



A Study of the Children's Court of New South Wales

Never Stand Still

Faculty of Arts and Social Sciences

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Part of a National Assessment of
Australia's Children's Courts

2014

Elizabeth Fernandez, Jane Bolitho, Patricia Hansen,
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2 INTRODUCTION

Australia's child welfare system can be traced to the period of white settlement. Significant child welfare problems emerged in this period when mortality rates and levels of neglect and deprivation were high (Liddell 1993). From the earliest days of the New South Wales colony, concern was expressed about the care and protection of convict children who roamed the streets and who were thought to be responsible for petty crime. A charity set up by Governor King's wife was to provide schooling for these vulnerable children. As early as the mid nineteenth century state involvement in children and families is evident through the establishment of universal schooling and industrial schools (Van Krieken 1991). Later in the nineteenth century child labour laws and compulsory education were established, along with policies to board out children rather than accommodate them in institutions (Picton and Boss 1981, Tomison, 2001). Unsurprisingly, child care and juvenile justice were seen hand-in-hand both to protect children and to protect the wider society from crime. This report is concerned with reviewing this complex system for the twenty-first century.

Children's Court magistrates in New South Wales (NSW) adjudicate on both criminal and care and protection matters. It is widely accepted that the Children's Court is an effective means for trans-

forming the treatment of children by their parents and carers, and for influencing the behaviour of criminal defendants and potential young offenders in the community (Borowski and Ajzenstadt 2005; O'Connor 1991). However, the operation of the Children's Court, in criminal and care and protection matters, is underpinned by beliefs about the role and responsibility of the state in protecting the 'best interests' of the child (Cunneen and White 2011; Sheehan 2001; Sullivan 1993). These beliefs are based on particular ideas about young people and cannot be separated from wider social, political, and economic developments (Cunneen and White 2011; Ainsworth 1991; Day 2011; Seymour 1997). Thus, an examination of Australia's Children's Courts in the contemporary context requires some understanding of the historical underpinnings. This monograph presents findings from research conducted with key stakeholders about the current purpose, role, scope and effectiveness of the Children's Courts in NSW. The proceeding discussion will be divided into four sections: literature review (establishing the context for the research and the gaps in the literature); methodology (outlining the aims of the research and the study design); data analysis and findings; discussion and recommendations.

3 LITERATURE REVIEW

3.1 History of Children's Courts in New South Wales

The first Children's Court in NSW was founded in 1905 under the 'Neglected Children and Juvenile Offenders Act' (Blackmore 1989). The Children's Court in NSW has jurisdiction over children's criminal and care and protection matters (Crawford 2005). The premises for the establishment of a Children's Court were two-fold. Firstly, it was perceived that children needed separate, closed courts with specialist magistrates to protect them from the stigmatisation associated with the adult court system. Secondly, it was argued that the procedures for dealing with children's legal matters should be faster and simpler than for adults; that is, summary procedures should be employed and juries should not be appointed (Crawford 2005).

These premises stemmed from the 'child saving' philosophy that prevailed at the time, which created, as some have argued a paternalistic role for the state (Seymour 1997). In 1905, children between the age of five and sixteen could be declared a 'state ward' for criminal offences or 'neglect' and were sent to special children's institutions for protection and reform (Blackmore 1998; Crawford 2005; Dickey 1977). For criminal offence matters, the idea was that non-punitive, preventive and corrective approaches should be used in order to 'reclaim erring children' (Seymour 1997, p.294; Ainsworth 1991). Thus, until 1974, the Children's Court did not have the power to deal with an indictable offence by way of fine or imprisonment (Blackmore 1989, p.15). At the same time, however, these ideals were pursued in a police court context with criminal procedures and penalties. This contradiction is fundamental to subsequent legislative changes impacting on the purpose, role and scope of the Children's Court.

Throughout the 1900s there were several legislative changes of relevance to the Children's Court in NSW. However, there was no fundamental shift in the philosophy underpinning the purpose, role and scope of the Children's

Court until 1987. In 1923 the 'Neglected Children's and Juvenile Offenders Act' of 1905 was repealed by the 'Child Welfare Act'. Under the 'Child Welfare Act 1923' a Statutory Child Welfare Department was established and the jurisdiction over young criminal offenders and neglected children was extended to children up to eighteen years of age. Amendments were also made in sections relating to 'affiliation', and new legislation was enacted in relation to adoption (Blackmore 1989, 1998).

In 1939, a new version of the 'Child Welfare Act' was introduced, repealing the 1923 legislation. Most significantly, the 'Child Welfare Act 1939' contained new provisions in relation to 'mentally defective' children, maintenance of children by their relatives, discipline in institutions, and transfer of children from prisons to institutions. The definition of 'neglected child' was also expanded to include children not attending school regularly (without a lawful reason) and the minimum age of criminal responsibility was set at eight years of age (Blackmore 1989, p.8). Further, the Sydney Children's Court was established as a 'court of review' for regional courts to prevent the overuse of committal orders (Crawford 2005).

The 'Child Welfare Act 1939' was amended many times until it was replaced by a new set of cognate Acts in 1987. Between 1939 and 1987, legislative changes were made to remove affiliation and adoption sections from the Act, to replace the 'mentally defective' children with 'intellectually handicapped persons', and (from 1969) to no longer require that 'neglected' children be 'charged' before a court. In 1977, a series of significant amendments were made to the Act resulting in the age of criminal responsibility increasing from eight to ten years of age. Further, evidence contained in statements given to police by children became inadmissible unless a parent, guardian, or solicitor was present at the time the statement was made. Mandatory reporting by doctors of cases of child abuse was introduced, and the Court was empowered to investigate these cases. The Court was also empowered

to order the release of a neglected child (on particular terms and conditions). In 1981, reflecting the beginning of change in relation to the ideology around children's status in society, any child could elect for committal for trial or sentence for an indictable offence. This was based on the notion that children should have the same procedural rights as adults (Blackmore 1989, p.7).

In addition to the changes in the 'Child Welfare Act', it is important to note other legislative changes that impacted on the Children's Court of NSW. In 1974, the jurisdiction of the Children's Court over minor indictable offences was greatly increased by amendments to the Crimes Act that aimed to reduce the number of matters heard by the District Court. In 1978 the Bail Act was amended to require that children should be treated as offenders rather than as children requiring special consideration. This Act gave the court the power to attach conditions to bail including curfews and non-association requirements (Crawford 2005). Finally, the 'Community Welfare Act' of 1982 made it possible for a 'Children's Panel' to refer a matter for 'conference' after determining that a charge not be prosecuted in the Children's Court (Blackmore 1989, p.23). It is also noteworthy that in 1975, legal representation for children by private legal practitioners was established through the Law Society of NSW (Crawford 2005).

Over time the 'child-saving' ideology underpinning the Children's Courts was increasingly criticised in favour of policies and procedures focusing on the rights of the child, due process, control and deterrence (Seymour, 1997, p.296-298). These changes in ideology were reflected in the ratification of the United Nations Convention of the Rights of the Child in 1990 and in the High Court of Australia's recognition in 1992 of the decision in *Gillick vs West Norfolk and Wisbech Area Health Authority*. The ruling in this case established that a competent youth must be allowed to make his or her own decisions. This marked the beginning of a new legal conception of 'adolescence' emphasising adolescent rights to autonomy and, in line with this, accountability and culpability.

In 1987, the 'Child Welfare Act 1939' was repealed by a package of Acts for dealing with young offenders and children in need of care. The most significant of these Acts was, firstly, the 'Children's Court Act', which constituted the 'Children's Court of New South Wales' as a separate Magistrate's court (Blackmore 1998, p.16). This meant that the Children's Court in NSW became a single entity with Children's Magistrates selected for their specialised training and personal qualities (Blackmore 1989, p.35). Secondly, the Children (Care and Protection) Act' separated the law of care and protection from the law of juvenile justice. Thirdly, the 'Children's (Criminal Proceedings) Act 1987' promoted a 'justice' model, focusing on the offence rather than the child, and providing children with full due process of the law so that they were dealt with according to the law and in a way warranted by the offence (Crawford 2005; O'Connor 1991).

While the fundamental characteristics of the Children's Court remain unchanged since the 1987 legislation, there were a number of important reports and legislative changes during the 1990's that affected the role, purpose and scope of the Court. Those of most relevance to understanding the current purpose and scope of the Children's Court in NSW are outlined here. The then Juvenile Justice Advisory Council's 'Green Paper on Juvenile Justice in NSW' (1993) presented issues for public consideration concerning young offenders in NSW. The ensuing 'White Paper: Breaking the Crime Cycle' (1994) has continued to provide a basis for reform in the NSW juvenile justice system. The issues included in the White Paper relate to crime prevention, community integration, community participation, appropriate physical and mental health support and post release programs, and the need to address the needs of vulnerable populations. Partially in response to these concerns, the 'Young Offenders Act' (1997) created a four tier system for responding to young offenders that focused on diversion. The 'Young Offenders Act' (1997) provided a legislated basis for the use of police warnings, police cautions and youth justice 'conferences'; and reserved appearance in the Children's Court as the op-

tion of 'last resort', consistent with the United Nations Convention on the Rights of the Child and other international guidelines on juvenile justice (Bargen et al 2005). It is also consistent with the NSW Charter on Victims' Rights (NSW Department of Human Services/Juvenile Justice 2011; Coppins et al 2011). The Young Offenders Act 1997 was intended to reduce the overall number of less serious matters reaching the Children's Court and to reduce the number of children in custody. The court now primarily hears more complex and serious matters where offenders are more likely to have a history of entrenched criminal activity (Crawford 2005).

