews and focus group discussions with a total of 74 participants (12 Judicial Officers and 62 key stakeholders). The first key finding is that the legislation is being hampered by two interrelated factors: (a) elements of cultural slippage in youth justice policy and practice and (b) system-wide resource impoverishment. The second key finding is that resources are particularly scarce in rural and country regions of WA and this compounds the challenges faced by the Children's Court with respect to ensuring successful outcomes for Aboriginal children, their families and communities. The third key finding is that there was a general consensus amongst Judicial Officers and stakeholders that multisystemic reform of the youth justice and care and protection jurisdictions is needed to address the issue of over-representation of young Aboriginal people, their families and communities in WA.

Keywords Over-representation of Aboriginal children • Cultural slippage • Resource divide • Multisystemic reform

C. Spiranovic (✉)
Crime Research Centre, Faculty of Law, University of Western Australia,
35 Stirling Highway, Crawley, WA 6009, Australia
e-mail: caroline.spiranovic@uwa.edu.au

J. Clare • M. Clare
Crime Research Centre, School of Law, University of Western Australia,
35 Stirling Highway, Crawley, Perth, WA 6009, Australia
e-mail: joe.clare@uwa.edu.au; mike.clare@uwa.edu.au

B. Clare
Social Work and Social Policy, University of Western Australia,
35 Stirling Highway, Crawley, Perth, WA 6009, Australia
e-mail: brenda.clare@uwa.edu.au

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9.1 Introduction

This chapter summarises the findings from an evaluation of the Children's Court in Western Australia (WA). The WA evaluation was undertaken as part of the national assessment of the Children's Courts in Australia. This chapter starts with a brief historical overview of the formation and evolution of the Children's Court in Western Australia followed by a summary of the main Legislative Acts guiding the Children's Courts in Western Australia.[1] After this brief discussion of Legislative Acts, three prominent issues pertaining to the geographic and demographic context of the Children's Court of WA are discussed. These three issues are (1) the disproportionate number of cases being processed by the Children's Court in WA relative to other states/territories, (2) the over-representation of young Aboriginal people in both the protection and care and the youth justice jurisdictions in WA and (3) the sheer geographical size of WA relative to other states and territories. It is noted that these issues present unique challenges in terms of addressing the needs of Aboriginal children, their families and their communities.

Following on from a discussion of these contextual issues, the WA evaluation methodology and key findings are presented. There were a total of 74 participants in the formal evaluation: 12 Judicial Officers and 62 key stakeholders. It is noted that overall, Judicial Officers and other stakeholders who participated in this evaluation reported that the court as an institution is not perfect, but it is satisfactory. A similarly universal view expressed by participants was that the broader system within which the Court is located makes it effectively unworkable. As a Judicial Officer noted:

> I am really against having powers where you end up with the appearance of things happening but the real work on the ground is not capable of being done…The real issue is about resources and facilities not being available. (Judicial Officer 1)

An overview will then be provided of the three key findings identified through the interviews and focus group discussions. These three key findings are as follows:

1. The legislation is being hampered by two interrelated factors: (1) elements of cultural slippage in youth justice policy and practice in relation to the principles of the *Young Offenders Act* (1994); and (2) system-wide resource impoverishment.
2. The absence of resources is most pronounced in rural and country regions of WA and this compounds the challenges faced by the Children's Court with respect to ensuring successful outcomes for Aboriginal children, their families and communities.
3. Multisystemic reform of the youth justice and care and protection jurisdictions is needed to address the issue of over-representation of young Aboriginal people, their families and communities in WA.

[1] A more detailed discussion of the history and current legislation and administration of the Children's Court of WA is provided in a report titled 'An assessment of the Children's Court of WA: Part of a national assessment of Australia's Children's Courts' (Clare et al. 2011).

9.2 Historical Overview

A separate system for dealing with children was put in place in WA in the early 1900s (Department for Community Development 2004).[2] The *State Children's Act 1907* made specific provisions for children to be dealt with by the West Australian State Children's Department and the Children's Courts (Department for Community Development 2004). From the outset, there was a strong welfare-driven approach to managing children in Western Australia. Youth justice matters were managed by welfare department staff under the provisions of the *Child Welfare Act 1947*. Treatment and intervention were the main methods for addressing problematic behaviours in children. The basis for this welfare approach to youth offending was driven by the recognition that a large portion of young offenders presented with various social welfare and mental health issues (e.g. neglect, abuse, social disadvantage) that played a causal role in their offending (Wells 1999).

However, this welfare approach to Youth Justice started to be challenged in the 1980s in WA through a number of influential reports. The first challenge came from the 1982 Edwards Report (cited in Wells 1999), which raised concerns regarding indeterminate sentencing and a lack of due process. The Edwards Report called for a clear distinction to be drawn between children in need of care and protection and those requiring management due to engaging in criminal behaviours (Wells 1999). This report as well as the subsequent 1984 Carter Report titled 'Wellbeing of the People' and an internal 1986 report titled 'Review of the Juvenile Justice System' (Wells 1999) paved the way for a restructuring of the system to deal separately with juvenile offending and care and protection matters. With this restructuring, responsibility for all youth justice matters was shifted to the Ministry for Justice. The *Children's Court Act of Western Australia* (1988) and the *Young Offenders Act* (1994) were introduced to augment the shift from what some viewed as a welfare- and rehabilitation-focused approach to a more justice-oriented approach in Western Australia (Wells 1999).

Clearly then, Western Australia has witnessed considerable administrative as well as legislative changes in the treatment and management of young offenders and children in need of protection and care. Change is ongoing in Western Australia, and the modern day youth justice and child protection systems in WA are currently undergoing further restructuring as outlined below.

9.3 Current Legislation and Administration

The *Children's Court Act* (1988) covers the administration of the Children's Court of WA in relation to the *Young Offenders Act* (1994), the more recently proclaimed *Children and Community Services Act* (2004) and the *Sentencing Act* (1995).

[2] A contemporary history of the WA Department for Child Protection is provided in a document authored by the Department for Community Development titled *History of the Department to 2004*, which was compiled by Noelene Proud and Brett Klucznik in 2003 and amended by Audrey Lee and Mark Crake in 2004

The *Young Offenders Act* (1994) is the most significant piece of legislation guiding the administration of Youth Justice in WA. It is evident that many principles of the United Nations Convention on the Rights of the Child (United Nations 1989) have been written into the act including participation (see Article 12.2), rehabilitation (see Articles 39 and 40) and detention as a last resort (see Article 37b).

The *Young Offenders Act* (1994) emphasises the use of pre-court diversionary methods in managing the majority of young offenders who have committed less serious non-schedule offences. Two primary methods for pre-court diversion are utilised in WA. The first of these involving formal and informal police cautioning has been practised since 1991 and gives police the discretion to issue verbal or written cautions to juveniles committing minor offences. The second form of diversion introduced through the *Young Offenders Act* (1994) provides for the formal diversion of young people who have committed minor non-scheduled offences to pre-court bodies referred to as juvenile justice teams (JJT). Both the police and the courts are able to refer young offenders to JJTs. These JJTs are comprised of a juvenile justice officer, a police officer and/or possibly a member of the Department of Education or the Aboriginal community. The JJTs engage in pre-court conferencing with the offender and the offender's family as well as the victim(s) if they are willing and are underpinned by restorative justice principles. A young offender may avoid a conviction if a satisfactory outcome is achieved through the JJT diversionary process (Wells 1997, 1999).

For matters that must be dealt with in court, the *Young Offenders Act* (1994) mandates that judges and magistrates take into consideration the age, maturity, culture and need for protection of a young offender when imposing a sentence. Table 9.1 displays the sentencing options available to the court via the *Young Offenders Act* (1994).

The *Children and Community Services Act* (2004) is the key piece of legislation guiding the care and protection jurisdiction. The following key principles are emphasised under Part 2, Division 2:

1. The best interests of the child are paramount.
2. Every child should have safe, secure and stable care arrangements.
3. The child should be supported to actively participate in the decision-making process.

In addition, the Act outlines three principles of specific relevance to Aboriginal and Torres Strait Islander children under Part 2, Division 3: the Aboriginal and Torres Strait Islander Child Placement Principle, the principle of self-determination and the principle of community participation.

Two broad types of Judicial Officers, specialists and non-specialists, staff the Children's Court of WA. The specialist Judicial Officers are based in Perth but travel throughout the state and comprise the President and Judge of the Children's Court of WA, four full-time magistrates and one part-time magistrate. These Judicial Officers have exclusive jurisdiction for offences committed by children in cases of indictable matters where the defendant has not elected a judge and jury. These Judicial Officers also hear all protection and care matters pertaining to children. The President is also a Judge of the WA District Court and has the same powers in sentencing as a Supreme

Table 9.1 Sentencing options available to the Children's Court of Western Australia through the *Young Offenders Act* 1994

Sentencing option	Description
No punishment and no conditions	
No formal punishment with conditions	Informal punishment and undertakings
No punishment but security or recognisance to keep the peace and be of good behaviour for a period of up to 12 months	
A fine	
A youth community-based order	May include course attendance, unpaid community work and supervision within the limits specified by the regulations on supervision orders. Children under 12 years cannot be ordered to do community work
An intensive youth supervision order	Exempt from the limits specified in the regulations on supervision orders. The same conditions for Youth Community Orders can be imposed
A conditional release order	A conditional release order refers to an intensive youth supervision order made in conjunction with a custodial sentence. The offender is only liable for the specified period of detention, or a portion of it, if the conditional release order is cancelled
A custodial sentence	Subject to the *Sentencing Act* 1995, a custodial sentence may be imposed as a last resort for offences punishable by imprisonment. A custodial sentence would typically be served in a detention centre although a young person aged between 16 and 18 years of age may be ordered to serve the custodial sentence in a prison in accordance with the *Prisons Act 1981*
A special order	A special order may be made only by a judge and involves the imposition of 18 months detention with a minimum of 12 months to serve which is added to any sentence of detention imposed. Special orders are reserved for serious repeat offenders with a high probability of reoffending. In such instances, the protection of the community is paramount

Court judge. As the maximum sentence a magistrate can impose for a community order or detention is 12 months, the President deals with all matters that require a greater sentence or the imprimatur of the president and hears reviews against the decisions of the Children's Court magistrates (Department of the Attorney General 2009).

Outside the Perth metropolitan region, 13 country court magistrates reside over Children's Court matters. These magistrates are non-specialists in the sense that they are charged with a broader jurisdiction that includes Children's Court matters as well as criminal and civil matters involving adults in the magistrate court.

9.4 Demographic and Geographic Issues

As outlined in the introduction, there are three prominent issues pertaining to the geographic and demographic context of the Children's Court of WA:

1. The Children's Court in WA is processing a disproportionate number of cases relative to other states/territories.
2. Young Aboriginal people are over-represented in both the protection and care and the youth justice jurisdictions in WA.
3. The sheer geographical size of WA relative to other states and territories presents unique challenges in terms of addressing the needs of Aboriginal children, their families and their communities.

These three issues are discussed in more detail here.

9.4.1 Issue One: The Disproportionate Number of Cases

As shown in Table 9.2, in 2009–2010, 21.3% of the total number of Children's Court defendants from across Australia came from WA even though only 10.6% of the national population aged under 18 years reside in WA. The ratio of percentage of total defendants to population aged less than 18 is the highest for WA (see

Table 9.2 Percentage of total defendants appearing in the Children's Court, percentage of the national population under 18 years and the ratio between the percentage of defendants and the percentage of the population, by state/territory, for 2009–2010

Children's Court defendants	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
% total Children's Court defendants	22.1	20.8	19.8	9.9	21.3	3.0	1.9	1.1
% population under 18	32.0	24.1	21.3	6.9	10.6	2.3	1.2	1.6
Ratio of % total defendants to % pop under 18	0.69	0.87	0.93	1.42	2.01	1.31	1.57	0.73

Percentage of total defendants based on the Australian Bureau of Statistics (2011). Criminal Courts, Australia, 2009–10, report number 4513.0; population estimates taken from the Australian Bureau of Statistics website

Table 9.2 below) which demonstrates that, relative to population size, WA is processing far more children through the Children's Court than any other state or territory.

There are a number of factors that may explain the disproportionate number of cases processed by the Children's Court of WA. One factor that is worthy of mention is the declining rates of pre-court diversions. The 2008 report by the WA Office of the Auditor General (OAG: Auditor General of W.A. 2008) indicated that police cautions and referrals to juvenile justice teams had declined by 13% over the recent 5-year study period, from 64% in 2002/2003 to 51% in 2006/2007, which equates to 1,937 fewer instances of young people being diverted.

A second factor that may contribute to the disproportionate number of cases being processed in WA is the types of criminal cases processed by the Children's Courts in WA. In 2009–2010 (see Little and Karp 2012), the majority of proven cases in the Children's Court involved the following principal offences:

- Traffic and vehicle regulatory offences (23.0% of all principal offences)
- Acts intended to cause injury (14% of all principal offences)
- Unlawful entry with intent (13.8% of all principal offences)
- Theft and related offences (12.1% of all principal offences)

With the exception of the traffic and vehicle regulatory offences, it would appear that the Children's Court in Western Australia is largely dealing with offences of a relatively more serious nature.

However, when compared with other states and territories in Australia, the proportion of offences involving acts intended to cause injury, unlawful entry with intent and theft and related offences is relatively low (see Little and Karp 2012). For instance, in 2009–2010, of all the proven cases, the Children's Court in Victoria had the highest proportion (i.e. 27.5%) of principal offences involving theft and related offences. WA had the third lowest proportion of theft and related offences of all states and territories; only South Australia and the Northern Territory had a lower proportion. Of all proven cases, the Children's Court in the Northern Territory had the highest proportion (i.e. 19.9%) of principal offences that involved unlawful entry with intent. WA had the fourth highest proportion of offences involving unlawful entry with intent; the ACT, Queensland and the Northern Territory had a higher proportion. Of all proven cases, New South Wales had the highest proportion (i.e. 29.4%) of principal offences that involved acts intended to cause injury. Queensland had the lowest proportion and Western Australia had the second lowest proportion of principal offences involving acts intended to cause injury.

In contrast, the Children's Court in WA is dealing with a relatively high proportion of offences involving traffic and vehicle regulatory offences (see Little and Karp 2012). In 2009–2010, the Children's Court in WA had the second highest proportion of principal offences involving traffic and vehicle regulatory offences of all states and territories. The Northern Territory had the highest proportion (30.0%) of principal offences which involved traffic and vehicle regulatory offences. The relatively high proportion of traffic and vehicle regulatory offences processed by the Children's Court in WA is, in part, due to the fact that offences involving dangerous

Table 9.3 Relative number (and percentage) of Aboriginal and non-Aboriginal children serving community-based orders or in detention as of 27 January 2011

Corrective services data			Aboriginal	Non-Aboriginal	Not recorded	Total
Juvenile distinct persons on community-based orders	N		501	357	9	867
	% N		57.8%	41.2%	1.0%	100.0%
Juvenile offenders in detention	Sentenced	N	63	20		83
		% N	75.9%	24.1%		100.0%
	Unsentenced	N	53	31		84
		% N	63.1%	36.9%		100.0%
	Total	N	116	51		167
		% N	69.5%	30.5%		100.0%

Taken from weekly offender statistics reports released by Western Australian Department of Corrective Services, 27 January 2011

or negligent driving are scheduled offences in WA which means they cannot be dealt with via referral to a juvenile justice team (Loh et al. 2007).

