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

R. Sheehan and A. Borowski (eds.), *Australia's Children's Courts Today and Tomorrow*, Children's Well-Being: Indicators and Research 7,
DOI 10.1007/978-94-007-5928-2_10,

Keywords Children's Courts • Juvenile justice • Child protection • Australia • Legal decision-making

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.

References

Australian Institute of Criminology (AIC). (2012). *Australian crime: Facts and figures 2011*. Canberra: Australian Institute o Criminology.

Australian Institute of Health and Welfare (AIHW). (2012a). *Child protection Australia, 2010–11* (Child Welfare Series No. 53, Catalogue number CWS 41). Canberra: AIHW.

Australian Institute of Health and Welfare (AIHW). (2012b). *Juvenile detention population in Australia 2011* (Juvenile Justice Series No. 9, Catalogue number JUV 9). Canberra: AIHW.

Beaulieu, L. A., & Cesaroni, C. (1999). Changing role of the youth court judge. *European Journal of Criminal Policy and Research, 3*(7), 363–393.

Berman, G., & Feinblatt, J. (2001). Problem-solving courts: A brief primer. *Law and Policy, 23*(2), 125–140.

Blackman, L. (2002). *Representing children and young people: A lawyer's guide*. Melbourne: Victoria Law Foundation.

Borowski, A. (2010). Indigenous participation in sentencing young offenders. *Australian and New Zealand Journal of Criminology, 43*(3), 465–484.

Cashmore, J. (2011). The link between child maltreatment and adolescent offending: Systems neglect of adolescents. *Family Matters, 89*, 31–41.

Children's Court of Victoria. (2010). *Annual report 2009–2010*. Melbourne: The Court.

Colyer, C. J. (2007). Innovation and discretion: The drug court as a people-processing institution. *Criminal Justice Policy Review, 18*(3), 313–329.

Commission for Children and Young People WA (Western Australia). (2012). *The state of Western Australia's children and young people—Edition One*. Subiaco: The Commission for Children and Young People.

Cuneen, C., & White, R. (2007). *Juvenile justice: Youth and crime in Australia* (3rd ed.). Melbourne: Oxford University Press.

Freiberg, A. (2007). Non-adversarial approaches to criminal justice. *Journal of Judicial Administration, 16*, 205–222.

Freiberg, A. (2011). Post-adversarial and post-inquisitorial justice: Transcending traditional penological paradigms. *European Journal of Criminology, 8*(1), 82–101.

Freiberg, A., Kirby, P., & Ward, L. (2004). *The report of the panel to oversee the consultation on protecting children: The Child Protection Outcomes Project*. Melbourne: Department of Human Services.

Hasenfeld, Y., & Cheung, P. P. L. (1985). The juvenile court as a people-processing organization: A political economy perspective. *The American Journal of Sociology, 90*(4), 801–824.

Kettner, P. M., Moroney, R. M., & Martin, L. L. (2008). *Designing and managing programs* (3rd ed.). Thousand Oaks: Sage.

Monahan, G. (2008). Autonomy vs beneficence: Ethics and the representation of children and young people in legal proceedings. *Queensland University of Technology Law and Justice Journal, 8*(2), 392–413.

Nicholson, A. (2003). *Justice for families and young offenders: A unified court system as a 21st century reform. The John Barry Memorial Lecture*. Melbourne: Department of Criminology, The University of Melbourne.

O'Connor, I. (1997). Models of juvenile justice. In A. Borowski & I. O'Connor (Eds.), *Juvenile crime, justice and corrections* (pp. 229–253). South Melbourne: Longman.

Peel, S., & Croucher, R. F. (2011). Mind(ing) the gap: Law reform recommendations responding to child protection in a federal system. *Family Matters, 89*, 21–30.

Salusinszky, I. (2012). Youth bail laws to be eased. *The Australian*, 7 February, p. 2.

Seymour, J. (2005). Parental rights and the protection of children: A presumption against state intervention. *Australian Journal of Professional and Applied Ethics, 7*(2), 16–30.

Smith, J., & O'Connor, I. (1997). Child abuse, youth homelessness and juvenile crime. In A. Borowski & I. O'Connor (Eds.), *Juvenile crime, justice and corrections* (pp. 121–150). South Melbourne: Longman.

Steering Committee for the Review of Government Service Provision (SCRGSP). (2012). *Report on Government Services 2012*. Canberra: Productivity Commission.

Stokes, G. (2004). The 'Australian settlement' and Australian political thought. *Australian Journal of Political Science, 39*(1), 5–22.