In addition to these legislative changes, a further relevant development for the Children's Court during this era was the establishment of the 'Youth Drug Court' in 2000. This program was established as a result of Recommendation 6.11 of the NSW Drug Summit 1999. The 'Youth Drug Court' diverted young people from custody by providing individually tailored case management with intensive supervision and intervention by specialist drug and alcohol practitioners (Noetic Solutions 2010). The purpose of this court was to address the underlying issues for young offenders, focusing on their health and well being whilst taking a non-adversarial approach (Freiberg 2005, 2007). Young people accepted into the program had their court matters adjourned for a six-month period and were subject to stringent bail conditions related to compliance with their case-management plan (Eardley et al, 2004; Noetic Solutions 2010). The 'Youth Drug Court' was closed by the newly elected O'Farrell government in 2012.

In the child protection jurisdiction the 'Child Welfare Act' (1939) was left without major review until the 'Community Welfare Act' (1982) but the 1982 Act was not proclaimed (NSW Department of Community Services, Parkinson Report, 1997). The 'Children's (Care and Protection) Act' (1987) was passed as part of the package of reforms to separate child protection from juvenile justice. This 1987 Act was reviewed by the NSW Government in the late 1990's (NSW Department of Community Services, Parkinson Report, 1997) to make

recommendations for law reform in care and protection. This review was based on recognition that child abuse occurs primarily within family structures but also that the best carers for children are their parents. Thus, child care and protection involves both maintaining children, in and removing them, from their families (Bao-Er 1998, p.234; Sheehan 1999, 2000, 2001). This requires decision making that balances the family's right to care for their child and the child's need for protection (see Parton and Thomas 1983). But a significant theme in this review concerned the emphasis on preventing child abuse, recognising the need for interagency cooperation to deal effectively with child sexual abuse, and a wish to ensure that the child protection system worked better than under the 1987 Act (NSW Department of Community Services, Parkinson Report, 1997, pp. 6-8). Most of the recommendations from this review were enacted in the Children and Young Persons (Care and Protection) Act 1998 (CAYPCPA).

The legislation is clear that the preservation of the family is fundamental to the Court's decision making and that intervention by the Court to protect children at risk must not exceed the requirements of the child's welfare (Sheehan 2001, p.18). A further development is the introduction of new models for responding to child care and protection issues. In particular, following practice in New Zealand and other states of Australia, the 'family group conference' or 'family decision making conference' model was implemented in NSW on a pilot basis for Aboriginal families. The purpose of these conferences is to demonstrate that the primary role in caring for and protecting children lies with the family and to increase family participation in child protection decision making (Bao-Er, 1998; Fraser and Norton, 1996, p.37; Swain and Ban, 1997; Klease 2008; O'Connor and Sweetapple 1988; Sheehan 2003; Sullivan 1993; Thomson and Thorpe 2003). These developments have shaped the purpose, role and scope of the Children's Court of NSW in the current context. This is the focus of the next section.

3.2 Purpose, Role and Scope of Children's Courts in New South Wales in the current context

Introduction

In the current NSW context, the Children's Court remains as a separate Local Court for children's criminal and care and protection matters. The head of the Children's Court is the President of the Children's Court. Fifteen specialist magistrates are appointed for periods of up to three years. These magistrates are located in specialist Children's Courts in Parramatta, Glebe, Broadmeadow, Campbelltown, Illawarra, Woy Woy and Wyong. Local Courts in all other areas of NSW sit as Children's Court as needed. A country care circuit for specialist Children's Court magistrates was initiated to assist courts in remote areas in responding to children's care and protection matters (Marien 2009). Country care circuits currently operate in the regions of Lismore, Dubbo and the Riverina. One particular feature of the Children's Court in NSW is the 'Children's Court Clinic'. There are currently two clinics (located at Parramatta and Broadmeadow). They are specialist assessment units established under the 'Children's and Young Persons (Care and Protection) Act 1998' to provide specialist clinical services throughout NSW. The role of the clinic is to provide independent clinical assessments of children, young people and their families to assist Magistrates in their decision making concerning care matters in the Court (Brown 2004). Since 2002 the Children's Court Clinic has had a limited amount of funding to offer services for young people and their families involved with the criminal jurisdiction.

3.3 Trends in Care and protection and Crime jurisdictions

NSW has the largest population of children on Care and Protection Orders in Australia, with 15,981 children on care and protection orders as at June 2012. This can be compared to the statistics for the state of Victoria, which has a similar population size but only 7262 children on care and protection orders (Australian Institute of Health and Welfare 2013). Indigenous children are overrepresented in all areas of the NSW care and protection system. At June 2012, the number of Indigenous children on Care and Protection Orders was 5299. The rate of Indigenous children in out-of-home care (OOHC) was 83.4 per 1000, the rate for non-indigenous children being 7.1 per 1000 for the same period (Australian Institute of Health and Welfare 2013).

According to the Australian Institute of Health and Wellbeing Bulletin 120 (2014), on an average day in NSW between 2012-2013 there were 1700 young people under supervision (331 young people in custody and 1378 young people supervised in the community). Over the period 2008-2009 and 2011-2012 there was a small decrease in the rate of young people under supervision in NSW. During the 2012-2013 period the level of indigenous over-representation for those under supervision in NSW was the highest in the nation (at 20 times the non-Indigenous rate) (Australian Institute of Health and Welfare, 2014). In the Children's Court there has been a 6.5% decrease in criminal disposals, from 7919 in 2012 to 7401 in 2013 (BOCSAR, NSW Criminal Courts Statistics 2013). Key statistics relating to the NSW Children's Court (crime) are presented in Table 1.

Table 1: NSW Children's Court (crime) statistics (2009-2013)*

	2009	2010	2011	2012	2013
Finalisations:					
Number of persons charged in Children's Courts	9,607	8,587	8,633	7,919	7,401
Number of charges determined in Children's Courts	23,165	25,150	27,057	26,480	25,345
Outcome of appearance: (%) of persons charged found guilty	79.5	87.0	85.6	86.2	87.8
Legal representation: (%) of persons charged having legal representation**	n.a.	n.a.	81.9	92.2	93.1
Bail refusal: (%) of persons charged refused bail	17.1	15.2	15.3	15.8	16.8
Delay: Median delay for defended cases (days)	127.0	137.0	140.0	128.0	117.0
Sentencing: (Number of persons given a control order sentence)	822	807	733	727	695
Average length of minimum/fixed term control order (months):					
Total persons	4.6	4.5	4.3	4.1	4.3

* Modified table taken from NSW Children's Court Statistics, NSW Bureau of Crime Statics & Research, accessed online 05/07/14

** n.a. = not available. Data for the years 2009 and 2010 is unreliable due to high levels of missing data.

Legislation

The Acts of *primary* relevance to the Children's Court in NSW in the current context are as follows:

- Children's and Young Persons (Care and Protection) Act 1998
- Children (Criminal Proceedings) Act 1987
- Young Offenders Act 1997
- Bail Act 1978

As there is separate legislation for children's care and protection matters and children's criminal matters in NSW the purpose, role and scope of the Children's Courts varies depending on the jurisdiction. Accordingly, the ensuing discussion will be divided into two sections: 'Care and Protection Jurisdiction' and 'Criminal Jurisdiction'.

3.4 Care and Protection Jurisdiction of the Children's Court of NSW

The current purpose, role and scope of the Children's Courts in NSW in relation to care and protection matters is defined by the Children's and Young Persons (Care and Protection) Act 1998. Under this Act, the statutory child welfare department in NSW, Family and Community Services (previously known as the Department of Community Services or DOCS and hereinafter referred to as the 'statutory department'), can apply to the Children's Court to place a child on a 'care and protection order'.

These applications are usually a last resort, used when the child's family has resisted intervention from the statutory department, and when other avenues for resolution have been exhausted (Australian Institute of Health and Welfare 2011, p.30). In NSW, a child or young person may be found in need of a 'care and protection order' for multiple reasons relating to neglect and abuse (see Australian Institute of Health and Welfare 2011, pp.96-97).

The 'Children's and Young Persons (Care and Protection) Act 1998' was significantly amended following the *Special Commission of Inquiry into Child Protection Services in NSW* (also known as The Wood Report). These findings were reported in 2008 and initiated changes not only for the Children's Court but also for other government departments and non-government organisations. The principles and goals underpinning the Special Commission of Inquiry into Child Protection Services in NSW can be summarised as follows.

- Child protection is the collective responsibility of the government and the community.
- The service system should ensure that children and young people are able to grow up unharmed by their social, economic and emotional circumstances and are supported in this by their parents. When parents are unable to support their children in this, it is the responsibility of the state to address this in a humane and responsive way that protects the safety of the child or young person.