A third factor to consider when exploring causes for the disproportionate number of cases processed by WA is the fact that the number of protection and care orders granted by the Children's Court of WA has been increasing in recent years. Despite a 5% decrease in the number of applications made to the courts in 2007–2008 compared with 2006–2007, a total of 717 orders were granted in 2007–2008 compared with 577 in 2006–2007. Coinciding with the increase in orders being granted, the numbers of children placed under the care of the CEO in WA have been increasing. In WA, as at 30 June 2009, there were 3,195 children in the CEO's care, which represents an increase of 6% since 30 June 2008 and a 20% increase since 30 June 2007 (Department for Child Protection 2010).[3]

9.4.2 Issue Two: The Over-Representation of Young Aboriginal People

Aboriginal people comprise an estimated 3.8% of the WA population (Australian Bureau of Statistics 2006). However, just over half, or 1,393, of the 3,195 children under the care of the Chief Executive Officer (CEO) in June 2009 were of Aboriginal or Torres Strait Islander descent and this figure represents an increase of over 163% on the 851 Aboriginal or Torres Strait Islander children under the care of the CEO in June 2006 (Department for Child Protection 2010).

With respect to the youth justice jurisdiction, Table 9.3 displays the relative numbers and percentages of Aboriginal and non-Aboriginal children who were serving a

[3] Reliable data for 30 June 2010 was not available in the 2009–2010 annual report due to rollover to a new client management system that was undergoing further developments at the time of this report (Department for Child Protection 2010).

community-based order or who were detained, based on information released by the WA Department of Corrective Services on 27 January 2011. In particular, approximately 58% of all juveniles on community-based orders in WA are Aboriginal children and approximately 76% of all juveniles sentenced to detention and 63% of all juveniles on remand in WA are Aboriginal children. It is clear that the relative contribution of Aboriginal children to both of these sentencing options is dramatically higher than the corresponding percentage Aboriginal children contribute to the overall population in WA. The Australian Institute of Health and Welfare (2012, p. vii) reported that in the June quarter of 2011 in Western Australia 'an Indigenous young person aged 10–17 was 29 times as likely to be in unsentenced detention and 50 times as likely to be in sentenced detention as a non-Indigenous young person'. The rates of over-representation of young Aboriginal people in detention in WA have consistently been higher than the national average for Australia since the mid-1990s (see Richards 2011).

The challenges to Aboriginal children, their families and communities, the Children's Court of WA and the broader WA community are summarised by Potter (2010a):

> Indigenous youth in Western Australia are more likely to come into contact with police, they are more likely to be subject to care and protection proceedings, they are more likely to be remanded in custody, they are more likely to become enmeshed in formal court proceedings and outcomes and at an earlier age, they are over- represented in the juvenile justice system by ten times and the numbers remain static and have done so for the past twenty years at approximately 70% of all juveniles in detention/remand. (p. 96)

The reasons for the over-representation of Aboriginal and Torres Strait Islander children in both of these jurisdictions are complex, and it is beyond the scope of the current chapter to discuss these reasons in depth. Nonetheless, it is clear that colonisation and the policies of forcibly removing Aboriginal children from their families between 1910 and 1970 have had a profound impact on most, if not all, Aboriginal families. There has been growing recognition of the transgenerational trauma experienced by many Aboriginal families and communities since the European 'invasion' over 200 years ago (e.g. see Atkinson et al. 2010). Associated with this transgenerational trauma is the high rates of victimisation experienced by Aboriginal people. As noted by Potter (2010b, p. 21), 'It is arguable that Aboriginal women and children are the most repeatedly and multiply victimised section of the Australian community to the extent that Indigenous peoples in Western Australia are nearly seven times more likely to be a victim of assault than non-Indigenous peoples.' The factors contributing to the higher rates of over-representation of Aboriginal children in WA in particular are poorly understood at present and undoubtedly complex. However, it is plausible that the geographical context of WA in particular may play a contributing role.

9.4.3 Issue Three: The Geographical Size of WA

It has been noted by Harker and Worrall (2011, p. 364) that 'Geographically, Western Australia (WA) is one of the largest and most sparsely populated single jurisdictions in the world.' The sheer geographical size of WA relative to other states and territories has significant implications for the availability of infrastructure, service provision, client

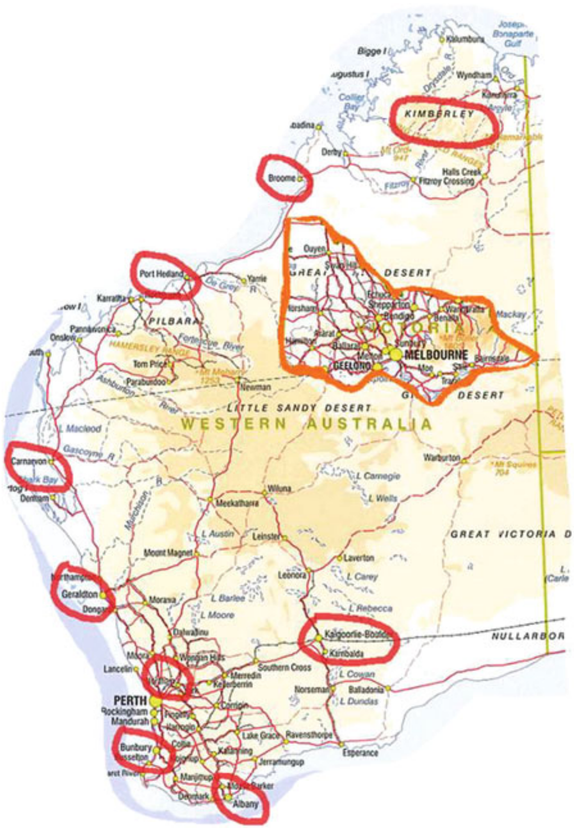

Fig. 9.1 Location of magistrate-operated Children's Courts in WA (*circled*) and comparative size to the state of Victoria (Adapted from Geoscience Australia folio map © Commonwealth of Australia (Geoscience Australia) 2011. This material is released under the Creative Commons Attribution 3.0 Australia Licence. http://creativecommons.org/licenses/by/3.0/au/legalcode)

management, access to appropriate programmes and the scope to provide appropriate, timely assistance to clients' families in rural and remote regions, as well as sufficient and timely court services. As illustrated in Fig. 9.1, there are rurally based Children's Court magistrates who are required to preside over geographical regions that are larger in size than the whole of the Australian state of Victoria. This issue of a resource divide in metropolitan and rural/remote regions in WA is critically related to the issues concerning Aboriginal over-representation given that a disproportionate number of Aboriginal people live in the rural and remote regions.

9.5 Methodology

9.5.1 The Study Participants

There were a total of 74 participants in the formal phase of the project: 12 Judicial Officers and 62 key stakeholders. With regard to the 12 Judicial Officers, all six of the Judicial Officers from the Perth Children's Court took part and six country

magistrates of Western Australia participated. Stakeholders comprised representatives from Legal Aid, WA Police, Family Inclusion Network of WA, Youth Justice (Department of Corrective Services), Aboriginal Legal Service, Department for Child Protection and Cross Roads West Transitional Support Services (Salvation Army) as well as research academics/practitioners.

9.5.2 Data Collection and Analysis Procedure

The interviews with the Judicial Officers and focus groups with stakeholders utilised the same interview questions and focus group questions as per the national methodology with the addition of some state-specific questions in the interview. Digital audio recordings were taken of all interviews and focus group sessions, and these digital audio files were transcribed by paid professionals. Two members of the research team independently reviewed and analysed these transcriptions to derive key themes. Where there was disagreement in derivation of key themes between these two researchers, additional members of the research team were called upon to finalise the matter.

9.6 Key Findings

Overall, Judicial Officers and other stakeholders who participated in this study reported that the court as an institution is not perfect, but it is satisfactory. A similarly universal view expressed by participants was that legislation itself is satisfactory but the broader system within which the court is located makes it effectively unworkable.

As outlined in the introduction, the three key findings identified through the interviews and focus group discussions were:

1. The legislation is being hampered by two interrelated factors: (1) elements of cultural slippage as defined in section 9.5.1 below and (2) broader contextual issues relating to system-wide resource impoverishment.
2. The absence of resources is most pronounced in rural and country regions of WA and this compounds the challenges faced by the Children's Court with respect to ensuring successful outcomes for Aboriginal children, their families and communities.
3. Reform of the youth justice and care and protection jurisdictions is needed to address the issue of over-representation of young Aboriginal people, their families and communities in WA.

9.6.1 Legislation Hampered by Cultural Slippage

We use the term 'cultural slippage' here to refer to the emergence of principles and practices that conflict with youth justice principles. There was a generalised concern that the principles informing Youth Justice were undermined to some extent by a

'filtering-down' process and the indiscriminate application of legislation to both adults and children:

> A lot of legislation was introduced to deal with adults, which is simply a broad brush to deal with everybody, and again it fails to recognise the distinction that their own government has made between dealing with adults and dealing with children. (Judicial Officer 9)

The Three Strikes legislation[4] for repeat home burglaries and the requirement for a 'responsible person' for young offenders under the *Bail Act* 1982 *(WA)* were highlighted as particular issues of concern because they conflict with the diversionary principle embedded within the *Young Offenders Act* (1994*)*. In addition, another adult-oriented legislative change considered to have impacted negatively on youth offenders was the introduction of mandatory reporting for sexual abuse in 2008, and the introduction of a Sex Offender Register. A number of stakeholders reported that young people are being placed on register for relatively minor offences at a young age.

Cultural slippage was also evident with respect to diversionary practices as many Judicial Officers expressed concerns about the perceived increase in the number of trivial offences being heard in court. They attributed this increase in part to changing police practices, noting the failure to adequately apply the discretion to caution or apply diversionary strategies for minor offences as noted:

> The original concept behind the Young Offenders Act and the Children's Court in its current format was basically diversionary.... When the concept behind the Children's Court was introduced along with the legislation, the idea was to defer that 95% away from the Court.... That seems to have fallen away and disappeared somewhere along the line. (Judicial Officer 9)

Another concern highlighted by Judicial Officers was an increased tendency amongst police officers to arrest rather than summon youth offenders and to stipulate stringent conditions for bail, such as curfews or school attendance regardless of the relevance or appropriateness of such conditions:

> Invariably police will place a juvenile on a curfew, sometimes just standard course and I would deliver those curfews if the crime was committed at night time.... If it is committed at night time fair enough, but it seems to me that with all these curfews to remain at home from 7 to 7, not to go out unless it is in the direct company of a responsible adult (for example, to attend school) and all of those factors, what you find is that you are setting them up to fail before they even get to sentencing. (Judicial Officer 10)

Similar concerns were voiced about cultural slippage with respect to the application of the principle of the best interest of the child in the welfare jurisdiction:

> The legislation is quite clear about the rights of the child, but in practice we often lose the voice of the child. It is now in our legislation that the child must have a voice.... It is the operational side that is not necessarily happening. We lose the voice of the child a lot of the time because we are focussing on the parents because they have the problems that need to be fixed – it's their behaviours we need to change, not the children's. (Child protection worker 1)

[4] Twelve months mandatory imprisonment/detention for repeat (third time) home burglary offenders was introduced in WA through amendments in 1996 to *s* 401 of the *Criminal Code Act Compilation Act* 1913 *(WA)*.

It was also evident that foundation principles such as child participation were eroded through court processes that limited the capacity of children to participate:

> I had a client, we'd been to Court three or four times, and finally he said to me "what just happened?" He'd been to Court three or four times…back and forward, back and forward…. He came out saying, "what just happened?" At that moment I realised that his lawyer needed to be telling him in words he could understand, that I needed to be telling him in words he could understand, that the Court didn't know that he didn't understand. (Parent Advocacy worker 1)

The capacity of the child and their family to participate was also being limited by a common practice in both jurisdictions noted by many stakeholders whereby legal representatives meet with clients immediately before court proceedings. Stakeholders were concerned that this did not allow time for adequate discussion with clients and therefore limited the capacity of children and their families to actively participate in court processes.

9.6.2 Legislation Hampered by System-Wide Resource Impoverishment

There was a generalised concern that the absence of appropriate services for children and families across both criminal and protective jurisdictions has serious implications for the operation and status of the Children's Court in WA. Some participants argued that the resource impoverishment and absence of service options compromise the intent of the legislation:

> I am really against having powers where you end up with the appearance of things happening but the real work on the ground is not capable of being done… The real issue is about resources and facilities not being available. (Judicial Officer 1)

Similar comment was made on the need to manage the tension between children's needs and their offending behaviour and to properly resource child-focused facilities and services:

> One of the areas that is inadequate, not only in legislation terms but in practical terms, is the fact that nowhere in the State do we have a secure facility for children who have mental health issues… The Young Offenders Act has a little tiny, stupid old- fashioned comment in regards to mental health: 'section 49 remand for observation'. They're saying that the child should be placed in some suitable place – where's that?
>
> (Judicial Officer 2)

Concerns were also expressed about facilities in waiting rooms and holding cells in the Perth Children's Court. A number of stakeholders noted that waiting room facilities are not child- or family-friendly, citing the absence of childcare or refreshment facilities, noted by one stakeholder as a significant issue because of extended waiting periods and anxiety about 'missing court' if not available when called. With regard to the holding cells, stakeholders noted there are too few cells, males and females are held together and lawyers are required to interview children in this

environment. It was suggested that the environment was abusive and likely to further traumatise already traumatised children.

In addition to the issues noted regarding physical resources, stakeholders also expressed concerns about the skills and experience of court personnel which was frequently viewed as an impediment to successful outcomes. The majority of Judicial Officers and stakeholders were of the view that all court personnel could benefit from additional training, with an emphasis on the specialist knowledge required to understand the particular needs of children and communicate effectively with them, thus avoiding the imposition of adult-centric perceptions and interventions.

Participants universally argued for a greater understanding amongst court personnel of children's development, and in particular for working with traumatised children, with some participants commenting on the need for recognition that coming before the court was both the result and cause of trauma for children. Many participants also noted that most court personnel would benefit from education in working across cultures – not only with Aboriginal people and communities but with the growing population of refugees and members of culturally and linguistically diverse communities.

9.6.3 Responses to Aboriginal Children, Their Families and Communities

It is clear that issues concerning lack of programmes, facilities, services and personnel are only compounded in country and regional areas of WA. For instance, Judicial Officers and stakeholders alike noted the absence of essential facilities, services and programmes as well as experienced staff in country areas. Court facilities in rural and remote settings, particularly in temporary circuit courts, were described as 'poor to dreadful', with some lacking any facilities.

With respect to the relative disadvantages of court services outside the capital city of Perth, Judicial Officers practising in regional settings have a wider sphere of responsibility, legislatively and geographically, than their colleagues in Perth. They work under circumstances of resource impoverishment, with poor facilities, very limited, if any, pre- and post-sentencing services, to address the needs of children whose family and community settings are characterised by extreme deprivation:

> I find the orders a little frustrating and useless to be honest, especially up here… there is no community work service available; no counselling available; no violence or substance abuse programs. All you are left with in youth community-based order is reporting and reporting is perhaps once every two months by telephone. That is the extent of the order – it is just absolutely useless.... (Judicial Officer 10)

Inevitably, these circumstances impact significantly on the outcomes achieved through court interventions. It must be noted, however, that these disadvantageous circumstances are mitigated by the commitment of the dedicated magistrates and court officials, whose insight and humanity was consistently evidenced in this study.

Aboriginal communities are predominantly affected by the limitations of time, court facilities and legal representation, pre- or post-court services and, in many cases, the communication difficulties associated with the absence of suitably qualified professional interpreters. Participants noted the particular issues faced by Aboriginal children in regional WA placed on bail. Three issues of concern were highlighted: (1) the failure to recognise underlying personal and social problems associated with persistent minor offending and the unrealistic expectations associated with maintaining a curfew and/or meeting requirements such as school attendance, (2) the lack of resources and 'responsible adults' to support bail in rural and remote areas and (3) the severe and potentially traumatic consequences for breaching bail given the absence of secure facilities outside Perth, resulting in children being transported great distances to be held in adult facilities or placed in the Perth remand centre.

