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

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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

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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.

References

Australian Institute of Health & Welfare. (2011a). *Child protection Australia 2009–10*. Canberra: AIHW.

Australian Institute of Health & Welfare. (2011b). *Juvenile justice in Australia 2009–10*. Canberra: AIHW.

Children's Court of Queensland. (2010). *Annual report 2009–2010*. Brisbane: Queensland Courts.

Commission of Inquiry into Abuse of Children in Queensland Institutions. (1999). *(Forde Inquiry). Report of the Commission of Inquiry into abuse of children in Queensland Institutions*. Brisbane: Queensland Government.

Crime and Misconduct Commission. (2004). *Protecting children: Inquiry into abuse of children in foster care*. Brisbane: Author.

Cullen, F. T., & Gilbert, K. E. (1982). *Reaffirming rehabilitation*. Cincinnati: Anderson Publishing Queensland Legislative Assembly. *Hansard*, 18 June 1992.

Department of Justice and Attorney-General. (2010). *Model litigant principles*. Accessed from Department of Justice and Attorney-General website on 25 June 2012 at http://www.justice.qld.gov.au/__data/assets/pdf_file/0006/43881/20100505095729872.pdf

Freiberg, A. (2002). Therapeutic jurisprudence in Australia: Paradigm shift or pragmatic incrementalism? *Law in Context, 20*(6), 23–30.

Magistrates Court of Queensland. (2010). *Annual report 2009–2010*. Brisbane: Queensland Courts.

Martinson, R. (1974). What works? Questions and answers about prison reform. *Public Interest, 35*, 22–54.

O'Connor, I. (1992). *Youth, crime and justice in Queensland*. Information and Issues Paper. Brisbane: Criminal Justice Commission.

O'Connor, I. (1994). The new removals: Aboriginal youth in the Queensland juvenile justice system. *International Social Work, 37*(3), 197–212.

O'Connor, I., & Sweetapple, P. (1988). *Children in justice*. Melbourne: Longman Cheshire.
Platt, A. (1969). *The child savers. The invention of delinquency*. Chicago: University of Chicago Press.
Stevenson, O. (1992). Social work intervention to protect children: Aspects of research and practice. *Child Abuse Review, 1*(1), 19–32.
United Nations. (1989). Convention on the rights of the child. Accessed from the website of the United Nations on 25 June 2012 at http://www.un.org/documents/instruments/docs_en.asp?type=conven
Waldfogel, J. (2000). Reforming child protection services. *Child Welfare, 79*(1), 43–57.
Wexler, D. B., & Winick, B. J. (1996). *Law in a therapeutic key*. Durham: Carolina Academic Press.