- Participation from children and young people should guide service delivery.
- Child protection services should be integrated.
- Early decision making about permanency planning and restoration is in the best interests of children and young people.
- Indigenous children and young people in OOHC should be connected to their family and community.
- Children and young people coming into care should receive early, in-depth and comprehensive assessments and intervention.
- Children and young people should be placed with relatives and/or siblings where possible.
- There should be appropriate health and specialist services available to children and young people in OOHC.
- Young people should be assisted in the transition phase from OOHC to alternative accommodation.
- Carers should be provided with information and support.
- Non-government agencies should deliver services in partnership with the statutory department.

The Wood Report illuminated the challenges confronting the statutory department in relation to increasing numbers of reports about children and young people suspected to be at risk of harm. Many of the reports made to the statutory department were perceived to be about family situations where there was less need for coercive intervention from the statutory department. The diversion of resources to manage these reports was acknowledged. In turn, the children and young people and their families who are the subject of reports to the statutory department were perceived to receive inadequate assistance (Special Commission of Inquiry into Child Protection Services in NSW 2008, p.ii-iii). This situation is compounded by a lack of prevention, early intervention, and targeted services for children and young people and their families. Moreover, this is particularly problematic for Indigenous children, young people and families, as

“culturally appropriate interventions are not widespread in any of the agencies expected to work with them” (Special Commission of Inquiry into Child Protection Services in NSW 2008, p.iv) and some Aboriginal organisations are not sufficiently developed and resourced to facilitate partnership with the statutory department.

In 2009, the NSW parliament passed the ‘Children Legislation Amendment (Wood Inquiry recommendations) Act’. This introduced into law, 106 of the 111 recommendations made in the Wood Report. The intent was to implement changes over five years (Hansen and Ainsworth 2009). Emphasising the ‘best interests of the child’ principle, the Wood Report recommended the following changes as the key reforms:

- Raising the threshold so that only children thought to be at risk of significant harm should be reported to the Helpline;
- Instituting procedures for review in police, health and education to determine when a report should be made to the Helpline;
- More use of prevention and early intervention programs;
- Development of integrated, multi-disciplinary child and family services;
- Further development of non-government services at universal, secondary and tertiary level;
- Development of an inter-agency common assessment framework;
- Ensuring that agencies freely exchange information in order to provide services to children and ensure child protection;
- Transfer of out of home care to the non-government sector;
- Further development of information technology;
- Reduction of technicality in Children’s Courts and greater use of alternate dispute resolution;
- Appointment of a District Court Judge as President of the Children’s Court;
- Reconstitution of the Child Death Review Team led by the Ombudsman;

(see Special Commission of Inquiry into Child Protection Services in NSW 2008, vol 1, pp vi-ix)

Recommendations were made to simplify the practice and procedures of the Children's Court and to reduce technicality. Further, Wood recommended greater use of alternative dispute resolution (ADR). The Inquiry also recommended that a District Court Judge be appointed as the Court's senior judicial officer, and the development of a code of conduct for all legal representatives practicing in the care jurisdiction. Finally, it should be noted that the Inquiry focused on addressing the disproportionate numbers of Indigenous children in the child protection system and increasing the participation of Indigenous agencies in the child protection system (Special Commission of Inquiry into Child Protection Services in NSW 2008, p.ix). Some changes were legislated but not fully operationalised. The provision to abolish contact orders from the Children's Court was not implemented. Further procedural and organisational changes were implemented. In NSW the 'risk of harm' reporting threshold was amended to 'risk of significant harm' as part of the NSW 'Keep Them Safe' reforms. Child Wellbeing Units (CWUs) were established in major government reporting agencies of Health, Education, Family and Community Services and Police in accordance with attempts to reshape responses to child protection concerns and provide guidance to staff in determining the new threshold of 'significant harm'. The newly formed CWUs were to facilitate agency responses to less serious cases through referral to service systems. These changes have implied intent to enhance the focus on preventative and early intervention services to address concerns earlier, and reduce the number of reports of children at risk.

With the change of government in 2011 the new Minister for Family and Community Services embarked on a new reform process which has been enacted in the most recent amendments to the 'Children and Young Persons (Care and Protection) Act' (1998). The changes documented in the Child Protection Legislation Amendment Act (2014) include:

- Defined priorities in relation to permanency planning, including adoption as a priority;
- Changes to contact orders that may be made;
- Changes to application to vary contact orders;
- Introduction of guardianship orders;
- Introduction of Parenting Capacity Orders.

Again it may be said that this new reform, like the Wood reforms introduce new parameters around the decisions that judicial officers in the Children's Court may make. In the latest amendment, the Children's Court may make contact orders for 12 months only in the circumstances where the court has made a finding that restoration of the child to parents is not a realistic possibility.

3.5 Criminal Jurisdiction and the Children's Court of NSW

The criminal jurisdiction of the Children's Court of NSW in the current context is defined by a number of pieces of legislation including the 'Children (Criminal Proceedings) Act 1987', Children (Criminal Proceedings) Regulation 2011, Children (Community Service Orders) Act 1987, Children (Detention Centres) Act 1987, the 'The Young Offenders Act 1997', and the 'The Bail Act 2013'. The purpose, role and scope of the Children's Court in relation to criminal matters directly relates to wider discourses on how offending children should be understood and treated. Historically these discourses have promoted a 'child-saving' ideology, more recently others have suggested that the current context is characterised by a more justice oriented approach. In accordance with this, there is the use of a full range of penalties (Seymour 1997, p.297). The most recent review of the NSW juvenile justice system (see Noetic Report, 2010) suggested that this system has been strongly influenced by 'get tough on crime' discourse. The population of young people in contact with the Children's Court (crime) contains disproportionate numbers of children of Indigenous background and is characterised by contact with child care protection services, mental health problems, intellectual disability, dislocation from education, and homelessness (Noetic solutions 2010, p.vii).

The age of criminal responsibility in NSW (as in all Australian States and Territories) is ten years (Borowski & Sheehan, 2013). In NSW the Children's Court hears criminal matters for children between the age of ten and eighteen years; this is consistent with other Australian States and Territories except for in Queensland where there is a lower upper limit (16 years), and in Victoria where there is a 'dual track' system and older youth (aged 18-20 year) may still be processed in the Children's Court (Borowski & Sheehan, 2013). The Children's Court of NSW does not have jurisdiction over serious indictable offences (i.e. homicide and offences punishable by imprisonment for life or twenty five years). Children and young people come into contact with the Children's Court for a wide range of offences and in the majority of cases have no prior convictions (Richards, 2009).

The *Young Offenders Act (1997)* provides a framework for dealing with young people in contact with the law and this Act emphasises the principle of diversion. Placing a child before the Children's Court should be the option of last resort and the Young Offenders Act ensures that, where possible, a system of warnings, cautions and youth justice conferences precede court appearances. In 2007-2008 warnings accounted for 30% and cautions accounted for 17% of police responses to offending children. In contrast, 26% of cases were referred to the Children's Court and only 3% of cases were referred to a youth justice conference (Australian Institute of Criminology 2009). Male and Indigenous children were more likely to be referred to the Children's Court and offenders in younger age groups were more likely to receive less severe responses (warnings, cautions and youth justice conferences) (Noetic Solutions 2010, p.16).

Seymour (1997) outlines the current purpose, role and scope of the Children's Court in relation to three primary functions: fact-finding; community satisfaction; and imposition of sanctions. In relation to 'fact-finding', the use of informal measures such as 'youth justice conferences' requires an admission of guilt by the child or young person. The Children's Court also has a role in relation to scrutinising

the evidence on which a guilty plea is based. Arguably, the importance of this is increased when 'justice' models are applied. However, it is unlikely that the Children's Court will perform this function in practice, as when a young person pleads guilty the primary purpose of the Children's Court hearing is to decide on a penalty (Cunneen and White 2011, p.263-264). This highlights both the relevance of the Children's Court in the current context and the limitations of its scope.

With respect to 'community satisfaction', the Children's Court has a role in satisfying the community that appropriate action has been taken in response to juvenile crime (Seymour 1997, p.301). This is particularly important in the current context where the Children's Court is more likely to hear more serious matters. Yet, at the same time the Children's Court must balance these justice needs with the age and maturity of young offenders should be taken into account by the justice system. Thus, the purpose, role and function of the Children's Court are constrained by conflicting discourses.

Cunneen and White (2011) discuss the relationship between Children's Court sentencing processes and international human rights principles, namely those enshrined in the Convention on the Rights of the Child 1990 (CROC) and the 'Standard Minimum Rules for the Administration of Juvenile Justice 1985 (Beijing Rules)'. These authors make several relevant points. The international human rights principles of direct relevance to the process of sentencing juvenile offenders assumes a commitment to, and process for, diverting young people from formal judicial proceedings (Cunneen and White 2011, p.267). Based on this foundation, there are eleven principles that underpin the sentencing of young people: participation; best interests; community protection; rehabilitation; the prohibition on cruel, inhuman, and degrading punishment; the availability of a range of options; the requirement of proportionality; the availability of review; detention as a last resort; detention for the shortest period of time; and freedom from arbitrariness (Cunneen and White 2011, p.267; Human Rights and Equal Opportunity Commission 1999).