Although concerns were widely raised about the bail conditions, there was no great impetus for change in the legislation amongst participants as the focus of concern was on interpretation and application of the legislation, and a cultural move away from application of discretionary diversion. Noting the need for practical steps to improve the application of legislation, one Judicial Officer argued for the removal of the discretion to refuse bail for a young person for whom a 'responsible adult' could not be found, noting that this is, in effect, punishing the child. Other stakeholders argued the need for many more bail hostels in regional settings, so that children could stay within their communities and it was suggested that a list of potential custodians should be developed with local Aboriginal communities in advance so that a responsible adult can be identified for young Aboriginal offenders when and where the need arises.

Another major concern expressed by some Judicial Officers was that the thresholds for protective intervention appeared to be much higher for Aboriginal children in remote communities. Three key reasons were cited for this acceptance: (a) the 'tyranny of distance' and relative invisibility of Aboriginal children, an invisibility compounded by the general impoverishment that made it hard to distinguish between circumstantial outcomes and deliberate abuse or neglect; (b) the transience and inexperience of child protection workers, ill-equipped to assess children's circumstances or intervene effectively; and (c) the overrigid interpretation of Aboriginal Child Placement Principles in the face of long-standing political imperatives in WA to avoid repeating the mistakes associated with the 'stolen generations' of Aboriginal children removed inappropriately from family and community.

9.6.4 Addressing the Over-Representation of Aboriginal People

Judicial Officers were aware of the successful introduction of indigenous courts in other jurisdictions, but were cautious about their utility in WA. They noted the diversity of the Aboriginal population and commented on the culture of feuding between many families and communities that would impede their effectiveness:

> The usual problem is that not all Aboriginal people are the same. In fact, they often resent and hate various other Aboriginal groups more than they hate the Whites. (Judicial Officer 3)

In fact, a number of Judicial Officers expressed the concern that indigenous courts might be no more than 'window dressing' because Aboriginal elders might sit at the bench with the magistrate, but without formal decision-making powers and the courts are not able to refer Aboriginal children to culturally sensitive services designed and run by Aboriginal people. There was a common recognition that addressing these deeply embedded social problems in WA is beyond the scope of the Children's Court. There was a sharp awareness of the need for innovative strategies to engage Aboriginal communities more fully in the reform process, through identifying, mandating, educating and resourcing Aboriginal leaders to spearhead this reform process. This view is detailed in the following excerpt:

> The court doesn't have at its disposal the programs that it wants for Aboriginal children. There aren't programs that Aboriginal people have had at least some part in designing and also some part in delivering. It is only Aboriginal people who can assist young people to understand their own Aboriginal culture and have their own sense of identity. Programs like 'walking the trails', 'learning for the south-west' young Noongar kids learning the Noongar language, the Noongar custom/dance and all those sorts of things – they don't exist; that's what the court is calling for.... (Judicial Officer 11)

9.7 Summary and Conclusions

In summary, Judicial Officers and stakeholders alike expressed the view that whilst the court itself as an institution was satisfactory, the broader system within which the court is located makes it effectively unworkable. There are three interconnected findings arising from reflecting on the published data about services and the interview and focus group responses.

9.7.1 Application of Legislation

The first of these issues is that effectiveness of legislation is being hampered in legislation due to two factors: (1) cultural slippage in youth justice policy and practice in relation to the principles of the *Young Offenders Act* (1994) and (2) lack of resources. With regard to the issue of cultural slippage, participants noted that the impact of service outcomes is being eroded by a watering down of foundational and long-established youth justice principles from the broader adult criminal justice arena. However, there were many instances of practices conflicting with youth justice legislative principles that could be attributed to 'cultural slippage' rather than conflicting legislation. Although adequate resourcing could overcome some of this, it is also clear that principles from the organisational culture and change management literature may be applied here as the implementation of legislative change is likely to be ineffectual if the broader culture within an organisation directly conflicts with the values and principles outlined in legislation. For a useful discussion of organisational change and

culture in relation to juvenile justice in particular, interested readers are encouraged to review the ethnographic study by Anna Souhami (2007).

In relation to the second issue of inadequate resources, participants were aware that the absence of appropriate resources and services across both criminal and protective jurisdictions of the Children's Court of WA was causing a growing gap between the espoused and the actuality in both policy and practice. This has serious implications for the operation and status of the Children's Court in WA and raises questions as to how the court is meant to act in the best interests of the child. The best interests of the child is a key principle underpinning the *National Framework for Protecting Australia's Children 2009–2020* (Council of Australian Governments 2009), which has been endorsed by all Australia Governments. In order to realise their commitment to this national framework, it is argued that it is imperative that the WA government invest greater funding into service provision and rehabilitation programmes for young offenders in WA.

9.7.2 The Resource Divide and Impact on Aboriginal Children, Their Families and Communities

The issue of resource impoverishment is compounded in country regions of WA where a disproportionate number of Aboriginal people come into contact with the criminal justice and protection and care systems. In the youth justice jurisdiction, the lack of resources in country regions means that a disproportionate number of young Aboriginal children are being denied bail. In the care and protection jurisdiction, the lack of resources in country regions is a factor contributing to the apparently lower standards of care deemed acceptable for Aboriginal children living in these regions. It is clear that the issues of Aboriginal over-representation and resource divide are interlinked and, as such, the system needs to be reworked to overcome the issue of resource impoverishment in country regions in order to improve service outcomes for Aboriginal people in WA.

9.7.3 Multisystemic Reform to Address the Over-representation of Aboriginal People

There was a clear awareness amongst Judicial Officers that the court is responding, in a very limited way, to behavioural symptoms of long-standing issues of disenfranchisement, impoverishment and despair amongst Aboriginal people. In response to this situation, however, there was a common recognition that addressing these deeply embedded social problems in WA requires innovative strategies to engage Aboriginal communities more fully in the reform process, with suggestion that this could be achieved through identifying, mandating, educating and resourcing Aboriginal leaders to spearhead this reform process.

The views expressed by Judicial Officers and stakeholders are in fact consistent with some of the key recommendations made by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2011) in the national 'Doing Time – Time for Doing' report. The committee outlined a number of key principles that must be adhered to in order to successfully tackle the problems of indigenous disadvantage and over-representation in the criminal justice system. These principles are as follows:

- Engage and empower Indigenous communities in the development and implementation of policy and programmes.
- Address the needs of Indigenous families and communities as a whole.
- Integrate and coordinate initiatives by government agencies, nongovernment agencies and local individuals and groups.
- Focus on early intervention and the wellbeing of Indigenous children rather than punitive responses.
- Engage Indigenous leaders and elders in positions of responsibility and respect.

Collective analysis of the current situation in WA in particular facing Aboriginal children, their parents and communities and the WA political, judicial and welfare systems (e.g. Sanderson 2008; Blagg 2009; The Commissioner for Children and Young People 2010; Potter 2010a; Reynolds, President of the Children's Court of Western Australia 2010) suggests that a significant coordinated and multisystemic political, financial, legislative and professional service-delivery approach is required. Multisystemic responses are required in at least three levels including at the level of (a) universal access by Aboriginal people to citizenship rights and responsibilities with access to such opportunities as employment, education, health and housing; (b) programmes and services, an integrated policy development and a macro-level budgeting paradigm change; and (c) authentic participation by Aboriginal people in the design and delivery of services aimed to promote transformative change and to ameliorate the impact of post-traumatic stress disorder and secondary trauma. This will require education of all citizens and professionals working with indigenous children, families and communities to develop a multilevel systematic approach leading to self-determination and self-management by Indigenous families and communities.

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Part II
Australia in the International Context

Chapter 10
A Portrait of Australia's Children's Courts: Findings of a National Assessment

Allan Borowski

Abstract The Children's Court is a critical social institution that decides important legal and social issues relating to children and families. This chapter reports the findings of a national study which canvassed the views of judicial officers and other key stakeholders in each of Australia's eight States and Territories concerning the court's contemporary status and challenges and future reform directions with a view to informing current policy debates and deliberations. It draws together the major themes that emerged from the analysis of data gathered from study participants in eight separate but parallel sub-studies conducted concurrently which together comprised the national study. Data were gathered in metropolitan and regional (and, in the larger States and Territories, remote) locations across Australia. The chapter provides an overview of Australia's Children's Courts before presenting the major findings. The national findings point to the need, for example, for additional resources for the court and the youth justice and child protection systems, for further training of courtroom personnel, for greater clarity about the role of lawyers, for the greater use of Indigenous sentencing courts and circles and for raising the lower age of criminal responsibility from 10 to 12 years. Two further prominent findings were concern about the underutilization of bail in general and in relation to Indigenous youth in particular and support for the broader use by Children's Courts of the therapeutic jurisprudence-oriented problem-solving approaches already found in some other Australian courts. In conclusion, the chapter points to the underinvestment in Children's Courts. While the inadequacy of resources is a common refrain across the public sector, in some jurisdictions the dearth of resources has placed the Children's Court at risk of becoming a meaningless institution in the absence of the wherewithal to achieve its mandate.

A. Borowski (✉)
School of Social Work and Social Policy, Faculty of Health Sciences,
La Trobe University, Melbourne, VIC 3086, Australia
e-mail: A.Borowski@latrobe.edu.au

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10.1 Introduction

Following federation in 1901, the Commonwealth of Australia's early governments introduced a range of national policies (e.g. tariffs on imports to protect Australian industry, arbitration and conciliation to address industrial conflicts) which historians have referred to as the 'Australian Settlement' (Stokes 2004). As a result of the Settlement, in the first decades of the twentieth century Australia came to be viewed as a social laboratory of new ideas about the roles and responsibilities of government in society. In addition to this national laboratory, the six new States and two Territories created by federation have also served as a social laboratory for comparing and contrasting different approaches to addressing the areas of responsibility assigned to them under the Commonwealth's constitution.

Under Australia's federal system, responsibility for the administration of youth justice and child protection rests with State and Territory governments, and Children's Courts are a key institution in each of Australia's youth justice and child welfare systems. Drawing on the eight case studies presented in the earlier chapters of this volume, this chapter presents the overall findings of the national assessment of Australia's Children's Courts and considers their implications.

The national assessment involved both individual and focus group interviews with a large number of Children's Court judicial officers and other stakeholders in urban, regional and remote locations across Australia concerning the contemporary challenges faced by this court and future directions for reform. The issues focused upon in these interviews were determined collectively by the members of the national research team comprised of youth justice and child welfare experts. In deciding upon the issues of highest priority, the research team was broadly informed in its deliberations by its construction of mainstream Children's Courts as belonging to a class of organsiations termed people-processing organizations (Hasenfeld and Cheung 1985; Colyer 2007) whose programme elements (inputs, throughputs, outputs and outcomes) (Kettner et al. 2008) varied across the States and Territories.

This chapter begins with a national overview of Australia's Children's Courts and then presents the findings as they relate to the areas that were the focus of the study, namely, the purposes of the Children's Courts, their current standing and effectiveness, their major inputs, aspects of their throughputs, Indigenous issues and directions for legislative and other reforms. The findings derive from thematic analyses of the transcripts of the individual and focus group interviews. As soon becomes evident in what follows, the study did not simply confine itself to the institution of the court. Although the Children's Court was certainly the major focus, the issues that were explored took cognizance of the youth justice and child welfare systems of which it is an interdependent part.

10.2 An Overview of Australia's Children's Courts

Australia's legal system, like that of Canada, England, Wales, Ireland and New Zealand, is a common law adversarial one in which the judicial officer largely functions as a passive adjudicator and the parties are primarily responsible for defining the issues in dispute and for investigating and advancing the case. It may be contrasted, for example, with Europe's inquisitorial approach in which judicial officers may be actively involved in the investigation and analysis of cases and in which the courts are animated by 'truth seeking rather than proof-making' (Freiberg 2011:83).

Children's Courts are a specialist jurisdiction in Australia. They hear criminal matters and also child abuse and neglect cases where they have the authority to determine matters relating to the child's care and protection. They are not courts of public record. Thus, no body of case law has been built to guide judicial officers' decision-making in relation to either criminal or child welfare matters. Children's Courts are normally open to the public in Victoria and the Northern Territory but closed elsewhere.

The term 'Children's Court' is employed in the Australian Capital Territory (ACT), New South Wales (NSW), Queensland, Victoria and Western Australia, while South Australia has a Youth Court. In the Northern Territory, both the Youth Justice Court and the Local Court deal with children and young people. Tasmania has no dedicated Children's Court. Rather, children and young people are dealt with by a division of the Magistrate's Court. In this chapter, all of these courts are mostly referred to simply as Children's Courts.

In their criminal jurisdiction, Children's Courts are 'lower' courts that serve a clientele which spans a wide range of developmental maturity. They deal summarily with non-indictable criminal matters alleged to have been committed by young people 10 years of age or over but less than 18 years of age—except in Queensland where those aged 17 or older at the time of the commission of the offence are treated as adults. Although some Children's Courts have the power to also deal with major, indictable matters, young people charged with such serious offences as homicide and sexual assault are normally tried in a higher court in all jurisdictions. In relation to children and young people who are either at risk of abuse, neglect or otherwise being harmed or whose families lack the capacity to adequately care for them, the age jursidiction is from birth to under 18 years:

Australia's Children's Courts are embedded in State and Territory youth justice and child welfare systems, systems which have a strong bearing on their functioning. The youth justice systems' other elements include the police (who often divert young people from the court, e.g. through cautioning programmes), variably utilized pre-court or presentence diversionary programmes such as community conferencing, statutory juvenile justice agencies who supervise young people both in the community and secure settings on a range of orders (e.g. remand, probation, detention, parole) and nongovernment community service organizations which may work with statutory agencies in providing services and programmes for young people under supervision. In some States and Territories, the youth justice systems also include other courts for children, for example, the Koori and Murri Indigenous

Children's Courts in Victoria and Queensland respectively, and the Youth Drug and Alcohol Court in NSW. (At the time that data were collected for this study (2011), plans were in train to establish a Youth Drug and Alcohol Court in the ACT.)

The dominant institutional actors in the child welfare systems are the statutory child protection agencies (e.g. Community Services Directorate in the ACT, Department of Children and Families in the Northern Territory and the Department of Human Services' Child Protection Service in Victoria). All States and Territories have mandatory reporting requirements although in some, only selected professions are mandated to report suspected child abuse or neglect, while in others, anyone who suspects child abuse or neglect is required to report it (AIHW 2012a:1). The statutory child protection agencies are responsible for assessing and investigating notifications. However, the substantiation threshold (and the definitions of abuse and neglect) can vary with some States and Territories substantiating the harm or risk of harm to the child and others the action of parents or incidents that cause harm (AIHW 2012a:2). The statutory agencies may provide or refer families to support services for at-risk families (secondary prevention). They may also intervene when deemed necessary, including pre-court 'diversion' to case conferences in order to negotiate care arrangements or making application for a Children's Court order to protect a child and place him/her in out-of-home kinship, foster or residential care. Placement in out-of-home care and case management are often contracted out to nongovernment community service organizations that are overseen by the statutory agencies. The remaining element of the child welfare systems includes intensive family support services to either prevent removal of a child or reunify families (tertiary prevention).

10.3 Purpose of the Children's Court

The first area canvassed with study participants focused on the purposes of Australia's Children's Courts. These were found to be generally quite straightforward and uncontroversial. In all States and Territories, the purposes of the Children's Courts' criminal jurisdiction include rehabilitation, punishment and deterrence and community safety. The purposes of the child welfare jurisdiction are to advance the best interests of children and protect them from harm. However, there are differences in underlying philosophy and hence emphasis among the States and Territories.

For example, relative to the Children's Courts of Victoria and South Australia, the Children's Courts of NSW, Western Australia and the Northern Territory generally place greater emphasis upon public safety and responding to the criminal deeds of young offenders rather than their rehabilitation needs, that is, they are animated more by the justice model of youth justice than the welfare model (O'Connor 1997). (Indeed, Western Australia study participants observed that both the enabling legislation and judicial officers are not sufficiently cognizant of the fact that the youth justice system deals with children and young people and not adults.) These differences are most succinctly captured in the differences in the rates of detention of young people who are alleged to have committed an offence (those remanded in

custody) or who have been proven guilty of committing an offence. Thus, in 2011 the detention rates in Victoria and South Australia were 0.15 and 0.31 young people aged 10–17 years per 1,000, respectively, compared with 0.77 in Western Australia and 1.2 in the Northern Territory (AIHW 2012b:8).

There are also differences of emphasis in relation to child welfare matters. Thus, for example, Western Australia has mandatory reporting provisions for child sexual abuse only, Victoria and the ACT have mandatory reporting for suspected cases of child sexual abuse and physical abuse, while the remaining jurisdictions have mandatory reporting of all forms of child abuse (physical, emotional and sexual abuse) and child neglect (Commission for Children and Young People WA 2012:63). Further, in Queensland and NSW, for instance, care orders are assumed to be long term (children will need to remain in care until 18 years of age), whereas in Victoria orders are reviewed annually (McPherson 2012, personal communication).

10.4 The Children's Court Today

The national assessment sought the views of judicial officers and other stakeholders concerning the effectiveness, workload and structure of the Children's Court.

10.4.1 Effectiveness

Study participants did not cast their responses concerning the effectiveness of the Children's Court in terms of either its impact on recidivism or protecting children from harm. Rather, they offered varied views of the current standing, or regard, of the Children's Court and the members of its workgroup, views which did not always distinguish the institution of the court itself from the systems in which it was embedded. Thus, while the NSW, South Australian and the ACT Children's Courts were generally held in high regard, this was only true of the criminal division of Victoria's Children's Court. In both NSW and the Northern Territory, study participants offered little criticism of the court but saw its effectiveness as largely dependent upon the broader youth justice and child welfare systems and the availability and actual delivery of services. In a similar but more emphatic vein, Western Australia's Children's Court, although seen as imperfect but nevertheless satisfactory, was strongly criticized as an effectively unworkable institution due to the gross underresourcing of the youth justice and child welfare systems in that State.

10.4.2 Workload

Australia's Children's Courts currently finalize almost 67,000 criminal matters and 21,000 child welfare matters per year (SCRGSP 2012:Tables 7.5 and 7.6). To help understand the comparative workload of a Children's Court in relation

to a State's or Territory's population, a useful broad indicator is the lodgement rate—the number of cases initiated with the court per 100,000 people (AIC 2012). For criminal matters, the Children's Court lodgement rate ranged, in 2010–2011, from a low of 164 in the ACT to a high of 519 in the Northern Territory. The lodgement rates for Western Australia, South Australia and Tasmania were above the mid-300s. For child welfare matters, the lodgement rate ranged from a high of 143 in the Northern Territory followed by 129 in NSW to a low of 44 in the ACT. For the remaining States, the lodgement rates ranged from the low 70s to the high 90s. Over the past 5 years, the lodgement rate for criminal matters increased markedly in NSW and moderately in the Northern Territory. Over the same period, the lodgement rate for child welfare matters escalated enormously in the Northern Territory and also grew in NSW (SCRGSP 2012: Tables 7A.3 and 7A.4).

But irrespective of lodgement rates, the growth in State and Territory populations over the last 5 years or so means that the absolute number of cases processed by Children's Courts has grown in tandem. Not surprisingly, therefore, a common theme to emerge from the data analysis was that of high and, in many instances, excessive workloads, a situation that was seen as compromising the quality of professional practice. Thus, for example, Victorian judicial officers described the Children's Court as 'hugely busy' and pointed to the substantial growth in their criminal and child protection workloads in both metropolitan and regional locations. Although dealing with criminal cases was seen as being more time-consuming than similar cases in the adult Magistrate's Court, it was nevertheless 'more manageable'—much less emotionally taxing—than dealing with child protection matters. South Australia's magistrates also faced heavy workloads but more so in regional than metropolitan locations.

The Northern Territory's child protection workers (CPWs) and youth justice workers (YJWs) also viewed their workloads as excessive. Similarly for CPWs in Tasmania—despite the low rate of investigation of the rapidly increasing number of notifications in that State. Curiously, despite the availability of family group conferences to negotiate care arrangements without resorting to a court hearing, study participants reported that Tasmania's CPWs did not routinely use such conferences to reduce the numbers of cases progressing to court.

10.4.3 Structure

There is variability in the structure of Australia's Children's Courts and variable satisfaction with those structures. In Victoria, for example, the Children's Court is comprised of two divisions that deal separately with criminal and child welfare matters. There is no such separation in South Australia. In the Northern Territory, the Youth Justice Court deals with criminal matters, while the Local Court deals with child welfare matters. In Queensland, the Children's Court is a two-tiered affair. The 'lower' tier is presided over by a magistrate and deals with most matters, while the upper tier is presided over by judges appointed from the District

Court to deal with serious cases and appeals from the lower tier. Western Australia is somewhat similar to that of Queensland. There the president of the Children's Court, a judge of the District Court, deals with more serious matters (e.g. offences that may result in community orders or periods of detention greater than 12 months) and appeals against the decisions of the Children's Court magistrates. In Tasmania, there is no dedicated Children's Court but, rather, a Children's Division within the Magistrate's Court.

While study participants were satisfied with Victoria's two-division Children's Court, Queensland's two-tiered structure was viewed as problematic, not least because of the lack of understanding of and close communication between the two tiers plus the absence of a mechanism to facilitate the active overall leadership of the Children's Court. In the Northern Territory, study participants' views were mixed as to whether a single Children's Court that would deal with both criminal and child protection matters was preferable to the current two-court structure. And as far as Tasmania's judicial officers were concerned, the lack of a dedicated Children's Court was unproblematic.

In all States and Territories, many respondents underscored the large number of children and young people who appear in Children's Courts in relation to *both* criminal and child protection matters. While many young people appearing on criminal matters are child protection 'graduates' of the Children's Court, in other cases the court can often be more or less concurrently but separately dealing with criminal and child protection matters involving the same child or young person. As Queensland and Northern Territory study participants pointed out, the current structure of their Children's Courts does not permit a coherent response to children and young people in these circumstances.

A still further complication of the structure of Australia's courts is the overlapping roles of the Children's Court and the federal Family Court of Australia where cases in the latter court involve child abuse. Here once again a coherent response is obviated.

But Australia's Children's Courts are also embedded in a still wider system of courts and tribunals. In both Victoria and Queensland, for instance, appeals in relation to child welfare matters (most often by parents regarding court-ordered care arrangements) are directed to those States' Civil and Administrative Tribunals (CATs). In both States, study participants expressed concern about the appropriateness of the CATs to hear such matters, and in Queensland's case, study participants argued that children should also have the right to appeal care decisions to QCAT.

10.5 Inputs

The national assessment sought study participants' views on the court's inputs—its human resources (judicial officers and other members of the courtroom workgroup), the court's clientele and court facilities.

10.5.1 Human Resources

10.5.1.1 Judicial Officers

Children's Court judicial officers are the leaders of the courtroom workgroup and the court's most prominent stakeholders. There are about 60 specialist judicial officers (mainly magistrates but also some judges) in Australia who preside exclusively over Children's Court matters (SCRGSP 2012:7.28). They are mostly located in Australia's major cities. While some of these specialist judicial officers may also go on circuit (e.g. in NSW, Victoria and Western Australia), there is a much larger number of 'generalist' judicial officers (most often those who preside over Magistrate's or Local Courts in regional and remote locations) who convene Children's Courts as required in order to deal with both criminal and child welfare matters.

The mix of specialist judicial officers located in the capital cities and the much larger number of generalists who convene Children's Courts in regional and remote locations was viewed by NSW, South Australian and Queensland study participants as problematic. Generalist judicial officers' lack of knowledge and skill was seen as producing geographic variability in case processing and decision-making, for example, in criminal sentencing (typically harsher in regional and remote locations) and reviews of child protection case plans.

Although some Queensland study participants suggested that all Children's Court judicial officers should be specialized and some in Victoria recommended a specialist qualification in children's law as a prerequisite for working in the Children's Court, there was a national consensus that all judicial officers, especially the generalists, were in need of more ongoing professional development. (See below.)

10.5.1.2 Child Protection Workers (CPWs)

CPWs employed by the statutory child protection agency are key actors in contested hearings. And yet, most jurisdictions suffered from a shortage of qualified CPWs. In NSW, for example, this often results in discontinuity and inconsistency of CPWs' involvement in proceedings.

In some jurisdictions, for example, Victoria, Queensland and NSW, CPWs were the subject, at times, of considerable criticism by study participants. Despite acknowledgement of the pressures of child protection work (e.g. little support, high caseloads, tight timelines), their professional expertise was often called into question in terms of the quality of their case plans (e.g. recommending unavailable services), not fully appreciating the difficulties faced by parents in meeting restoration plans consequent to a court-ordered removal of a child from home, the failure of their interventions to be evidence-informed and their poor 'court craft' (their inability to 'perform' as witnesses in adversarial court proceedings in which they are often subjected to quite vigorous cross-examination). Indeed, some study participants suggested that CPWs who were involved in court work, just like Children's Court judicial officers, should be required to have a specialist qualification.

For their part, CPWs in some jurisdictions experienced the court as a very difficult work environment (see below) and, in Victoria for instance, underscored the challenge of conveying to judicial officers a family's environment and the neglect and cumulative harm experienced by a child.

10.5.1.3 Youth Justice Workers (YJWs)

YJWs often participate in criminal proceedings, but like CPWs, there are shortages of such personnel. The Northern Territory suffers from a desperate shortage of tertiary qualified staff, and there is a real challenge in retaining those who are trained given poor remuneration and high workloads. Tasmania also reported a shortage of YJWs.

In contrast to CPWs in some jurisdictions, YJWs were generally well regarded. Their presentence reports, for example, were seen as professional and useful by Victorian study participants. In NSW, however, YJWs (known as Juvenile Justice Officers in that state) were seen by some as overstepping their role in their attempts to influence judicial decisions.

10.5.1.4 Lawyers

Lawyers play a key role in both criminal and child protection hearings. With the exception of the Children's Court in Brisbane (but not elsewhere in Queensland), lawyers working in Australia's Children's Courts do not require any special accreditation. Three themes emerged from the data analysis concerning Children's Court lawyers, namely, their quality, accessing legal representation and their roles.

Study participants' views of lawyers, for instance in Queensland, Victoria and the ACT, were varied. In Victoria, those appearing in criminal matters were seen as performing better than those appearing in child protection hearings. Criticisms of lawyers focused on poor case preparation, poor court craft (including poor advocacy and weak critical scrutiny of evidence) and being overly adversarial… in an adversarial legal system! Study participants explained the mixed quality of lawyers in terms of the fact that good lawyers usually avoided Children's Court work as it was neither a pathway for career advancement nor a means of making a good living given the low levels of Legal Aid remuneration for their work. In Queensland, study participants were divided over whether Children's Court legal practice should require specialized training.

The difficulty of accessing legal representation was a second theme yielded by the data analysis. In places like regional NSW and Queensland, there was simply an insufficient number of lawyers, especially for young Aboriginals. Of the small proportion of families that contested child welfare matters in the ACT, not all were represented. A further access barrier, in NSW, was tight Legal Aid budgets. But even if accessed, the continuity of representation could be problematic. Additionally, inadequate Legal Aid resourcing could also mean insufficient time being available for

lawyers to meet with their clients, a situation that had implications for the quality of representation. Other obstacles to accessing legal representation included language barriers, poor education and insufficient lead time before cases came to court.

The third theme was a lack of clarity concerning the role of lawyers (Blackman 2002; Monahan 2008) in some jurisdictions. In Victoria, for instance, some member of the courtroom workgroup criticized lawyers for their lack of focus on the best interests of the child when, in fact, they are required to act upon the instructions of the child or young persons ('direct' representation) in both criminal and care and protection proceedings. (It is the role of the Child Protections Service to present the case for achieving an outcome that is in the best interests of the child.) In the ACT, where the direct instructions approach applies unless the child is incapable of properly instructing in which case the lawyer acts on his or her assessment of the child's best interests ('best interests' representation), some lawyers were criticized for failing to perform either role properly. And in NSW, where the child's legal representative is required to act as a direct instructions representative or an 'independent legal representative' depending on the child's age or level of disability, some study participants pointed to the tension between lawyers' direct and best interests representation.

10.5.1.5 Prosecutors

Few study participants commented on the roles of police prosecutors in Children's Court criminal proceedings. Only the Children's Courts in Melbourne and Brisbane are served by specialist police prosecutors, and they were well regarded for their work. In rural NSW, courtroom workgroup members' assessment of 'generalist' police prosecutors was also quite positive. Nevertheless, their expertise was seen as quite variable and this affected both court processes and outcomes. The prevailing view, however, was that NSW police should not serve as prosecutors at all as they are party to the 'get tough on crime' philosophy in that state. Rather, all prosecutions should be the responsibility of the Director of the Public Prosecutions.

10.5.1.6 Additional Court Staff

Similarly, few study participants felt that there was a need for additional courtroom staff. Some study participants from Western Australia pointed to the need for qualified interpreters in court locations where there was a large Indigenous clientele, while some NSW participants recommended, given the prominence of mental health issues among the court's clientele, the employment of mental health court liaison officers.

10.5.1.7 Training Needs of Members of the Courtroom Workgroup

Data analysis indicated that in many jurisdictions the members of the courtroom workgroup did not fully appreciate each others' roles. Thus, for example, some

CPWs felt that judicial officers did not understand the challenges of child protection work and, as noted, the approach to representation required of lawyers was not always universally understood. This suggests that many jurisdictions would benefit from training in the role of members of the courtroom workgroup, their precise responsibilities and their work realties.

Study participants did not excuse any members of the courtroom workgroup from the need for further training. The additional training needs most commonly identified were in developmental psychology and childhood trauma arising from abuse and/or neglect and removal, developmental criminology, mental health, intellectual disability and communication skills. In jurisdictions with large Indigenous (and, indeed, culturally and linguistically diverse) communities, the importance of training in cross-cultural professional practice was underscored.

Queensland study participants additionally underscored the need for training of judicial officers to ensure consistent interpretation and application of legislation (e.g. to impose a sentence of detention as a last resort and for the shortest period), while Victorian participants pointed to the need for judicial officers to hone their skills in 'court craft', that is, the management of hearings.

10.5.2 Clientele

As noted above, Australia's Children's Courts currently finalize almost 67,000 criminal matters and 21,000 child welfare matters per year (SCRGSP 2012:Tables 7.5 and 7.6). Study participants in all States and Territories reported that, relative to a decade or so ago, Children's Courts now served a much more challenging clientele. While the children, young people and families who appear before Children's Courts remain highly socioeconomically disadvantaged and marginalized, what is 'new' is the complexity of their problems and needs and, in Victoria and NSW, the increase in clients from a refugee background. Alcohol and drug abuse, domestic violence, mental health problems and, indeed, previous involvement with the child protection system are now common among the clientele of the child welfare jurisdiction. Young offenders appearing in Children's Courts manifest similar problems and have increasingly engaged in serious (i.e. violent) criminal activity. ACT study participants also reported a growth in the number of young female offenders appearing in court.

In one respect at least, this change in the composition of the clientele should come as no surprise, at least as far as the criminal jurisdiction of the Children's Court is concerned. The considerable use made of diversion programmes for young offenders throughout Australia (between a third and two-thirds are diverted (SCRGSP 2012:Table C.7)) means that only the more serious and complex cases are brought before court. This is most likely also true for child welfare matters where only those cases that cannot be resolved through alternative means (e.g. family group conferences) proceed to a contested court hearing.

10.5.3 Court Facilities

With the exception of Tasmania where the lack of a dedicated building to hear matters in the Children's Division of the Magistrate's Court was not seen as a problem (seemingly due to the relatively small volume of cases), a further theme to emerge from the data analysis was profound concern about court facilities throughout Australia.