Due to the generalised nature of these principles, how these principles are applied in practice will vary depending on the relative weight placed on rehabilitation or deterrence by the Court. Further, there are difficulties with balancing the need to hold young people responsible for their actions whilst also recognising the reduced responsibility of the offender due to their age and immaturity. Furthermore, sentencing requires making a judgement about the weight that should be given to protecting the community in comparison to the likelihood of a young person undergoing rehabilitation (Cunneen and White 2011, p.273-275).

Furthermore, it is crucial to acknowledge young people's experiences of the Children's Court. The majority of young people who experience Children's Court processes have pleaded guilty to an offence and appear in Court with legal representation. However, there are barriers that young people face in accessing appropriate legal representation. For example: cost; lack of legal knowledge; limited availability of services; and duty solicitors (who are the primary group of solicitors providing legal representation to young offenders) not having the time to communicate with young offenders and take adequate instructions (Cunneen and White 2011, p.286; O'Connor 1994, p.88-91; Youth Advocacy Centre 1993). Moreover, as the majority of young people who experience the Children's Court have pleaded guilty, these young people experience the Children's Court as a system concerned with sentencing. In keeping with the CROC and the Beijing Rules, the NSW legislation (and other State and Territory legislation in Australia) provides that children before the Court have the right to participate in decisions that affect them. Recent research on sentencing in the Children's Court reveals that, in contrast to the past where young offenders reported they did not understand Children's Court processes and decisions (O'Connor and Sweetapple 1988), welfare values are being reflected in the Children's Court and sentencing is being acknowledged as a collaborative process (Travers 2007, p.31-32). In support of these findings, McGrath's research on young offenders' perceptions of the sentencing process in

NSW Children's Courts found that appearing before the Children's Court is not an inevitably stigmatising experience (2009, p.39).

4 RATIONALE FOR THE STUDY

While legislation frames the workings of the Children's Court, it is the professionals attached to the court that interpret and implement these ideas on an everyday basis. For this reason, the perspectives of these professionals on the purpose, role, scope and effectiveness of the Children's Court of NSW is critical to understanding the operation of this system in the current context and the areas that are in need of policy reform. There is currently little empirical research that has examined the perspectives of Children's Court magistrates, police and lawyers in the NSW context. Research of this nature has been undertaken in Tasmania (Travers 2007) and South Australia (King et al 2011) with a focus on juvenile justice, and in Victoria with a focus on child 'care and protection' matters (Sheehan 2001). Research in this field in the international arena has focused solely on the criminal component of the Children's Court (see Applegate et al 2000; Bazemore 1998; Bazemore and Feder 1997; Brown 1991; Doob 2001; Leip and Bazemore 2000; Parker et al 1989; Sanborn 2001; Sprott and Doob 2002). This empirical study addresses both the 'care and protection', and 'criminal' jurisdictions of the Children's Court of NSW and fills a significant gap in the international and Australian literature.

5 METHODOLOGY

5.1 Aims

This study was part of a national study into Australia's Children's Courts (Borowski and Sheehan, 2013) and as such the research questions, design and methods are framed within the context of the national research project. The broad aim of this research was to elicit the perspectives of court based professionals and related stakeholders on the purpose, role, scope and effectiveness of the Children's Court and the areas that are in need of reform. The research was framed by three main questions:

1. What is the contemporary status of, and current challenges faced by, Australia's Children's Courts in relation to both their child welfare and criminal jurisdictions from the perspective of its judicial officers and other key stakeholders?
2. What issues and challenges do judicial officers and other key stakeholders believe the Children's Court will face over the next decade?
3. What are the judicial officers' and other key stakeholders' assessments of, and degree of support for, child welfare and juvenile justice jurisdiction reforms that have recently been canvassed in Australia and overseas?

The professionals identified as potential research participants for this (NSW based) study include the president of the Children's Court, specialist magistrates and specialist solicitors, and a variety of stakeholders who contribute to the operation of the Children's Court in both care and protection and juvenile justice jurisdictions. For example, stakeholders for the care and protection jurisdiction include the independent Children's Court Clinic, the NSW statutory department for care and protection, and various non-government organisations (NGOs) such as the Benevolent Society, Barnardos, Foster Carers' Association, and the Legal Aid Commission. Relevant stakeholders for the criminal jurisdiction include the

NSW Attorney General's Department, Juvenile Justice, Justice Health, NSW Police, the Children's Legal Service and the Aboriginal Legal Service.

5.2 Study Design

In order to address the broad aim of the research and the questions outlined above, a multi-method qualitative study was conducted with research participants who were identified as key members of the Children's Court and/or primary stakeholders. A purposive sampling technique was applied (Sarantakos 2005, p.164). This study used in-depth individual interviews and focus groups. These methods of data collection will be outlined in further detail in the proceeding discussion. The interviews and focus groups conducted for this research were audio-recorded and then transcribed to facilitate analysis of the text. A thematic approach was applied in order to analyse the data collected.

5.3 Sampling

The purposive sample was drawn from a population of NSW practitioners of the Children's Court and key stakeholders including the President of the Children's Court, specialist magistrates, solicitors, caseworkers from government agencies and NGOs, policymakers, and clinical practitioners. In total, the sample consisted of 76 participants consisting of 12 magistrates, 19 legal practitioners, 20 NGO/Community stakeholders, 17 government practitioners, 3 policy stakeholders, 2 academics and 3 clinical specialists. A total of 45 individual interviews were conducted. A total of 10 focus groups were conducted (with 28 participants in the focus groups overall). Seventeen participants were from regional/rural areas, 5 participants were Indigenous, 58 participants were female, and 15 participants were male. Focus groups were conducted with statutory department caseworkers, Juvenile Justice Officers, NGO caseworkers (in the child protection field), Aboriginal community workers, care solicitors and crime solicitors.

The sample size for the study was determined by reaching 'saturation point' (Padgett 1998, p.52), that is, where the data obtained were rich enough to cover all the dimensions of the research aims/questions (Liamputtong and Ezzy 2005, p.49).

5.4 Interviews

In-depth interviewing is a conversational style of research interview utilising open-ended questions to explore the meanings that participants share in the research process. This method of data collection is underpinned by an interpretive theoretical framework that recognises the interviewer as a co-participant in the construction of knowledge that occurs during the research interview (Liamputtong and Ezzy 2005, p.56-57). Padgett accounts for the interactional nature of qualitative research and suggests the following methods: prolonged engagement; triangulation; peer debriefing and support; member checking; negative case analysis; and auditing (1998, p.94-102). The primary way that rigor has been achieved in this study is through the use of multi-method data collection and the 'triangulation' of data that this permits. By using in-depth interviews and focus groups, the data collected from these two sources can be compared and verified (Miles and Huberman 1994; Patton 2002).

5.5 Focus Groups

The purpose of using focus groups as a method of data collection is to understand the perceptions, interpretations and beliefs of a particular population in order to gain an understanding of a particular issue from the perspective of the group participants (Liamputtong and Ezzy 2005, p.76). Further, focus groups are useful for exploring people's knowledge and experiences; they illuminate not only what people think but also how and why they think the way they do (Kitzinger 1995). The key feature of this method of data collection is that the interaction of the group participants is central to the research method. Focus groups therefore compliment in-depth interviews (and other qualitative methods of data collection) by providing data about the perceptions and

thoughts of a group of people that could not be accessed without the interaction found in the group (Morgan 1997).

5.6 Data Analysis

The method of data analysis used for this research was a thematic analysis underpinned by a 'grounded theory' approach (Bryman 2008). For this research, the application of grounded theory applies in the sense that the data analysis aimed to inductively produce themes from the data. This requires coding the interview and focus group transcripts. However, in line with Charmaz (2000, p.521-522) a 'constructionist' grounded theory approach has been used, emphasising the co-construction of knowledge (or themes) that occurs during (interactional) research. This approach is most suitable for this research because it acknowledges not only the role of the researcher in the process of knowledge production (during data collection and analysis) but also that in focus group research, the interaction between research participants is central to the data that is produced. The next section of the report will present the analysis and findings of the data collected during the research interviews and focus groups.

6 RESEARCH FINDINGS

This section presents the findings from the study. It will begin by addressing the broad themes that were identified from the data. Thereafter it will explore separately the themes identified in the care and crime jurisdictions.