One aspect of this concern related to the separation of children and adult matters at court. Children's Courts in some capital cities are located in purpose-built buildings (e.g. Brisbane, Adelaide and Melbourne) which permit a completely separate hearing of matters. In Canberra, court facilities, although not purpose-built, nevertheless permit such a separation. In other cities (e.g. Darwin and Hobart), however, and in regional and remote locations, there is no physical separation between Children's Courts and adult courts resulting in children's matters often being heard alongside adult ones.

But even where housed in purpose-built buildings, concerns remain. Thus, the physical layout of Adelaide's Youth Court building does not permit a demarcation between the criminal and child welfare jurisdictions of the court. In Melbourne, although the criminal and child welfare jurisdiction courtrooms are physically separated in a single purpose-built building, they are nevertheless very closely located.

All buildings in which children's matters are heard were reported as failing to cater to the needs of children. They were described as overcrowded, tense, chaotic and often unsafe and without adequate security. They had either no or inadequate interview rooms for lawyers to meet privately with clients. Many also had either no or inadequate audiovisual systems to permit parents unable to travel long distances to nevertheless participate in proceedings. Further, holding facilities for remanded children and young people brought to court were either inappropriate or inadequate (e.g. not sex-segregated in NSW); defendants could spend very lengthy period of time in these facilities either awaiting their hearing or, after its completion, transport back to the remand centre. But however poor the facilities may be in metropolitan locations, they were uniformly seen as much worse in regional and remote locations.

10.5.4 Other Resources

Beyond the inadequacy of court facilities, a major issue for all jurisdictions was the under-resourcing of the youth justice and child welfare systems, a situation which impacted directly on the operation of the court and, hence, its ability to fulfil its mandated purposes. While the lack of adequate resources was a serious issue throughout Australia, it was particularly salient in the geographically larger States and Territories with large Indigenous populations. Indeed, locational disadvantage was seen as contributing to different processes and outcomes for the court's socio-economically disadvantaged clientele based on where they live rather than on what they have done or need.

For example, resource constraints meant that the requirements of the enabling legislation could not be met. In the Northern Territory, for instance, some sentencing

alternatives (e.g. community supervision orders) could not be used due to the shortage of Community Corrections Workers. In remote locations, it was very difficult to tailor post-court programmes and services to address individuals' needs as they simply did not exist. Notwithstanding the growing complexity of the court's clientele, there were no secure therapeutic facilities whatsoever in Western Australia or the ACT for children and young people with mental health and drug and alcohol issues. In Western Australia, the lack of resources outside of metropolitan Perth, including sufficient and timely court services for children, young people and families who are disproportionately Aboriginal, was reported by study participants as so severe that the Children's Court was seen as a sham—an institution simply incapable of seriously realizing its purposes because of resource impoverishment.

10.6 Throughputs

Australia's Children's Courts finalized almost 67,000 criminal matters and 21,000 child welfare matters in 2010–2011 (SCRGSP 2012:Tables 7.5 and 7.6). The timeliness with which cases are processed once they get to court varies considerably across Australia. Delays and slow case processing are not uncommon. In Queensland, study participants expressed concern about the State's failure to act as a model litigant.

In 2010–2011, the average number of Children's Court attendances per finalization for criminal matters was 2.8 in Queensland and 6.6 in the ACT. In relation to child welfare matters, the average number of attendances required to finalize a matter ranged from a low of 1.1 in the Northern Territory to a high of 4.1 in Western Australia. More attendances were required to finalize criminal matters than child welfare matters in Victoria, South Australia, the ACT and the Northern Territory, while the reverse was true for Queensland and Western Australia (SCRGSP 2012:Table C.8). The cost per finalization, however, was higher, and often considerably so, for child welfare matters than criminal matters in all jurisdictions. While the differences were small in the Northern Territory and Western Australia, it cost twice as much to finalize a child welfare matter than a criminal matter in the ACT (the most expensive place to finalize any type of case) and Queensland and 17 times as much in Victoria (SCRGSP 2012:Table C.8). The fact, on the one hand, that a significant number of young criminal defendants plead guilty thereby only requiring the court to impose penalties rather than determine guilt or innocence (Cuneen and White 2007:250–251) and, on the other, the adversarial nature of contested child welfare proceedings are probably important factors contributing to the relatively higher cost of finalizing child protection cases.

The time required to finalize cases has variable consequences. In Tasmania, slow case processing of criminal matters often results in young offenders spending lengthy periods remanded in custody. In the Northern Territory, 'rapid' case processing means that there is often insufficient time for agencies to provide thorough assessments to the court for its consideration.

Organizations draw on different tools, techniques and actions in carrying out their work. But what transpires in Children's Courts in the process of transforming an input into an output, that is, in 'disposing' of cases? The study canvassed several aspects of the court's processes, namely, its social environment, the extent to which court processes are understood and its use of specialist assessments.

10.6.1 Social Environment

With the exception of the ACT and Victoria, study participants offered few thoughts on their sense of the social environment, or 'culture', of the court.

The small size of the ACT jurisdiction was seen as facilitating collaborative relationships among member of the courtroom workgroup as well as access to the judicial officer (a magistrate). (The small size also meant that a de facto docket system operates: Over time families become well known to the members of the workgroup.) In contrast, the family division of the Children's Court at Melbourne was seen as a very tense, 'low trust' and combative working environment in which CPWs often felt they were bullied by judicial officers and lawyers, their expertise was devalued and the court was more inclined to protect families from 'the welfare' (the Child Protection Service) than acknowledge the legitimate concerns of the service. Beaulieu and Cesaroni (1999:364) have observed that judicial officers play an important role in shaping the environment for court personnel. Indeed, study participants believed that judicial officers should be more respectful of other courtroom professionals and adopt a more collaborative stance. In contrast, in Victoria's regional Children's Courts, often characterized by stable workgroup membership, there was a high level of collaboration resulting in less directly adversarial court processes.

10.6.2 Understanding Court Processes

Study participants in Queensland, the ACT, NSW and Victoria believed that many children, young people and families who appeared in court often struggled to understand court processes as well as court decisions and their implications—despite the best efforts of some judicial officers to explain what was going on in court. This lack of understanding was seen as having implications for the ability of children, young people and families to have their voices heard in court, an issue common to both criminal and child welfare proceedings (but more so in the latter). Among the factors contributing to this situation were cognitive 'disability', lack of English proficiency, poor education and inadequate time for judicial officers to explain court outcomes. While this situation could be partly ameliorated by quality legal representation, lawyers did not always explain court processes and outcomes satisfactorily.

10.6.3 Specialist Assessments

Children's Courts often rely on specialist assessments to inform judicial decision-making. Prominent providers of these assessments in NSW and Victoria are the Children's Court Clinics. Victoria's Children's Court Clinic provides assessments for both criminal and child protection cases, while the NSW Clinic only does so for the latter.

Clinic assessments were highly regarded by study participants. However, understaffing (despite the use of some sessional providers) and clients' socioeconomic and locational disadvantage were seen as creating access barriers to the clinic, factors which, in turn, contributed to slow case processing and delays in decision-making for children. Study participants expressed the view that the clinics required a much higher level of resourcing and that the NSW Clinic should have its role expanded to include assessments in criminal matters.

10.7 Indigenous Issues

In 2011, an Indigenous 10–17-year-old was 20 times more likely to be in unsentenced detention (remand) and 26 more times more likely to be in sentenced detention than a non-Indigenous youth (AIHW 2012b). Further, a much higher proportion of Indigenous than non-Indigenous children are clients of Australia's child welfare systems. Indeed, study participants confirmed the overrepresentation of Indigenous Australians among the clientele of Children's Courts.

Study participants' views concerning Children's Courts vis-a-vis Indigenous Australians largely revolved around Indigenous criminal courts and sentencing circles—even though many acknowledged that evaluations had shown that they did not reduce recidivism (Borowski 2010). In both Victoria and Queensland, for example, study participants were generally positive about the value of the Koori and Murri Children's Courts respectively, especially Elders' involvement in these courts. The ACT reported increased use being made of the Ngambra Circle Sentencing Court, while in NSW greater access to Nowra Care Circle Sentencing was supported. Curiously given the relatively large size of their Indigenous populations, there are no Indigenous courts in the Northern Territory, and Western Australia's judicial officers were cautious about introducing them.

Western Australia's judicial officers additionally pointed to the higher thresholds for protective intervention for Aboriginal children in remote communities. The lack of resources meant that lower standards of care were effectively deemed as being acceptable. Western Australia study participants also supported closer consultation between government and Indigenous communities in addressing youth justice and child welfare matters. In Victoria, well-established consultative mechanisms already exist, for example, the Aboriginal Justice Forum.

10.8 Directions for Reform

The national assessment sought study participants' views concerning desirable legislative reforms, the Children's Court's overall approach to dealing with the matters before it and the place of both a national framework and a unified court. The additional issue of bail arose serendipitously during the course of the study.

10.8.1 Reform of Current Legislation

Study participants variously offered both general observations and some specific recommendations for change regarding the legislation under which Children's Courts operate. In Victoria, for example, the legislation was generally seen as too complex, too technical, too large and unclear about both key concepts (e.g. cumulative or significant harm) and some of the court orders available to judicial officers in child welfare matters.

Specific suggestions were offered regarding the age of criminal responsibility and the sentencing tariff. Thus, in South Australia and Queensland, study participants recommended that the lower age of criminal responsibility be raised from 10 to 12 years (as recommended by the UN Convention on the Rights of the Child (Cashmore 2011:39)) and, in the latter State, that the upper age limit be raised to under 18 years of age, the upper age in all other Australian jurisdictions. Some Victorian judicial officers, however, were concerned by the fact that, since the introduction of the under 18 years upper age limit, some 'hardened', mature young offenders were now appearing in the Children's Court when the adult Magistrate's Court was the more appropriate jurisdiction.

While there appeared to be general satisfaction with sentencing tariffs for criminal matters, NSW participants advocated an expansion in the criteria for utilizing community service and work orders and allowing pre-court diversionary youth justice conferences to be made available to more serious offenders. And, as previously noted, Western Australia study participants felt that judicial officers needed to be much mo cognizant of the fact that the youth justice system deals with children and young people and not adults.

Nationally, however, there appears to be broad satisfaction with the legislation and Children's' Court processes in relation to criminal matters. This was not so for child welfare matters.

10.8.2 Towards a Non-adversarial Court

A major finding of the national assessment was that in most (but not all) States and Territories, there was strong support for a shift away from the critical incident-based, antagonistic and confrontational approach of common law adversarialism in

dealing with cases of child abuse and neglect. The preferred approach was one that focused less on disputation and more on dealing with the often long-term and complex problems of the children, young people and families who appear in court, that is, towards a collaborative problem-solving therapeutic jurisprudence approach. Problem-solving courts are characterized, for example, by judicial monitoring of cases and close collaboration with statutory and nongovernment service providers (Berman and Feinblatt 2001), practices found in the drug and alcohol, mental health and domestic violence courts already operating in Australia. Illustrative of the preference for this problem-solving approach was the concern of both NSW and ACT study participants about the lack of support for families after a child had been removed, a situation which had negative implications for addressing family needs, working towards restoration and minimizing the risk of harm to other children. While the resource implications of adopting this approach were acknowledged, especially in regional and remote locations, study participants in most jurisdictions supported non-adversarial courts not only for child welfare matters but also for criminal ones.

At the same time, judicial officers in some jurisdictions had their reservations. In Queensland, for instance, they did not see the court as having a problem-solving role: In criminal matters, their role was simply to be neutral decision-makers dispensing justice, that is, simply 'people processors'. In relation to child welfare matters, some Victorian judicial officers felt that the adversarial appraisal of evidence in child welfare matters was essential to upholding children's and families' rights.

Some study participants, for example, in the ACT, additionally also supported an inquisitorial model for addressing child welfare matters, as found in many European countries, or other models, such as the Scottish system. In contrast, in NSW this was not seen as a desirable course. Indeed, it was seen as undermining the court's role as an impartial party in contested proceedings. However, NSW respondents did support the coordinated and monitored delivery of services to children, young people and families through the court assuming a case management role.

10.8.3 A National Framework

A further finding of the national assessment was that there was little enthusiasm for a national Children's Court framework. Some jurisdictions opposed it (e.g. South Australia), and others (e.g. NSW) were lukewarm about the idea at best. While a unifying philosophy and, in criminal matters, a common sentencing tariff were seen as helpful in obviating the difficulties experienced in negotiating inter-jurisdictional differences, a national framework was seen as neither likely nor practical given constitutional barriers and implementation difficulties. Indeed, the diversity of Children's Courts across Australia was seen as facilitating experimentation and innovation and providing jurisdictions with the opportunity to learn from each others' experience.

10.8.4 A Unified Court

The nexus between child abuse and neglect and adolescent offending has long been recognized (e.g. Smith and O'Connor 1997). While there is consistent evidence of a link between child abuse and neglect and later offending and youth justice system involvement, the majority of abused and neglected children do not offend. Nevertheless, a large number of children who do offend have experienced abusive, neglectful or inadequate parenting (Cashmore 2011:31). Indeed, young children whose maltreatment continues from childhood into adolescence or begins in adolescence are much more likely to offend and become involved in the youth justice system than those whose maltreatment was limited to their childhood (Cashmore 2011:33). As a result, many cases dealt with by the child welfare jurisdiction of a Children's Court eventually reappear as criminal ones. It also means that the criminal and child welfare jursidictions of a Children's Court can often be more or less concurrently but separately dealing with matters involving the same child or young person, a concern raised by study participants in both Queensland and the Northern Territory. And yet, there has been a lack of a coordinated response to this situation by the youth justice and child protection systems and, indeed, as noted by Norhern Territory study partcipants, the Children's Courts themselves.

This situation can be further compounded where families may also be invovled in Family Court proceedings in order to deal with issues arising from separation and family violence. This has led to some to call for the establishment of a unified court system involving the integration of the Family Court and the Children's Court (Nicholson 2003; Freiberg et al. 2004; Peel and Croucher 2011) to provide a coherent and systemic approach to child-related law (Seymour 2005). The unified court would deal with the interlocking problems of families, such as family breakdown, criminal behaviour, abuse and neglect, in the one court. Like other problem-solving courts, this would also entail moving away from an adversarial approach towards non-adversarial approaches (Freiberg 2007) and/or something more akin to the European inquisitorial approach. Such a unified court would also entail the increased use of private-public partnerships to provide children and families with coordinated and easier access to needed services and maintaining some degree of ongoing case management following the making of a court order.

Despite the wide acknowledgement of the issues animating calls for the introduction of unified courts, support for such a court was modest. While there was some support in Queensland and Victoria, for instance, in the absence of a unified court Victorian study partcipants saw scope for improvements in the interface between the Family Court and the Children's Court.

10.8.5 Bail

A prominent theme that emerged serendipitously during the study was the widespread concern (in Queensland, the Northern Territory, Western Australia, NSW and Victoria) about the underutilization of bail. In Western Australia, not only are young Aboriginal people disproportionately overrepresented in the youth justice system but they are also disproportionately denied bail.

The underutilization of bail was attributed to the lack of appropriate accommodation for young people (who may be homeless or have no safe home) and bail support programmes to maintain young people in the community, an especially acute problem in regional and remote locations. This situation was seen as resulting in unnecessarily high rates of young people being remanded in custody pending a Children's Court appearance. Although the overwhelming majority of those on remand will not receive a custodial sentence and a small proportion will be acquitted, some young people can be remanded for often extended periods, a seemingly common occurrence in Tasmania. Where bail is granted but then breached, in some measure due to such unrealistic bail expectations such as maintaining a curfew and attending school, the consequences can include long journeys away from home communities and placement in secure, often adult facilities.

There have been some recent bail initiatives. For instance, in 2010 in Victoria, an intensive bail support programme was established on a pilot basis serving Melbourne's north-west region (Children's Court of Victoria 2010:4). And as of this writing, steps are under way in NSW to change bail laws in order to reduce the number of young people on remand. (The changes are likely to include exempting accused young people from being prohibited from making further bail applications once an initial application had been denied (Salusinszky 2012).) Nevertheless, the study found that nationally bail for alleged young offenders remains an issue in need of urgent and serious attention.

10.9 Conclusion

The national assessment of Children's Court is the first study of its type in Australia and, in terms of its scope, is without precedent anywhere in the world. It is undoubtedly possible to have quibbles about the issues which the research team believed to be of greatest priority for investigation. Indeed, the research team itself was well aware, for instance, that it did not attempt to capture the voices of the court's clients. Doing so may have provided direction for addressing the problem of their lack of understanding of court processes. However, 'giving voice', an area of research that remains a significant lacuna, would have involved very substantial challenges in obtaining approval from institutional ethics committees. Nevertheless, the study's findings point to both similarities and differences across the eight jurisdictions that compromise the 'Australian social laboratory'. They also provide some explicit direction for further reform of both what has been a 'dynamic' institution over the course of the last 100 years or so and the youth justice and child welfare systems of which it is an integral part.

The findings point to the need, for example:

1. For additional court resources to cope with growing and increasingly complex workloads
2. For a review of the structure of the Children's Court in some States/Territories, their interface with other courts/tribunals that deal with children's law and their response to children and young people who appear in relation to both criminal and child protection matters

3. For further training of all members of courtroom workgroups—for some perhaps as a prerequisite for Children's Court work (e.g. judicial officers, lawyers and CPWs) and for all on an ongoing professional development basis
4. For greater clarity about the role of lawyers and additional Legal Aid allocations to ensure access to legal representation
5. For a substantial investment in court facilities, especially in non-metropolitan locations, including court holding facilities for young people remanded in custody
6. For the greater use of Indigenous children's sentencing courts and circles and for considering the introduction of such courts by those jurisdictions that have not yet done so
7. To give serious consideration to increasing the lower age of criminal responsibility from 10 to 12 years

The study additionally pointed to the need for a change towards a non-adversarial approach by Children's Courts, particularly in relation to child protection matters. While some study participants had some qualms in this regard, the confluence of the increasing complexity of cases coming before Children's Courts and the very evident dissatisfaction with a common law adversarial approach to protecting children suggested to many that a therapeutic jurisprudence-oriented problem-solving approach, one that is already in use in some Australian courts, was preferred.

Arguably the most significant theme that emerged from this study was that of under-resourcing, not simply of Children's Courts but of Australia's youth justice and child welfare systems too. Children's Courts are a vital institution for holding young offenders accountable for their behaviour, helping rehabilitate them and protecting the community and for advancing the best interests of children and protecting them from harm. And yet in the competition among public bureaucracies for resources, these courts and systems have not fared well resulting in substantial underinvestment. This situation has placed the Children's Court at risk (in some jurisdictions at very considerable risk) of becoming meaningless in the absence of the instrumental means of achieving its mandates.

The failure to garner the requisite resources could be due, for instance, to the 'low' status of the Children's Court within State and Territory court systems and/or the social devaluation of the often vulnerable clientele that it serves. But whatever the reasons, this underinvestment is also an underinvestment in society's greatest asset, namely, its children and young people. Their well-being is certainly of vital interest to them. But it is also of great importance to the welfare of society. The continued failure to invest adequately in the Children' Court and the youth justice and child welfare systems will have major long-term detrimental consequences for Australia as a whole.

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Chapter 11
Care and Protection: Australia and the International Context

Marie Connolly

Abstract This chapter focuses on the key themes in relation to the function of the child protection jurisdiction of Children's Courts both in Australia and internationally. Particular attention is given to the operation of the child welfare court in New Zealand which looks to resolving family disputes in non-adversarial ways, avoiding trials and supporting families to, as much as possible, find their own solutions. For Maori, the indigenous people of Aotearoa New Zealand, this is significant to maintain children's links with their cultural heritage. Legislation reinforces that wherever possible children should remain within the family system. It introduced family group conferencing as the key decision-making mechanism about the care and protection of children. It has now been adopted as a model of practice across international jurisdictions, including Australia, the United States, Canada and the United Kingdom. The development of collaborative spaces across the spectrum of child protection intervention can moderate the adversarial nature of the child welfare jurisdiction practice. This chapter examines legal initiatives which engage families and resolve problems through less formal deliberative processes and shift child protection from the more forensic, bureaucratic and formulaic practices which have characterised its contemporary practice.

Keywords Adversarial justice • Family participation • Child protection • Family group conferencing

M. Connolly (✉)
Social Work, School of Health Sciences, University of Melbourne,
Parkville, VIC 3052, Australia
e-mail: marie.connolly@unimelb.edu.au

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11.1 Addressing Adversarial Practices in Child Protection

In the past three decades, court systems have striven to find collaborative ways of resolving matters relating to the protective needs of children. In seeking less adversarial processes, some countries have explored the use of informal or, at least, less formal settings that promote resolution by mediation rather than protracted disputes that can often characterise Children's Court matters within English-speaking jurisdictions. The more adversarial systems of these jurisdictions have been contrasted with the European inquisitorial systems where a judge advances matters with the parties involved (Cummins et al. 2012). Another less formal setting can be found in Scotland's lay tribunals where children's hearings are convened by specialist volunteers. Whilst the adversarial and inquisitorial systems have often been discussed as dichotomies, it is nevertheless argued that "no country now operates strictly within the prototype models of an adversarial or inquisitorial system" (Australian Law Reform Commission 1999:26). Indeed, Cummins and his colleagues note that within more adversarial systems there is no reason why judges cannot both manage a court and undertake fact-finding (Cummins et al. 2012). As Cannon (2010:10) notes:

> In a well-designed justice system the question should not be whether the judge should manage the fact finding process, but rather, when and how?

Jurisdictions have also explored "a space before the law is involved" (McGrath 1997, cited in Sheehan 2001:218) allowing deliberation opportunities to resolve issues without taking matters through to court. The United Kingdom puts a good deal of effort into pre-court work, case conferences and interagency consultation. In Australia, various state jurisdictions have also explored more responsive regulatory frameworks that enable families to work with professionals to resolve matters of child protection (Harris 2008).

11.2 Collaborative Spaces in Family Law: The New Zealand Experience

Aotearoa New Zealand now has a long and established history of finding collaborative spaces in family law. The Family Court was first established in 1980, following a Royal Commission in the late 1970s (Beattie et al. 1978). It represented a radical change to family law philosophy and practice:

> Where criminal and civil courts continued to focus on wrongdoing and the identification of fault, the Family Court was created to find solutions without the attribution of blame. (von Dadelszen 2009:1)

Until the introduction of the Family Court, the court system was serviced within a Magistrate Court system that had broad jurisdiction of a range of criminal, civil and some family matters (Boshier 2012). The shift to a specialist Family Court

reinforced that families were important, requiring a specialist forum where complex matters of family dispute could be resolved. Fundamental to the Court's establishment was the notion that disputes could be resolved in non-adversarial ways, matters could be resolved without trial, and families would be supported to find their own solutions. Presiding judges were expected to have the training, experience and personality to deal with family law matters (*Family Courts Act* 1980, s. 5(2)), clearly signalling the need for specialist skills in mediation and arriving at solutions through agreement. The Royal Commission argued that the new Court should have access to support services, including social workers, conciliators and counsellors, and that it should sit in a more relaxed environment where people could be put at their ease. This less formal approach also extended to other aspects of previous formality:

> Strict adversary rules should be relaxed, as should the more traditional forms of dress and address so that, when cases have to be resolved in court, the hearing can be conducted in an atmosphere of relative informality. The aim of the court should be to help resolve problems with the co-operation of the parties, wherever that is possible, and with a minimum of disruption in all cases. (Boshier 2012:4)

Interestingly, over time, some of the formalities have returned. During the 2000s, judges, when not in chambers, began wearing gowns once again. Courts became bigger, and counsel is now required to stand when addressing the Court. These changes have been made to reinforce the seriousness and status of the Court, as a perception had taken hold that it was not a "real court" (Boshier 2012:10).

11.3 Participation in Child Care and Protection

As the court system was changing in the area of family law, the state's child welfare responses were also undergoing scrutiny. At that time matters relating to the care and protection of children were heard in a Children and Young Person's Court. New Zealand's system of child welfare followed overseas practices that used foster care as the primary means of caring for children who could not live at home. Like other Western countries, this meant that the number of children taken into care was high. Whilst some children remained in stable foster placements throughout their time in care, many more experienced moves from one foster family to another. Foster parents were not expected to necessarily be available to foster children in the longer term. Many foster children also lost touch with their families and their broader kinship network. For Maori, the indigenous people of Aotearoa New Zealand, links with cultural heritage were also severed. Foster children, both Maori and non-Maori, lost family connection opportunities that other children took for granted, being involved in family gatherings – birthdays, weddings and christenings – and belonging to an extended family that was there for them as they grew into adulthood.

During the 1980s, many people in New Zealand were expressing dissatisfaction with the New Zealand system of care that distanced children from their families. Multidisciplinary child protection teams operated in many parts of New Zealand at that time. Within these systems it was not unusual for parents to be brought to a

professionals-dominated meeting and told what was expected to keep their child safe. Often the parents agreed to the changes expected of them and went on their way. Sadly for many families, little changed and whilst professionals did their best, the deficit-focused approach that characterised the response tended to have the effect of infusing failure into an already poorly motivated and often chaotic family system. A sense of failure also permeated statutory child protection systems as workers felt the weight of responsibility for keeping the child safe. Hyslop reflects on his experience of attending the multidisciplinary child protection meeting:

> This entailed interrupting your hopelessly overloaded work schedule, clutching a 'red-stripe' child protection file and rushing off to explain to a huddle of earnest health-care professionals why it was that you were not doing enough to protect children. (2007:6)

Whilst professionals were beginning to question whether systems of child protection were adequately supporting children, it was voices within the Maori community that most significantly challenged the state with respect to its alienating care practices. The most significant report capturing this critique was introduced in 1986. Puao-te-Ata-tu (Daybreak) was a Ministerial Advisory Committee report that influenced child protection services in Aotearoa New Zealand in a radical way. The report clearly articulated the ways in which child welfare systems had alienated Maori children from their families and challenged the state to think differently about involving families in child welfare matters that concerned them. Increasingly, it was recognised that something needed to be done, and a review of New Zealand's child welfare legislation in the mid-1980s became the catalyst for change.

In 1989, with the introduction of the *Children, Young Persons and Their Families Act*, Youth Courts were established thereby separating youth justice matters from child protection, and the Family Court was expanded to hear all matters of child care and protection. The principles of the new legislation reinforced notions of family participation – resonating strongly with the developments within the Family Court. Wherever possible the legislation expected that children should remain within the family system, that family relationships should be maintained and strengthened and that there be due concern for the protection and welfare of the child and the stability of the family. The new Act also introduced the Family Group Conference, a process that became the key decision-making mechanism supporting the care and protection of children.

The Family Group Conference was introduced as a way of diverting children and their families from the court: "a space before the law is involved" (McGrath 1997, cited in Sheehan 2001:218). Under the law, when a child is assessed as being in need of care and protection, child welfare professionals were required to bring the family together, including the extended family, to sort out what needed to happen to keep the child safe. Parents, grandparents, aunts, uncles and members of the broader kinship network were invited to a Family Group Conference to support their child. It was a straightforward formula. Step 1: bring everyone together. Step 2: provide the family with information about the professional concerns for the child. Step 3: let the family decide and plan what should happen to protect the child, and Step 4: reach agreement on the way forward. Step 3 was perhaps the most controversial part of the Family Group Conference process. Once the information is provided to the family,

professionals are required to withdraw from the meeting and allow the family to talk in private and make decisions and plans. In essence, it provided a space for families to do what many had traditionally done: come together and sort out what needs to be sorted. At first, professionals were concerned that this process would not keep the child safe, and the legislation was not without its critics. Over time, however, when practiced with integrity the Family Group Conference model has provided a forum to draw upon the wisdom and strengths of the collective family group in ways that supports families, restores family relationships and protects the interests of children.

Whilst family group conferencing is nested within New Zealand legislation providing the primary means through which statutory decision-making occurs, it has also been adopted as a model of practice across international jurisdictions, including Australia, the United States, Canada and the United Kingdom (Connolly and Morris 2012). According to Anderson (2005:221), the "FGC has grown from a practice innovation to an accepted, often heralded, service approach in child welfare". Most recently, an inquiry into child protection in Victoria, Australia, has proposed a tiered response to family conferencing (Cummins et al. 2012): continuing family group conferencing as a well established early intervention practice within the statutory child protection service; the provision for new legally mandated Child Safety Conferences, occurring prior to court where a matter has already reached protection application and incorporating aspects of the West Australian Signs of Safety conference model; and extending the use of New Model Conferences (alternative dispute resolution fora) when a matter is before the Children's Court. The state of Victoria first introduced family group conferencing in the early 1990s (Ban 1994, 1996), and projects have developed across Australia since that time. The FGC has been promoted and developed in New South Wales, and some Australian states, for example, Tasmania and Queensland, have also explicitly incorporated aspects of family group conferencing within state legislation (Huntsman 2006).

11.4 Support for Participatory Practice with Families

Drawing on the work of a number of writers, Harris (2011) notes the need for less adversarial statutory responses to children at risk. The formulaic and bureaucratic responses that have generally characterised child protection practices in English-speaking jurisdictions have been identified as undermining the potential for workers to engage more meaningfully with families. The coercive powers of statutory child protection workers can become easily overlaid by risk-focused paradigms that concentrate on identifying parental failings and use, what Beckett (2006) describes as protective leverage to encourage compliance. Beckett expresses concern about what may be an extensive and unconscious use of protective leverage:

> …we are inclined to greatly underestimate the extent of our implicit powers. Social workers sometimes exercise implicit coercive powers without even realising it, imagining that they are working in a voluntary partnership with service users when in fact service users are complying with their wishes out of fear of the consequences of not doing so. (2006:157)

Whilst efforts have been made to work more inclusively with families, including using family group conferences as a family engagement strategy, Harris (2011:1386) notes that these efforts "have struggled against the broader institutional factors that determine the way in which child protection is carried out".

Support for adopting more flexible ways of addressing issues of child protection has been found in responsive regulation theory (Braithwaite 2002). Within this theoretical frame, agencies are able to adopt a range of responses, from least intrusive to most coercive, across a regulatory pyramid (Harris 2011). The base of the pyramid provides collaborative spaces where the majority of matters can be decided through informal deliberative processes. At this level, decision-making largely rests with families. As the pyramid narrows toward the peak, responses become increasingly intrusive, court decision-making being the most intrusive. Family group conferencing is found in between where families are placed under pressure to respond whilst at the same time having an active role in decision-making. It is argued that by providing a responsive regulation theoretical mandate, workers are enabled to work more flexibly across the regulatory pyramid. Harris notes that whilst contemporary child protection environments already offer considerable opportunity to exercise the regulatory pyramid within daily practice, there is little evidence of a shift away from the risk-focused, formulaic investigatory practices that have been the subject of such criticism. In exploring the reason for this, Harris argues the fundamental significance of assessment processes:

> While assessment has benefits for child protection systems, most importantly identifying those cases in which there are immediate and significant risks for children, it is also apparent that a focus on assessment compliance undermines the degree to which practice can be responsive: it alienates many families, it focuses attention on a questionable indicator of parents' willingness to make changes, it increases coercive intervention and it is disempowering for families and their communities. (2011:1390)

Other writers note the marginal nature of the adoption of family engagement strategies (Connolly and Morris 2012). In England and Wales, there is a continued heavy practice reliance on the use of professional care when children are considered to be at risk – a legacy of the *child rescue* model (Marsh and Crow 1998). Research also suggests that there are complex issues in the adoption of participatory practices. Resistance has been identified when participatory practices are out of step with professionally driven processes. The challenges in adopting rights-based approaches have also been identified (Connolly and Ward 2008). Whilst participatory practices within Aotearoa New Zealand are set within a rights-based paradigm reflecting notions of social justice, this does not necessarily represent the basis of practice elsewhere. For example, Morris and Connolly note:

> The introduction of the FGC into the UK however lost some of this human rights dimension. Instead, a diverse mix of pilot FGC projects were introduced, some concerned primarily with the democratisation of decision making, others simply seeing FGCs as a potentially useful model for reducing stranger care …Indeed, in some authorities it became a means by which family access to resources was managed, with FGCs being held to ration the resources used by families, children and young people. (2012:23)

Hence, the reasons for the lack of increased collaborative spaces in child protection are complex and are very much influenced by time and place.