6.1 Broad Themes

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

With regards to the care and protection jurisdiction of the Children's Court, research respondents emphasized that the purpose of the Children's Court is to adjudicate upon the "best interests of the child". According to one magistrate:

The care jurisdiction is one which obviously emphasises the safety and well-being of the children. Statutorily, the paramount purpose of the legislation is to ensure the safety, welfare and well-being of the children. So whenever you do a care matter, whatever the exigencies are within the matter the paramount force often is that you've got to ensure the safety of the children and their well-being. (Magistrate 05)

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

Provide specialist judicial determinations and restrictions of young person being charged with criminal offences and in respect of them, to apply the specialized rules and procedures and outcomes that are available to juveniles and that are not available to persons over the age of 18 years. (Magistrate 05)

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

I think the children's court tries to fulfil two functions that are sort of competing against one another. One is the legal function of adjudicating and managing an individual charge. The other is looking at what are the best interests of that child and in doing that you might need to look far beyond that case. (Government official 01)

6.1.2 Independence and specialisation of the Children's Court

Research participants highlighted the essential role of the Children's Court as an impartial part of the child welfare process that provides a forum for the voices of all parties to be heard. Participants identified the particular importance of the Children's Court as a non-bureaucratic part of the child welfare process, and some argued for example that the Court should be empowered to monitor service provision and programs across both the care and crime jurisdiction. A magistrate noted:

What it is all about at the end of the day is true independence of the judiciary. I think the idea that so many of the things that we do are programs, it means that the Attorney General's department control it, they control the budget, they control the criteria of who gets onto it, etc. And really in a way, it's not allowing the court to be truly independent. (Magistrate 03)

The specialised and expert staff of the Children's Court, especially specialist magistrates, were identified as central to the role and effectiveness of the Court. Specialist Children's Court magistrates claimed they possess the knowledge and skills to manage highly complex cases, understanding and addressing the vulnerabilities and needs of children and young people with due consideration of the research evidence on child development and child psychology. In terms of the care and protection jurisdiction of the Court, these magistrates play a significant role in making judgements about the 'best interests of the child'. In terms of the 'criminal jurisdiction' of the Court, these magistrates are fundamental to the role of the Court in striving for justice; balancing the rights of children and young people with the rights of victims, and the primary need to rehabilitate as well as deter. The role and effectiveness of

the Children's Court was conceptualised in a holistic sense as follows:

I guess the aspects that I would like to think we do well is that most of the magistrates who are not just passing through the Children's Courts, but are staying in the Children's Court, are very committed to children and issues relating to children and take a lot of care and a lot of time, both in care and the criminal jurisdiction to really ensure that they're doing the very, very best they can for the children that come through, whereas I think there can be a tendency compared to say the local court where it's all about making tough standards, getting that efficiency, about getting the number of cases progressed, whereas I think we genuinely care about the approach we take in getting the best possible outcomes. (Magistrate 03)

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

There is a reasonable degree of expertise amongst specialist children's court magistrates and that gets applieda number of experienced practitioners, which mean that things are conducted well. (Magistrate 04)

Commenting on the care and protection jurisdiction it was noted:

I think there's been a bit of an increase in understanding around children's development....it's shown that the judicial officers are capable of taking in information around the welfare of the child, or the best interests of the child, and making decisions that are in line with the latest evidence and information. That's really good. (Practitioner 01)

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

Probably the most important thing is the collaborative attitude of a lot of people working in both of those areas to promote the welfare of children. (Magistrate 09)

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

We have some pretty active interagency consultative groups (for example) the Care Working Party ...we deal with pretty important issues pertaining to the court and care jurisdictions, both from high level policy type issues which we want to discuss and get feedback about but also right down to just the day to day nuts and bolt type problems which are arising in the conduct of cases in the court.... other courts don't have that kind of consultative process so I think that's another big plus for the court. (Magistrate 01)

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

The effectiveness of the Court was also seen as contingent on how the legislation is applied in practice. This varies depending on how the workers involved in a case interpret the 'best interests of the child' (in the care jurisdiction), and how magistrates interpret and balance this principle with the legislation (across both jurisdictions). Research participants highlighted that the 'best interests of the child' and the adversarial nature of the court can at times conflict; or at a minimum, need to be balanced: This was explained by one study participant who commented:

So the evidence tells us that for really young children, we should intervene significantly and massively to try and turn their behaviour around, whereas the legal framework that we operate under states that we really shouldn't do that at all, and we should get these people out of the criminal justice system as fast as possible. So I think the Children's Court tries to fulfil two functions that are sort of competing against one another. One is the legal function of adjudicating and managing an individual charge. The other is looking at what are the best interests of that child and in doing that you might need to look far beyond that case. (Policy Worker 01)

6.1.3 The city/rural divide

A primary factor affecting the experience of young people and professionals working in the Children's Court is whether the matter is heard in a metropolitan or regional centre or in a rural area of NSW. Participants reported a difference in resources available in these areas in terms of specialist courtrooms, availability of specialised staff including legal representatives and magistrates, and access to staff training. Research participants noted that police practice varies between these areas with young persons in rural areas more likely to be treated as adults by police and to receive harsher sentences from magistrates. In many rural areas of NSW, Children's Court matters are heard in the Local Court by non-specialist magistrates. One solicitor working in the crime jurisdiction commented upon this:

I think also when it comes to sentencing and the court imposing the appropriate penalties or sentencing options or whatever, I think generally that works pretty well in the specialist Sydney Children's Court. I think in country courts, where they may not have a specialist children's magistrate, they might just sit as a children's court one day a week or whatever, I think sentences by comparison are a lot

harsher, and that's not as appropriate for young people. (Crime Solicitor 02)

National figures similarly suggest a divide between outcomes for young people in the city and rural areas. On an average day between 2011-2012 young people aged 10-17 from 'remote' areas were almost 4 times as likely to be under supervision than those from 'major cities.' For those in 'very remote' areas this was 6 times as likely (Australian Institute of Health and Welfare, 2013).

The lack of mental health services in rural NSW was seen to be an additional issue of concern. On occasion, young people in rural areas can experience long delays as local magistrates adjourn matters so they can obtain specialist advice, whether from health professional or putting matters on hold until a specialist magistrate is available via the Rural Children's Court Circuit. Consequently, there was a great deal of support amongst research participants for further resources to be allocated to the Rural Children's Circuit, as well as increased funds to attract more professional staff to these areas of NSW.

6.1.4 Resources

A lack of resources was a problem that was raised by all the research participants in relation to the effectiveness of the Children's Court. Lack of resources affects the Children's Court in a variety of ways and with significant consequences. In particular, research participants made a direct connection between delays in the Children's Court and lack of resources across a range of areas.

Firstly, in terms of the 'care and protection' jurisdiction, increased resources are needed to fund services for parents with children in the statutory system. With more resources channelled into early intervention it is possible to reduce the number of matters reaching the Court, thereby reducing Court de-

lays, and potentially reducing the number of children in OOHC. Resources are needed to support consistency of statutory department casework with a child and family. Currently, it is common for the caseworker who appears in the Children's Court to be different from the caseworker who made the report for the Children's Court. This makes questioning in relation to the report problematic and diverts the court's time into addressing the problems that may arise from this. Research participants who work with families in contact with the statutory department report that parents often need more time in order to implement the changes that the statutory department requires of them to maintain contact or custody of their child.

Secondly, the Children's Court Clinic is currently experiencing under-staffing and consequently long delays with the preparation of reports. As the Children's Court Clinic provides reports for the 'care and protection' jurisdiction of the Court, this has potentially harmful consequences for children identified as at risk of significant harm by prolonging the process through which decisions about their care are made.

Thirdly, in the 'criminal jurisdiction' of the Children's Court, it is noted that resources are needed for services to support young people on bail (in meeting their bail requirements and therefore breaking cycles of crime) and for youth accommodation services (as accommodation is a condition of bail and homelessness is an increasingly common issue for young people in the juvenile justice system). These issues will be discussed further in the section on 'criminal jurisdiction'.

Fourthly, it was observed an increase in mental health services, particularly in rural NSW, could divert criminal matters from the Children's Court and potentially reduce the likelihood of re-

cidivism. Mental health court liaison officers, justice health community mental health workers and forensic outreach workers for young persons leaving custody with a mental health problem were identified as crucial service providers for young people in the juvenile justice system. Participants also identified the connection between mental health services and the care and protection jurisdiction of the Children's Court. Increased mental health services for parents in the statutory department system were considered to be crucial as an early intervention measure to prevent or limit the need for intervention from the statutory department. It was further argued this may result in fewer applications to the Children's Court for 'Emergency Care and Protection Orders' and for orders to remove children from their birth parent(s). Further, earlier and increased intervention from mental health services could result in particular matters being less complex, and taking less of the Court's time to address.

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

We need more clinical and therapeutic support for young people in the criminal jurisdiction as well as the care jurisdiction...there'd be a whole lot of supports that we could build in. We don't have specialist domestic violence officers. We've had the mental health liaison with us for a little while, but there is still a lot more that could assist us in our daily work considering the very, very large volume and the serious nature of the matters that we're dealing with. (Magistrate 03)

6.1.5 Accessibility

The understanding that children, young people and parents have of court processes and outcomes will vary depending on their cognitive ability, the

explanation provided by magistrates, the explanation provided their legal representative, and their level of anxiety and confusion on the day of the Court hearing. This can disadvantage children, young people and parents with intellectual disability or mental illness. This can also disadvantage children, young people and parents for whom English is a second language or whose level of education is poor. Children, young people and parents of low socioeconomic status may also be disadvantaged in this area, as they will be less likely to be able to afford a private solicitor with time to detail and explain the legislation, the language used in the Court and the orders that are made. According to the research participants, the majority of young people and families in contact with the Children's Court fall into one or more of these categories.