Whilst the uptake of more collaborative and flexible practice responses such as the family group conferencing model has remained a challenge, there is an increasing body of research which supports practices that engage families and resolve problems through less formal deliberative processes. Morris and Connolly (2012) have summarised an international review of research relating to family engagement strategies (Burford et al. 2009). Briefly, a number of studies indicated that families were very positive about being involved in processes of discussion and decision-making. High satisfaction with the process was found (Crow et al. 2004; Falck 2008; Titcomb and LeCroy 2003, 2005). Studies also suggested that children preferred family to professional decision-making processes, reporting that they had a greater say in what happened to them (Laws and Kirby 2007; Holland and Rivett 2008). Children nevertheless noted that attendance at decision-making meetings did not necessarily indicate participation and that being listened to is not necessarily being influential. This raises important challenges in terms of making children's participation meaningful.

In terms of outcomes, research findings are more complex, in part because of the methodological difficulties and the lack of longer-term findings. Some studies nevertheless suggested that children were more likely to be retained within their kinship system (e.g. Edwards et al. 2007; Gunderson et al. 2003; Koch et al. 2006), experiencing increased stability (Gunderson et al. 2003; Pennell and Burford 2000), with children remaining in care for shorter periods of time (Wheeler and Johnson 2003). In terms of safety, researcher noted a reduction in both child maltreatment and re-substantiation of abuse following the FGC (Pennell and Burford 2000; Titcomb and LeCroy 2005). Some research has nevertheless presented challenging findings that question the impact of FGCs on longer-term outcomes (Sundell and Vinnerljung 2004) suggesting the need to exercise caution in the adoption of processes across different cultural contexts. Having said that, research has also indicated successful cross-cultural application (Kiely and Bussey 2001; Pennell and Burford 2000), and cultural adaptations have also been successfully promoted (Desmeules 2003; Glode and Wien 2007).

Finally, support for the development of collaborative spaces can also be found in rights-based ideas relating to practice with children and families. For example, Lenzer and Gran (2011:159–60) note:

> International treaties provide useful frameworks for thinking about how rights belonging to families, parents, and children are relevant to family engagement in child welfare decision-making.

An argument for involving families in collaborative decision-making can be made on the basis of their intrinsic moral right to meaningful participation and self-determination (United Nations Conventions on the Rights of the Child 2006). A core principle defending human autonomy is the right to live one's own life – to "evaluate, choose, deliberate, and plan" (Nickel 2007:63) within the context of self-determined action. When parents are perceived to have failed in their responsibility to provide safe care for their children, professionals may struggle to reconcile their actions within a rights-based paradigm. Indeed, the notion of supporting parental rights in

the context of child abuse and neglect is likely to present complex arguments associated with roles, responsibilities and ethics of care. In citing the work of key human rights theorists below, Freeman (2002) captures key elements that are clearly relevant when working with children and families:

> There are various strong reasons for supporting human rights, derived from respect for human dignity (Donnelly), the bases of moral action (Gewirth), the demands of human sympathy (Rorty), or the conditions of human flourishing (Nussbaum). Human rights do not constitute the whole of morality …they have to be balanced with other values…. (2002:75)

There is potential to use a human rights framework to negotiate and integrate complex issues of agency, self-determination, responsibility and obligation across multilayered systems that impact on the lives of people. From a child welfare perspective, this also includes influencing practice across the levels of the regulatory pyramid (Harris 2011).

11.5 Conclusion

Over the past 30 years, the participatory elements of family group conferencing and family engagement practices have added richness to family law developments across international jurisdictions. To a varying degree, as practices have evolved, they have influenced the multilayered systems that respond to children and families. Some practices have emerged from a rights-based paradigm, and others are influenced by the unique cultural environments within which they exist. The degree to which they affirm self-determination and support the right of families, including extended families, to be involved in decision-making will depend upon how the system has developed over time and the ways in which professionals engage with the ideas. It is clear that over time, child protection has shifted internationally toward more forensic, bureaucratic and formulaic practices. It is also clear, however, that in developing collaborative spaces across the spectrum of intervention, we have the potential to moderate the adversarial nature of practice that has been the subject of contemporary criticism.

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Chapter 12
Juvenile Justice: Australian Court Responses Situated in the International Context

Judy Cashmore

Abstract This chapter focuses on the key themes in relation to the function of the criminal jurisdiction of Children's Courts across the various states and territories in meeting the requirements of important international legal instruments and conventions. The generally agreed aims of juvenile justice mechanisms and Children's Court criminal processes in compliance with the Beijing Rules are to treat children and young people less harshly than adults, taking account of their circumstances and promoting their reintegration into society and their rehabilitation. The history of juvenile justice in Australia and in other Western countries indicates various swings of the pendulum between 'needs' and 'deeds' and, more recently, some new approaches such as restorative justice and therapeutic or problem-solving courts. The limitations in relation to the participation of children and young people in these processes, and in Children's Court proceedings, and the need for a good evidence-base and reliable data are outlined.

Keywords Restorative justice • Therapeutic courts • Children's participation • Child abuse and neglect • 'Cross-over' kids

12.1 Introduction

In accordance with the UN Convention on the Rights of the Child and the Beijing Rules, Children's Courts in Australia dealing with children and young people in conflict with the law are underpinned by a requirement to treat juveniles with greater

J. Cashmore (✉)
Sydney Law School, University of Sydney,
Sydney, NSW 2006, Australia
e-mail: judith.cashmore@sydney.edu.au

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leniency than adults, to divert them where possible from the formal processes of the criminal justice system, and promote their rehabilitation and reintegration into society.[1]

12.2 Separating Juvenile Justice from Adult and Welfare Approaches

The separation of Children's Courts from adult criminal courts began in Australia in the late nineteenth century with South Australia being first in 1895. The separation of criminal matters from welfare matters spread across the country from the late 1970s. Until the 1980s, children and young people deemed 'at risk' or 'in moral danger' because of behaviours such as running away, truancy and, for girls in particular, 'promiscuity', were dealt with in Children's Courts in accordance with the relevant state child welfare legislation; this meant they could be dealt with at court and detained 'for their own good' in 'correctional facilities' together with those who were charged with criminal offences. In the 1980s, there was a shift from this 'welfare' or 'best interests' model to a 'justice' model in the Children's Courts in all states and territories because of well-based concerns that children with 'welfare needs' were receiving longer, more punitive and more intrusive 'sentences' than those who had committed criminal offences. The lack of due process and the arbitrary and indeterminate nature of the 'sentences' for these needy and 'wayward' young people were criticised in a series of inquiries and legislative reform processes in each state and territory, and this resulted in changes in law, policy and practice.

This 'paradigm shift' to the 'justice' model in the 1980s involved a pendulum swing from the 'needs of the child' to the 'deeds of the child'.[2] As O'Connor stated some years later:

> The needs based focus of the welfare models of juvenile justice has disappeared from legislation, practice and juvenile justice discourse. In all states, there has been a shift to the justice model with a renewed focus on the offence, proportionality of punishment, the payment of lip-service to due process rights and a superficial commitment to non-intervention for non-criminal behaviour. (1997: 2)

[1] Article 40 of the Convention requires that 'States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society'. The Beijing Rules emphasise the importance of promoting the well-being of the children and young people involved, their rehabilitation and reintegration and the need for a 'proportional' response which should take account of the gravity of the offence and their 'personal circumstances'.

[2] As Alder and Wundersitz (1994: 3–4) pointed out: 'These terms provide a short-hand way of capturing variations in emphasis between different approaches to the treatment and processing of young offenders. .. the so-called "welfare" and "justice" models are in fact conceptual tools, and no juvenile justice system has ever fitted exclusively into either one or other of these categories'.

The shift to a justice model in Australia occurred at about the same time as similar moves in other English-speaking common-law jurisdictions (England, Wales, Australia, Canada, the USA) Doob and Sprott (2004) with the exception of Scotland. In non-English-speaking European countries (Sweden, Denmark, Norway, Finland, Belgium and Germany), however, where the age of criminal responsibility is generally much higher than in Australia (e.g., 15 years in all Nordic states), behaviour that is 'troublesome' and potentially criminal (if committed by someone over the age of criminal responsibility) is dealt with via welfare processes (Harrikari 2008; Albrecht 2004; Muncie and Goldson 2009).[3] In Scotland, too, children who offend and their families appear before a lay panel in children's hearings. The aim in these 'welfare' processes is to understand why children are offending, and what their needs are, and prevent further 'offending' or troublesome behaviours. The focus is more on their 'needs' rather than their 'deeds' though there has also been some push towards a more punitive approach and the incursion of the 'risk politics' in these countries, a push that has reportedly been largely resisted in Finland (Harrikari 2008; Muncie and Goldson 2009).

12.3 The Nexus Between 'Care' and 'Crime'

The clear separation in the legislation and between the criminal and care and protection jurisdictions of the Children's Court has, as Judge Marien, the former President of the Children's Court in NSW, pointed out, given rise to the view that the 'responses to abuse and neglect of children and juvenile offending should, like the legislation, be kept entirely separate'. As Judge Marien pointed out: 'Such a view fails to recognise that with respect to many young offenders who come before the Children's Court charged with a criminal offence, the clear underlying cause of their offending behaviour is essentially a welfare issue rather a criminogenic one' (Marien and Judge 2012).[4] Indeed the deeper children and young people have progressed into the juvenile justice system, the more likely they are to have experienced abuse and neglect, to have mental health problems and to be developmentally delayed (Cashmore 2011; Indig et al. 2011).

Concern and tension about this issue was common across most all of the jurisdictions in this study, with the call for more integrated approaches and better coordination,

[3] It is worth noting, however, that the welfare approach in Finland, at least, has meant dealing with 'troubling and troubled young people from a psychiatric rather than penal perspective' and resulted in much higher numbers of young people in Finland being accommodated within mental health institutions or 'reformatories' (Pitts and Kuula 2005: 156).

[4] Judge Marien gave the example of a 13 year old, living on the streets because of ongoing domestic violence and/or parental drug and alcohol abuse, who commits offences for survival and asks whether 'this "offending behaviour" requires a response within the criminal justice system (with the consequent stigmatising of the young person and the possible prejudicing of their future employment prospects) or [whether] the child should be dealt with within the child welfare system? Is there a risk in "criminalising" the behaviour of a young person with serious welfare needs? Alternatively, is there a risk that we may be "welfarising" our response to the criminal behaviour of young people'.

case management and resourcing for the many children and young people who come before the criminal jurisdiction with 'welfare needs'. As Tilbury and Mazerolle (see Chap. 5) state, for example:

> Most interviewees noted the need for integrated responses to deal with young people's issues. Many of the Court's clients are from socially disadvantaged, vulnerable families. Compared to other specialist courts, the Children's Courts were regarded as poorly resourced in terms of the services they can offer children. Integrated responses to multiple needs recognise the impossibility of separating children's social welfare needs from their criminal behaviour or child protection needs. There were particular concerns about homeless children, children excluded from school, children with cognitive impairments or mental health problems, and children in unsatisfactory out-of-home placements or family situations. …
>
> There were three areas of concern indicating greater collaboration between child protection and youth justice systems may be needed: (1) criminalising the behaviour of children with welfare needs (for example, children who are homeless or suspended or excluded from school frequently come to the attention of police; (2) child protection officers who fail to attend court when a child in care on their caseload is appearing in a youth justice matter; and (3) child protection officers who recommend a young person be held in custody due to a lack of placement options, without due regard to the detrimental effects of detention on children.

The need for a more integrated approach is increasingly recognised in the USA where these children and young people are referred to as 'cross-over kids' and where model delinquency courts are providing a collaborative approach and coordinated judicial case management (Buffington et al. 2010; Bilchik and Nash 2008; Duquette 2007; Nash and Bilchik 2009; US National Council of Juvenile and Family Court Judges 2011).

Among the 16 key principles of the model delinquency court, for example, are the following:

> Juvenile delinquency court judges should engage in judicial leadership and encourage system collaboration;
>
> Juvenile delinquency courts and juvenile abuse and neglect courts should have integrated "one family-one judge" case assignments;
>
> Juvenile delinquency system staff should engage parents and families at all stages of the juvenile delinquency court process to encourage family members to participate fully in the development and implementation of the youth's intervention plan;
>
> The juvenile delinquency court should engage the school and other community support systems as stakeholders in each individual youth's case;
>
> To be most effective in achieving its missions, the juvenile court must both understand the role of traumatic exposure in the lives of children and engage resources and interventions that address child traumatic stress. (National Council of Juvenile and Family Court Judges (NCJFCJ) 2005: 1–2)

Under these model juvenile court processes, 'the underlying philosophy in dealing with "cross-over kids" is to deal with the child's needs and deeds as one, holding young people responsible for their behaviour but taking into account and responding to their needs and trauma by ensuring that they have the necessary support and services around them and their family' (Cashmore 2011, p. 38). Significantly in the US model, the judicial role in these collaborative courts under their guidelines is one of leadership with a more proactive outreach focus than the more restricted legal role ('directing the traffic') in Australia.

12.4 'New' Approaches to Juvenile Justice

In Australia, and a number of other countries, several new models have emerged over the last decade or so: restorative justice (and similar processes like family group conferences)[5] and therapeutic or problem-solving courts. These approaches go some way to redressing some of the tension between 'an appropriate criminal justice response to the offending behaviour of the young person (and its effects on victims and the community) and an appropriate welfare response to that offending behaviour' (Gilbert et al. 2001; Marion and Judge 2012: 18).

12.4.1 Restorative Justice Approaches

The aim of restorative justice is to reintegrate the offender with the community by involving both the victim in dealing with the offence and the offender in making amends – in effect, to restore the victims, offenders and communities and to do 'justice' (Braithwaite 1989; Walgrave 2004). As O'Connor (1997: 4) states:

> The new paradigm of restorative justice in its pure form assumes the shared social citizenship of victim and offender, conceptualises the individual as embedded in a web of social relationships, and perceives the role of the criminal justice system as maximizing the capacity of individuals to enjoy the benefits of citizenship and to facilitate the rebuilding of this capacity where it is fractured through offending behaviour.

However, as O'Connor goes on to critique:

> The shift to restorative justice in Australia has been distorted by the strength of punitive and exclusionary discourses. The moral panics over youth crime fed by politicians, media and certain sections of the police, have occurred not during the hey-day of the welfare model but during the ascendancy of the justice model with its just desserts orientation. (1997: 4)

Restorative justice is not a 'soft option', and various models are now used in other countries, with different levels of penetration (Bottoms and Dignan 2004; Walgrave 2004). New Zealand was at the forefront of developing and implementing family group conferences in the 1980s, particularly for Maori youth. They were incorporated into New Zealand's youth justice and the *Children, Young Persons and Their Families Act 1989*. While the term 'restorative justice' was not initially used in New Zealand, family group conferences are now seen 'as an example of restorative justice in practice, since the values underlying family group conferences are seen as reflecting restorative justice values … Both family group conferences and restorative justice give a say in how the offense should be resolved to those most affected - victims, offenders, and their "communities of care"- and both give primacy to their interests' (Morris 2004: 259).

[5] Youth justice conferencing has been operating in various states in Australia since the mid 1990s for some, adapted from the New Zealand model of family group conferences and influenced by the Braithwaite restorative justice model. See Alder and Wundersitz (1994), Bargen (1996); Braithwaite (1989); Daly and Hayes (2001), and Maxwell and Morris (1996).

While New Zealand has embraced family group conferences, victim-offender mediation, youth justice conferencing and community service are used in both common-law countries (Australia, Canada, Britain and the USA) and civil law countries (Norway, Switzerland and EU countries). With the exception of New Zealand where family group conferences are required for all but the most serious offences (murder and manslaughter),[6] restorative justice programmes are generally diversionary, leaving more serious offending to the court process (Walgrave 2004). These programmes have been developed for particular use with Aboriginal youth in Australia and Canada and initially for Maori youth in New Zealand.

12.4.2 Therapeutic or Problem-Solving Courts

Restorative justice processes are generally a means of diverting young people from the court and formal judicial system processes, whereas therapeutic or problem-solving courts provide a less formal judicial approach. These courts are not a means of diverting young people from the court but of involving the court in their 'case management'. The premise of therapeutic jurisprudence is that the 'law can act as a therapeutic agent' by focusing on 'the law's impact on emotional life and on psychological well-being' (Wexler and Winick 1996: xvii). It fits with the original intention of the Children's Court to 'correct' and rehabilitate children in conflict with the law while holding young people accountable for their behaviour.

The aim of the therapeutic jurisprudence model in juvenile justice in Australia is to respond to the particular problems of young people with drug and alcohol issues and to provide a more culturally appropriate approach for Aboriginal youth who are heavily overrepresented in the juvenile justice system across Australia.[7] For example, the Koori Court in Victoria operates under the *Children and Young Persons (Koori Court) Act* and involves Aboriginal elders and other members of the community with a presiding magistrate who is the sentencing authority (see Chap. 8 and also Chap. 5 in relation to the Youth Murri Courts in Queensland). As Spiranovic, Clare and Clare and Clare (Chap. 9) point out, however:

> … a number of Judicial Officers [in WA] in fact expressed the concern that Indigenous Courts might be no more than "window dressing" because Aboriginal elders might sit at the bench with the Magistrate, but without formal decision-making powers" with "the Courts not able to refer Aboriginal children to culturally sensitive services designed and run by

[6] In New Zealand, the 'Youth Court judge cannot impose any measure or sanction unless a family group conference has been tried. New Zealand is therefore often represented as the "beacon" country with the most far-reaching restorative justice system for juveniles' (Walgrave 2004: 566).

[7] A report by the Australian Institute of Criminology in 2009 reported that 'Indigenous juveniles were 28 times more likely than non-Indigenous juveniles to be detained in a juvenile justice centre' (Taylor 2009: 5). A recent NSW report also found that there were high rates of drug and alcohol use, mental illness and parental imprisonment among juveniles in custody but that these were higher among indigenous compared with non-Indigenous young people' (Crawford 2011).

> Aboriginal people. … There was a sharp awareness of the need for innovative strategies to engage Aboriginal communities more fully in the reform process, through identifying, mandating, educating and resourcing Aboriginal leaders to spearhead this reform process.

Youth Drug and Alcohol Courts are starting to operate in several states and provide a collaborative across-agency response involving the court and government and nongovernment adolescent service providers to address the needs of young people with substance abuse problems. The aim is to rehabilitate these young people, hold them responsible for their behaviours and prevent further drug use and reoffending (Dive et al. 2003). Young people who have pleaded or been found guilty are offered the opportunity to participate in an intensive programme of rehabilitation before being sentenced, with the court taking an active monitoring and 'report back' role. In the USA, juvenile drug courts[8] entail a particularly strong role for judges as a key member of the team and 'parental figure for client and team members' (Van Wormer and Lutze 2011: 18); this is outlined in the *16 Strategies of Juvenile Drug Courts* and backed up by research.[9]

Evaluations of these Indigenous processes and drug courts have indicated some positive outcomes and some capacity to engage with young offenders, but not surprisingly, no 'magic bullets' (Borowski 2010; Morgan and Louis 2010). As the US literature indicates, there is some good evidence from increasingly rigorous studies of the value of the juvenile drug courts in the USA (Van Wormer and Lutze 2011), and several studies in Australia indicate that 'the program is having success with the very "hard end" of juvenile offending and offenders' (Marien and Judge 2012).

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[8] See National Drug Court Institute and the National Council of Juvenile and Family Court Judges website and *Exploring the Evidence: The Value of Juvenile Drug Courts* and http://www.ncjfcj.org/resource-library/publications/substance-abuse.

[9] Among the 16 Strategies of Juvenile Drug Courts:

1. Engage all stakeholders in creating an interdisciplinary, coordinated, and systemic approach to working with youth and their families.
2. Develop and maintain an interdisciplinary, non-adversarial work team.
4. Schedule frequent judicial reviews and be sensitive to the effect that court proceedings can have on youth and their families.
6. Build partnerships with community organizations to expand the range of opportunities available to youth and their families.
7. Tailor interventions to the complex and varied needs of youth and their families.
8. Tailor treatment to the developmental needs of adolescents.
10. Create policies and procedures that are responsive to cultural differences and train personnel to be culturally competent.
11. Maintain a focus on the strengths of youth and their families during program planning and in every interaction between the court and those it serves.
12. Recognize and engage the family as a valued partner in all components of the program.
13. Coordinate with the school system to ensure that each participant enrolls.
14. Design drug testing to be frequent, random, and observed. Document testing policies and procedures in writing.
15. Respond to compliance and noncompliance with incentives and sanctions that are designed to reinforce or modify the behaviour of youth and their families.

Source: Ashcroft et al. (2003); see also Hora et al. (1999). Juvenile drug courts: Strategies in practice. Washington, DC: U.S. Department of Justice, Office of Justice Programs

12.5 Children's Participation and Legal Representation

According to Article 12 of the UN Convention on the Rights of the Child, children and young people have the right to participate and to have their views heard in any judicial and administrative proceedings affecting them, either directly or through a representative.[10] These principles are also embedded in the legislation of most states and territories. As research both in Australia and overseas indicates, however, this is not easily achieved and more often 'honoured' in the breach than the observance (Buss 2011; Hubble 2000). The first requirement is that children and young people actually understand what is going on, and this generally requires that someone explains both the process and the outcomes to them in age- and developmentally appropriate ways. As a number of the respondents across states and territories in Australia noted, however, children and young people in both jurisdictions – and their parents – 'often struggled to understand court processes, decisions and their implications' especially because they often had limited education, 'mental health problems or an intellectual disability' and were 'often distressed and fearful' and 'confused by legal jargon' (see Chap. 8 in this book). While magistrates indicated their concern about children's limited participation, 'time constraints often meant that they had to rely on lawyers to explain court proceedings and outcomes to their clients', and 'this was not always done satisfactorily' (Borowski and Sheehan 2012, Chap. 8 in this book). As Spiranovic et al. (see Chap. 9 in this book) described, children's participation and that of their parents was 'limited by a common practice in both jurisdictions noted by many stakeholders whereby legal representatives meet with clients immediately before court proceedings'. This practice, common to all jurisdictions, provides little time for 'adequate discussion with clients'. Legal representation based on direct instructions is no guarantee of participating in the process or feeling engaged.

Even when children and young people are invited to speak, this too is no guarantee of any meaningful involvement in the process, as Buss outlines very forcefully. Her description of the process she observed as both a lawyer and an academic researcher in the USA is similar to that in Australian courts. As she points out:

> … it is hard for anyone other than the involved professionals to follow precisely which issues are being addressed in the hearing. These professionals, who handle case after case with one another in the same courtroom, follow hearing scripts and speak in a short hand that is familiar to them and obscure to everyone else. … If a young person succeeds in following the jargon-ridden presentations of the lawyers and various agents of the state, he sees that his role is that of a polite listener with a chance to say some words, not that of an active and engaged participant, let alone a chief author and executor of the plans for his future. (2011: 319–320)

[10] Article 12 – participation principle; see also Cashmore (2002) and Seen and Heard Report (ALRC and HREOC 1996; Treseder 1995).

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

While it is likely that the lack of transparency and the difficulty of being or feeling heard jeopardises procedural justice and their trust in the process, little is known about the expectations and reactions of the children and young people involved (Buss 2011; Peterson-Badali et al. 2007).

12.6 Evidence Base

The lack of research about children's and young people's involvement is only one area in which there is little research about the Children's Court process, more marked in the care and protection jurisdiction than in the criminal jurisdiction. The amount and adequacy of data and research varies across Australia, with national data collected and analysed by the Australian Institute of Criminology (AIC) on the offences children are charged with, sentencing and detention, and in NSW by the Bureau of Crime Statistics and Research. There are concerns, however, about the comparability and availability of disaggregated data and information sharing especially in relation to 'cross-over kids' involved in both the criminal and care and protection jurisdictions. The UN Committee on the Rights of the Child expressed its concern about the 'lack of even basic disaggregated data on the nature and quantity of offences committed by children, use and length of pre-trial detention, number where not resort to judicial proceedings (diversion) and number of children who are convicted and how dealt with' (General Comment 2007, paragraph 98).

While there have been a series of specific research projects and evaluations of the effectiveness of various pilot projects and aspects of youth justice practice, especially concerned with recidivism, there is a need for a systematic research agenda and for rigorous research and evaluations to provide replication, longer follow-up and sustainability. In the USA, the model court principles state that 'juvenile delinquency court judges should ensure the court has an information system that can generate the data necessary to evaluate performance, facilitate information sharing with appropriate agencies, and manage operations information'. Such a commitment in Australian Children's Courts would go a long way to improve the evidence base for policy and practice here.

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About the Authors

Jane Bolitho is a Lecturer in Criminology in the School of Social Sciences, University of New South Wales, Australia. Her research interests concern juvenile justice, court-based diversion programs with a focus on youth justice conferencing and restorative justice.

Allan Borowski is Professor of Social Work and Social Policy, School of Social Work and Social Policy, Faculty of Health Sciences, La Trobe University, Victoria, Australia. He is a Fellow of the Academy of Social Sciences in Australia, and a member of the Research Panel, Criminology Research Council.

Peter Camilleri is a Professor of Social Work, School of Social Work, Faculty of Arts and Sciences, Australian Catholic University, Canberra, ACT. His research has canvassed, amongst other things, the history of welfare, social policy, development of the social work profession and case management.

Judy Cashmore is an Associate Professor in the Law School at the University of Sydney. Her significant research career includes a focus on child protection and child welfare, children's participation in legal proceedings and the impact on them of family law matters. She has extensive involvement in child death reviews and the review of child protection legislation and policy in NSW.

Brenda Clare is an Honourary Research Fellow in the Discipline of Social Work and Social Policy at The University of Western Australia. Her main research interests are child protection, child and family welfare and professional practice.

Joseph Clare is a Research Assistant Professor in the Crime Research Centre, School of Law, University of Western Australia and a member of the Institute of Canadian Urban Research Studies, Simon Fraser University.

Mike Clare is an Honourary Researcher in the Crime Research Centre at the University of Western Australia. Until recently, he was a Professor of Social Work and Social Policy at UWA, with current research interests in out-of-home care and elder abuse.

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Marie Connolly is a Professor and Head of Department in the Department of Social Work, School of Health Sciences, University of Melbourne, with an international research profile in child and family welfare particularly in the field of family group conferencing. She was the founding director of the Te Awatea Violence Research Centre at the University of Canterbury, New Zealand, and Chief Social Worker within the New Zealand Government.

Andrew Day is a Professor in Forensic Psychology and Director of the Forensic Psychology Centre at Deakin University. He has previously worked as a clinical and forensic psychologist in both the UK and Australia and is particularly interested in the application of psychological thought and practice to the correctional setting. Professor Day is a member of the Australian Psychological Society's Colleges of Clinical and Forensic Psychology.

Paul Delfabbro is an Associate Professor, School of Psychology, University of Adelaide. His research has focussed on foster care and related issues such as reunification, the effect of placement movements and parental contact. His other research interests are in the area of gambling behaviour, decision-making and learning theory.

Elizabeth Fernandez is a Professor in Social Work at the School of Social Sciences, the University of New South Wales, Australia. Her current research includes a 10-year longitudinal study of children in care and a national study of reunification outcomes.

Patricia Hansen is a solicitor who works in Children's Courts in NSW. She has worked as a social worker for many years with experience in services for families and children. She is also an Adjunct Professor at Australian Catholic University.

David Heath is a Lecturer in social work and community studies at Charles Darwin University in Australia's Northern Territory. He has worked both in Australia and the United Kingdom as a practicing social worker in mental health and alcohol and drug fields in community and criminal justice settings.

Myvanwy Hudson is completing a PhD in Criminology at the University of New South Wales, focusing on the justice needs of adult survivors of intra-familial childhood sexual assault. Her research interests include gendered crime and child abuse, refugee policy, youth justice and related social justice issues.

Daniel King is a Senior Research Associate in the School of Psychology at the University of Adelaide. His research has given great attention to the subject of the psychosocial impact of gaming and gambling technologies on young people.

Morag McArthur is a Professor and Director of the Institute of Child Protection Studies at Australian Catholic University in Canberra. Her published research focuses on policy and practice issues that affect children, young people and their families, such as child abuse, homelessness and substance abuse.

Michael McKinnon is completing postgraduate study in Criminology and Corrections at the University of Tasmania and has worked in policing and in child protection. He is interested in youth crime and child protection and in the challenges that arise in inter-agency working for vulnerable young people.

Paul Mazerolle is a Professor and Pro Vice Chancellor (Arts, Education and Law) and former Director of the Key Centre for Ethics, Law, Justice and Governance. He remains Director of the Violence Research and Prevention Program at Griffith University, Queensland. His current research includes criminal offending across the life course and projects examining juvenile offending behaviour.

Rosemary Sheehan is an Associate Professor in the Department of Social Work, Monash University, Victoria; she holds a Governor-in-Council appointment to the Children's Court of Victoria to conduct alternative dispute resolution conferences and is a member of the Victorian Child Death Review Committee.

Caroline Spiranovic is a Research Assistant Professor at the Crime Research Centre, School of Law, University of Western Australia and a Research Assistant Professor at the Faculty of Law at the University of Tasmania. Her research interests currently include public perceptions of the criminal justice system, risk assessment, sexual and violent offending and youth offending/mental health.

Loraine Thomson is a Research Fellow in the Institute of Child Protection Studies at the Australian Catholic University in Canberra, ACT. Her recent research has focussed effective family support and the support needs of foster carers.

Clare Tilbury holds the Life Without Barriers Carol Peltola Research Chair at the School of Human Services and Social Work at Griffith University, Queensland, Australia. Her research interests include child protection outcomes, accountability and performance measurement, with a focus on children's well-being in care systems and what they say would make a difference in their lives.

Max Travers is Senior Lecturer in the School of Sociology and Social Work, University of Tasmania, Australia. He has conducted ethnographic research about criminal defence lawyers, sentencing in Children's Courts and the impact of quality assurance on professional work when sentencing young offenders in three Australian states.

Deborah West is a Director of Education and Training Development at Charles Darwin University in the Northern Territory, Australia. Until recently she was Associate Professor and Head of social work at CDU. Her current research interests include family and domestic violence, family welfare and youth justice, remote area service provision and learning and teaching development.

Rob White is a Professor of Criminology in the School of Sociology and Social Work, University of Tasmania, Australia. His research interests include the sociology of youth and environmental criminology. Rob is the Director of the UTAS Criminology Research Unit and Director of the Australian Clearinghouse for Youth Studies.

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