Finally, the complex nature and number of cases heard in the Children's Court implied there is a considerable workload so that delays become inevitable. Time pressures leave magistrates, and lawyers, with less time to explain outcomes to children, young people and parents, and this may result in poor understanding of Court decisions. This is particularly problematic when children, young people and parents already face barriers to understanding court processes and outcomes. One magistrate noted:

I think sometimes the language can be difficult for them. I try to communicate in fairly simple and sometimes blunt terms, rather than trying to slip in the legal words, but that happens and sometimes because... I mean one of the pressures on us is that often we've got to deal with a lot of cases, so the speed can be perhaps a bit bewildering for people at times. (Magistrate 04)

Similarly, children, young people and parents also face barriers in accessing and negotiating the Children's Court and the systems that operate within it. Firstly, there is a need for resourc-

es that address the power imbalance between children, young people and parents appearing in Court and the departments they are opposing. This relates to legal representation, but also requires funding for more court support and specialist advocacy staff.

Participants suggest that these problems with access could be improved by increasing funding for more court support and specialist advocacy staff, specifically the numbers of juvenile justice officers, Indigenous support workers, children's registrars and court liaison officers. For parents who have their child removed by the statutory department at birth the additional problem of having extremely limited time to organise legal representation before the Court hearing for the 'Emergency Care and Protection Order' was raised. When only the child's mother is available to appear in Court, this window of time may be occurring within two days of the child's birth when the mother's health and mental state are more vulnerable. The limitations of accessibility were noted by one non government practitioner:

I think the fact that children and young people and families are so isolated from the processes that happen at the courts. I think they're completely left out of this system, which is governing so much of their lives... The timeframes, the adjournments, the administrative systems are just set up, it's sort of isolating. You look at children, you look at young people and families; they're completely oblivious to what is going on in the court system. From arriving, the layout of the court, to sitting in court and listening to what is going on and actually understanding the language that is being used. I think there are processes that are put in place around supports and Children's Courts Clinics and all that sort of stuff, but I think that's really alienating for families. (NGO practitioner 22)

Secondly, parents with impaired cognitive ability, parents for whom English is a second language, or parents whose level of education is poor are noted to have extra difficulty understanding the language of the Court and/or in expressing their viewpoints. In addition, these parents may also have difficulty accessing support services that could prevent further contact with the statutory department and the Children's Court (assuming these services are available). This is problematic in the sense that the appointment of a Guardian Ad Litem to act on behalf of these parents raises questions about parenting capacity, placing these parents in a 'catch-22' situation. Parents of refugee background are particularly disadvantaged by these circumstances as they are likely to face cultural and language barriers to understanding the systems that affect their lives in addition to managing mental health problems secondary to trauma. Further, there is a lack of support services for this population group. Research participants indicated that parents of refugee background need specific support services addressing language and cultural barriers to understanding Court processes, legislation and department policies, and that also recognise that this population is a vulnerable group. In terms of support in the Children's Court, the members of this population group require both a culturally sensitive support worker and an interpreter.

Another challenge identified for the court is including the voices of children and young people. This may vary with the age of the child or young person and the people involved in the case. This also relates to the child's or young person's ability to express their points of view. Research participants who work with children in the care and protection system report:

There's a huge sense of unfairness and injustice in that they haven't been heard, and that people aren't listening to them. As far as I know, children have a great ability to be able to speak what they want and how they want certain things. If you have conversations with kids, they're actually very realistic about their parents and what their parents can and can't do and whether they want to live with them or not... it's just about making them part of the process. (NGO practitioner 02)

This excerpt indicates the importance of providing children and young people with the support they need to get their views across during the Court process. Not only is this crucial to their understanding of Court processes and outcomes but also to satisfy their sense of justice, and to demonstrate that their viewpoints are important. Some Magistrates were well aware of this issue:

My philosophy is, no person should leave the court room that I've resided in with any sort of question mark over their head as to what happened and why does it happen. I'm not saying that they will agree with the court's decision, but if I'm able to effectively communicate in what I'm thinking, I'd like people first of all to have a sense that they've had a fair hearing, and in that regard, when I'm doing actual hearings, the law is that sometimes you just have to let people have their say. Even though you know what the outcome is going to be, you still give them opportunity to have their say.... In my view, in this jurisdiction, that's essential...I think the only difference would be the effort that the individual magistrate puts into achieving such a result. (Magistrate 06, Regional)

Research participants from stakeholder groups commenting on the care jurisdiction highlight the tension for them between acting on the child's instructions and doing what is in the child's 'best interests'. They stressed the importance of promoting the participation of children and young people in the decisions that affect them even if their wishes cannot be upheld. As

many young people in the juvenile justice system are currently or have previously been in the care and protection system, it was considered important to understand if young people's perceptions of the Children's Court as adolescents are shaped by their experiences as children in the care and protection system.

6.1.6 Clientele: the overlap between care and crime

A central issue that emerged from the data analysis relates to the overlap between the two jurisdictions of the Children's Court. Many of the young people in the juvenile justice system have a history of contact with the statutory department and multiple foster care placements. Several research participants commented on this issue:

Not all, but a lot of the children in the criminal jurisdiction have had some brush with the DoCS in the past in relation to them being at risk of harm, in relation to their parenting or how they have been parented. (Magistrate 02)

These are kids with really serious welfare issues, who DoCS either can't or won't work with. Can't so much because of lack of resources or because that person has got really challenging behaviour; you can't just put them in some placement. Or sometimes won't, because the kid is about to turn 16 or because of some idea of 'oh well this kid can go home if they want to, there's no child protection issues at home, why don't they go home', or because of some idea of 'well, juvenile justice is looking after them now, we don't need to worry'. (Crime Solicitor 02)

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

We see, unfortunately, children who we knew in the care jurisdiction and who were say removed from their parents and placed in out of home care a few years ago. A few years later we start to see them appearing in the criminal jurisdiction.....It does bring a whole lot of complexities because the way the legalisation is worked out is that there is the care legislation and then there is the criminal legislation and sometimes we have issues that come up. For example, in bail applications, we're nearly always dealing with other welfare issues and in crime and sentencing so it's quite complex because we'll thoroughly know in fact that there is a huge overlap in the way in which the structure of the court is and the jurisdiction. You can't actually use your knowledge you know from one jurisdiction and the other because that's not fair, it's very important that you approach each matter in isolation because that's what you're meant to be doing. It does make it very complicated. (Magistrate 03)

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

There are trends that go up and down, but overall the kinds of issues to do with poverty and marginalisation and poor parenting and lack of education and substance abuse and exposure to domestic violence, those kinds of things that is the vast majority of the kinds of households that the kids who are committing offences and obviously coming up in the care area, have remained the same. (Magistrate 03)

This raised significant concerns for the research participants about resources and the coordination of services. They considered that the separation of the two jurisdictions is to an extent superficial, and that children and young persons in the system may be better served by a case-management approach where care and protection and juvenile justice services were coordinated. The need for an integrated response was elaborated by one of the research participants:

The motive for separating the two areas originally, was we didn't want to see a situation where young people were held in detention or subjected to criminal charges for no other reason than they were neglected. And we certainly didn't want to see a situation where they were held in custody for longer than their offence would have warranted. But it's possible you can solve those problems without this complete separation of care and justice. So I'd be in favour of a partial reintegration of the two areas. Just so that we get a seamless process of identifying families in trouble, and kids who are likely to get into trouble as a result of that. In providing the families some kind of response, rather than just the child. (Government official 02)

This draws attention to the central importance of resources dedicated to early intervention in order to prevent children from entering OOHC and to prevent entry into the juvenile justice system. It also highlights the link between availability of mental health services and the Children's Court, given that children in OOHC frequently have a parent with a mental health problem and a history of incarceration.

Finally, this overlap between care and crime potentially adds weight to the idea that the Court should be empowered to monitor the provision of services. Research participants reported that while young people in the juvenile justice system generally have a history of contact with the statutory depart-

ment, there is a lack of adequate intervention by the statutory department. Concerns were raised that some young people do not access appropriate support services until they have committed a crime. The effectiveness of the Children's Court, and the legislation that operates in the Children's Court, is largely contingent on the availability, effectiveness and implementation of services. A magistrate commented:

I dealt with two juveniles who have committed a number of serious offences and I refused them bail. In custody they were both diagnosed with bipolar disorder. They had been completely undiagnosed and because they had never seen a psychiatrist -nobody had ever addressed these problems and it was only whilst they were in custody that they were given medication. That's a problem. (Magistrate 11, Regional)

6.1.7 The Indigenous population

It is important and necessary to highlight the specific and significant problems faced by Indigenous young people and families in contact with the Children's Court. Respondents acknowledged that the Indigenous population of NSW face particular barriers to accessing and negotiating the system. Importantly, there is a major deficit in resources for Indigenous young people and families. In particular, services controlled and run by Indigenous workers and communities are needed. The lack of culturally appropriate responses and services in NSW were cited as a social justice issue that translates to an overrepresentation of Indigenous children and young people in the care and protection and juvenile justice systems. This is particularly problematic when the young person has a mental health problem as the following quote illustrates:

Sitting in a room and talking with a non-Aboriginal psychologist, even with the language, it's probably just not going

to happen. So I think that's an issue that we've heard anecdotally from talking with Justice Health staff about the Indigenous young people in custody- they don't report mental illness, they don't access the mental health services that are there. (Crime Solicitor 02)

Participants also commented that the Aboriginal Legal Service was underfunded and understaffed. For example one of the respondents commented:

I think legal representation is an issue and it's one that's particularly problematic for Aboriginal kids in remotes areas or rural areas. And I'm thinking nationally here not specifically to NSW, but it's a problem in NSW as well, that the Aboriginal legal services really don't have the resources to be able to represent young people and Indigenous young people to the extent that they should be represented. And I think more generally, legal aid commissions do the best with the resources that they've got but there are problems in terms of the legal representation for young people given that they're not in the same position as adults to necessarily be able to afford private legal representation. We know many adults can't either, but the problem is more accentuated or exacerbated in terms of young people and lack of resources. (Academic 01)

Additionally, Indigenous families were perceived by respondents to face systemic disadvantages as a result of lack of understanding from the statutory department and NSW Police about Indigenous family structures and their application of ethnocentric understandings of parenting. Further, Indigenous families face systemic disadvantages as a result of police practice. Bail is used more frequently than cautions in this population group. This is problematic, as Indigenous families are often unable to afford bail. Indigenous families are also often unable to afford fines when these are imposed or legal advice and representation. Additionally, Indigenous families face systemic disadvantages accessing and negotiating the

systems that intervene in their lives because of language barriers and poor levels of education. Furthermore, due to lack of financial resources, it was pointed out that Indigenous families do not always have the means to meet the requirements set by the statutory department for contact or custody.

In the care jurisdiction, the legislation on OOHC for Indigenous children is not always followed. This legislation states that where practicable Indigenous children should be placed in foster care with an Indigenous family. This does not always occur due to a dearth of Indigenous foster carers. Moreover, this policy applies a blanket approach to the issue that Indigenous children need to remain connected to their culture, without acknowledgement of the differences between Indigenous groups.

6.1.8 The Nowra Care Circle

Research participants commented on the benefits of the Nowra Care Circle Pilot as a community-based response that promotes the participation, understanding, and self-determination of the Indigenous population in that region. As stated by two of the research participants:

I think that it is a very good way in which you can improve the participation of Indigenous people and young people in the system. I mean out of everything I've seen in the last say 10-12 years, I think that's actually the best way to actually improve the participation and the outcomes for those kids. (Solicitor, Care Jurisdiction 01)

Aboriginal people who've had experience with that feel consulted, listened to, part of the process, valued; it's increased their value and credibility as elders in the community...It's breaking down barriers, making the justice system more accessible to Aboriginal people. (Magistrate 03)

There was unanimous support from research participants for increased consultation with Indigenous communities

about the barriers facing Indigenous communities and particularly Indigenous youth. While many of the research participants were reluctant to speak on behalf of Indigenous communities in relation to how the Children's Court could be changed in order to better meet the needs of Indigenous communities, it was noted by several research participants that any effective change would need to be based on building relationships with Indigenous young people and families over time, and directed by the voices of Indigenous communities. The following quote is demonstrative:

I think the more we hand that power back and offer support, the better for all involved, but we need to do it carefully, sensitively and appropriately. (Academic 03)

I suspect the most important fix is a long-term fix. I'm not sure whether it's ever possible because I think Indigenous people have some basis for being fearful of court processes because there is a history of them not being well treated by the justice system. So how you build up that trust, I'm really not sure, apart from just doing it really well. If we were able to take more time, I think it could improve, but I don't think that that's isolated to Indigenous families. So more time so there was greater opportunity to understand, greater opportunity to process what was going on, even greater opportunity to develop a greater sense of trust with their lawyer. (Crime Solicitor 03)

Research participants highlighted the need for more Indigenous juvenile justice officers, field workers, court staff, and Guardian Ad Litem. Court processes could also be changed to better meet the needs of Indigenous families. Research participants cited the Koori and Murri Courts in other states as examples of how the NSW system could be improved. It was also suggested that the Nowra Care Circle Pilot be extended to adolescents.

6.1.9 Adversarialism in the Children's Court (care matters)

There were divergent views concerning the adversarial nature of the Children's Court in the care jurisdictions in particular in relation to its suitability for working with Indigenous families and young people but also in relation to the broader population. Several of the research participants highlighted how the adversarial nature of the Children's Court would seem to undermine its underlying principles and philosophy. It was noted this model can deter parents from agreeing to 'Emergency Care and Protection Orders' out of fear that the statutory department will later use this agreement as evidence for a removal order. With an adversarial model, parents in the statutory department system no longer have the option of voluntary undertakings. Participants commented on the lack of transparency and communication with parents noting relationships with statutory caseworkers are non-trusting, and plans non-collaborative. The following quote captures this issue:

Caseworkers used to be very clear and upfront with families, whereas now they don't build relationships, so they don't have those conversations, everyone goes to court trying to find the evidence. (NGO practitioner 02)

However, practitioners were not supportive of a complete move to an inquisitorial model in the care jurisdiction. Rather, there was support amongst participants for using approaches such as therapeutic and case-management approaches to shape court practice. This was in relation to supporting parents in meeting restoration requirements, and also for the purpose of including the perspectives of children, young people and parents in Court processes.

6.1.10 Specialist and Therapeutic Courts

There was wide support amongst the research participants across both care and crime jurisdictions for more specialist and therapeutic courts. In particular, there was support for courts that take a case-management approach so that young people are supported in making changes; are included in Court processes, increasing their understanding of Court processes, and enabling them to see people in authority as persons that can help them. In the crime jurisdiction, there was support for the Youth Drug & Alcohol Court (disbanded in 2012) as it was seen to provide young people with an intensive, long-term approach to addressing offending behaviours. As stated by one of the research participants:

In a therapeutic court the young people, to a very large extent, speak for themselves, not through their lawyers. We do some very, very informal court settings... with us sitting around the bar table with the young people coming along and just having a round table discussion. Those discussions end up being very frank and in language that they can really involve themselves... They see that the whole system can work to help them, and that the legal system can be part of their healing and part of their therapy as opposed to something that is just there to either punish or bewilder them. (Magistrate 03)

There was also support for specialist and therapeutic courts such as the Justice Health Adolescent Court and Indigenous Courts, while others cited the Mental Health Courts (as in the US). At the same time, concerns were also raised about the city/rural divide and access to resources. If more specialist and therapeutic courts are to be introduced, this should not further differentiate the practice and implementation of legislation in metropolitan and rural areas.

6.1.11 Facilities

Court facilities were a major issue raised by the research participants in relation to the purpose, role and scope of the Children's Court and, as highlighted previously, a key issue that separates practice in metropolitan and rural areas. Facilities in rural areas are extremely poor with no separate children's courtrooms; children's matters are heard in the Local Court alongside matters for adults. This means that children with a court hearing may have to wait for their matter to be called alongside adults with a court hearing. At times, children in the juvenile justice system may also be held in docks or cells due to a lack of other places for them to wait for their hearing. This undermines one of the fundamental purposes of the Children's Court to treat children and adults separately and to recognise children as a vulnerable group that need specialised treatment before the law.

The problem of poor facilities also applies in metropolitan areas. Whilst there are separate Children's Courts in Sydney, Newcastle and Wollongong many research participants highlighted the lack of suitable waiting areas, conference rooms and interview rooms in all Children's Courts except for the newer and custom-built Children's Court at Parramatta. There was concern about the lack of privacy for solicitors to meet with their clients, and there were concerns for safety where cases related to domestic or family violence. A solicitor commented:

There are really practical problems like... when you're in court they call all the care cases when you're waiting in a room and it comes over a PA system in your room, and I've been sitting with kids in a room, 'oh yeah, that's the Smith family, oh DoCS have taken their kids away have they', and they recognize names. The care jurisdiction should be in a totally separate court. I know why it was done the way it is, I

know there's not enough ... but I just think it's outrageous that care families...and I know often they're the same families, they still should have a totally separate area, and there should be more space for the little kids to be safe and play, and not near the big 17 and 18 year olds that we have in the criminal section. (Solicitor 06)

They also highlighted that families and young people in rural areas are also disadvantaged by poor audio-visual link (AVL) facilities. These facilities are either not available or unreliable. This means that children, young people and parents may have to travel great distances to appear in court. This particularly disadvantages parents in custody, and may exclude these parents from participating in the Court process. This also disadvantages young people in custody, in travelling to Court because AVL facilities are unavailable, they often miss out on participating in the rehabilitation programs they are assigned to. To cite the comments of one magistrate:

One of my constant bugbears is the use of audio visual links. In theory, they are a good idea, because it's crazy to have a kid taken out of a detention centre, brought to court, hang around most of the day in a cell, for what might be five or ten minutes in court. And sometimes that means transported really long distances to do that. That's got to be counter-productive, particularly if they can be engaged in programs and things. But often the people I think at the detention centres, are not as expert as they could be in operating the systems. Often there's competition for the use of the links, and often the video links stuff presumes that the lawyers have had a chance to speak to clients beforehand getting it structured. (Magistrate 04)

While many respondents spoke favourably of technological innovations such as Audio Visual Linkup, a number were more cautious:

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

6.1.12 The Children's Court Clinic

The Children's Court Clinic is located in Sydney and provides clinical assessments to the Children's Court for care and protection matters. Lack of resources is a crucial issue impacting on the effectiveness of the Children's Court Clinic. Participants reported that because there appeared to be under-staffing there were long delays for reports. Children's Court Clinic reports were seen to be highly influential in cases such that orders would be postponed if a report is pending. Many participants affirmed the importance of the Clinic reports as offering impartial, objective assessments that could be seen as a sound basis for decisions:

By and large the quality of reports from the clinic is very high and does have a significant impact in the cases where there is a report because quite often it will provide a clear way forward. (Magistrate 04)

The things that I like about it are that it's independent. I really like the way that the report is a report ordered by the court and it comes to the court. I think that people, everyone, including parents, and legal representatives, are really well able to understand that notion of independence, so I think that works incredibly well. As I say to you, I'd like it to be available both in the criminal and car jurisdiction as it was I think for a while. (Magistrate 03)

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

However, the time delay in the Court receiving reports is seen to be particularly problematic as noted by magistrates:

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

So there needs to be more clinicians. If anyone that you interview says anything different to that I would be greatly surprised. They do a great job in the context of what they're able to do. But you can't make a silk purse from the sow's ear, and if there's not enough of them and they're not adequately financed, then that problem is going to be an ongoing problem. It's too slow. They need to get the reports done quicker, and that's not their fault. The fault is that there is not enough of them. Too many cases, not enough of them. (Magistrate 05)

Alternately, some research participants working in the care jurisdiction highlighted how these assessments do not always take all of the contextual factors into consideration because the reporting professionals do not have a relationship or rapport with the families they are assessing.

6.1.13 Training

Research participants emphasised the need for all statutory department caseworkers to receive more training on the difficulties facing parents in meeting restoration plans. In particular, poor education, low income, lack of transport, and mental health problems were identified as barriers facing parents. The need for statutory department caseworkers to receive more training in the areas of mental health and intel-

lectual disability was also emphasised strongly by several participants.

In addition, the research participants highlighted the need for all practitioners in, and associated with the Children's Court, but particularly in the statutory department and NSW Police, to receive more cultural training to improve practice with Indigenous young people and families as well as young people and families from other minority groups. Research participants also indicated the need for solicitors to receive more training in advocacy and scrutiny of evidence. This was mentioned in association with the lack of 'standards of evidence' and 'burden of proof' in care and protection cases and the discretionary power of the statutory department, as well as the need for young people in the juvenile justice system to have high quality legal representation to counterbalance the excessive power held by NSW police.

Magistrates raised a number of different training initiatives they believed would benefit their work. Several magistrates expressed a need for more professional development, including attending specialist conferences. It was also suggested that a greater range of magistrates should be enabled to attend specialist conferences, as this would enable Local Court magistrates in rural areas to become more specialised. Magistrates also indicated that collegial support and more opportunity to debrief would be beneficial, particularly for magistrates who sit in single Local Courts in regional areas. Collegial support and debriefing was seen as essential due to the frequently traumatic nature of the cases heard. Some magistrates also expressed a need for greater training on social welfare, child development and child psychology. Children's crime solicitors expressed the need for training on effective communication with young people as well as training on mental health issues.

In relation to stakeholders working in government and non-government organisations, requests for training related more specifically to the need for better understanding of court procedures and protocol, including affidavit writing. In addition, Indigenous community workers specifically indicated the need for more court advocacy training. Both Care and Protection and Juvenile Justice stakeholders indicated the need for resources that would allow for better training and mentoring for new staff.

6.2 Care and Protection Themes

6.2.1 The role of the statutory department for care and protection

The discretionary power of the statutory department is seen by many participants as a central factor that impacts on the Children's Court decision making. Families and children in the statutory department system are subject to assessments of statutory department caseworkers about what constitutes 'risk'. How statutory department caseworkers interpret 'risk' will be influenced by their understanding of 'good parenting', the 'best interests' of the child, and the availability of options for addressing the 'risk'. In this context, the statutory department has the authority to determine what referrals are made for families, whether removal of a child from their birth parents is necessary, whether restoration is possible, and to stipulate what is required of parents in order to achieve restoration when a removal order has been made. In this respect, the statutory department was characterised as the 'judge and the jury' on what is in the 'best interests' of the child. Several research participants asserted that, for this reason, 'care' and 'protection' should be separated. The following quote is illustrative:

I think it's all part and parcel of the problem in them trying to be the policeman and the helper, you just can't do it: 'I'm here to help you and I'm here to remove your child'; there should be another body. (NGO practitioner)

It was argued the perceptions of individual statutory department caseworkers about particular families influence how the legislation is interpreted. Moreover, how the legislation is interpreted and utilised will vary depending on the knowledge of statutory department caseworkers on a range of issues including mental illness, developmental disability and alternative family structures. Research participants linked the overrepresentation of Indigenous families in the statutory department system to statutory department caseworkers' lack of understanding of Indigenous family structures, and parochialism around what constitutes 'good parenting'. This also applies to families of non-English speaking background. It was noted by research participants that the number of families in the statutory department system of non-English speaking and refugee background has increased.

The statutory department's authority to influence the information that is presented in Court was noted by some research participants. When reports are made about children at risk the statutory department determines what intervention should occur. The statutory department also selects information from the reports that they see as relevant to present in Court. As there are no rules of evidence in the Children's Court for 'care and protection' matters, the interpretations of statutory department caseworkers were perceived by participants to be highly influential, and not always critically evaluated. This was seen by participants in this study to be at times problematic, as the statutory department can exclude information that is inconsistent with their version of

events and recommendations. A number of the research participants raised the issue that they have had statements from their mandatory reports taken out of context, and that often the perspectives of support workers who spend the most time with families are not represented in Departmental reports to the Children's Court. When this occurs, the relationships that support workers have with families are compromised.

Sometimes we make reports based on our concerns, but what we're seeking from DoCS is to put some services in and to get some support for the family, whereas they might come from the other perspective of 'we need to remove this child and then maybe support the family'. We haven't necessarily recommended that, we've just said we have identified risk and we think this family needs support. (NGO practitioner 04)

Research participants also highlighted how the perspectives of carers are regularly excluded from the reports presented in Court, and that whether they are included is at the discretion of the statutory department. It was noted by several of the research participants that once the statutory department establishes a particular understanding of a child's needs and the potential for parents to change, this understanding becomes entrenched and conflicting information is treated as irrelevant. Furthermore, the recommendations made by the statutory department were not perceived to be based on research evidence.

In this context, there was opinion expressed by research participants on the feasibility of using Alternative Dispute Resolution (ADR), as a means for addressing care and protection matters outside of the Children's Court. There was consensus amongst the research participants that ADR could only work if the statutory department saw this as a viable option. The statutory department has the discretionary power

to determine which cases reach the Children's Court and determines which cases can be dealt with outside the Court. Given this degree of influence, flexibility and openness were advocated by a number of respondents.

6.2.2 Contact

'Contact' was an important issue raised by research participants in terms of the purpose, role and scope of the Children's Court. In keeping with the viewpoint that the purpose of the Children's Court is to provide impartial decisions in the 'best interests' of children, almost all of the research participants affirmed that the Children's Court should be empowered, as they are, to make contact orders. This was seen by the research participants as essential to the rights of children and parents, as contact is a contentious issue and should be determined by a party with no agenda. It was pointed out that, if decisions about contact are in the Children's Court's jurisdiction solicitors have the opportunity to put forward the viewpoints of their clients and advocate on their behalf. These viewpoints can also be put forward in clinical assessments presented in Court. As stated by one research participant:

I believe that most young people take it very seriously and appreciate what the court is sort of charged to do. It's the same for parents too. They generally will cooperate with the (court) clinic and they will treat the court with the kind of respect because they understand that it's independent. Some of them obviously think the court is just an add on to Community Services and they think they're all in the thing together, but that's an unusual perspective...Most of them can see that 'here's my chance to explain just why I should not have my kids removed'. (Court Clinic practitioner 01)

Other points raised by the participants about 'contact' orders are that they should be more flexible, and should not

be applicable for long periods of time. Several of the research participants argued that it should not be an option for a contact order to apply to a child's entire childhood. In their view this undermines parents' rights and promotes the attitude amongst statutory department caseworkers that once orders are made there is no need to support parents in increasing contact or working towards restoration. Research participants also noted that children over a certain age should be actively included in decisions about contact. Citing instances of children over a certain age absconding from foster homes to 'self-place' with their birth parents, it was pointed out that in certain cases the young person assumes a carer role in the home of their birth parents because the parents' mental illness, intellectual disability, or drug and alcohol related problem. In this context the point was made that working in the 'best interests' of children cannot be separated from providing resources and support services to their parents. A further reason cited for the Children's Court to have decision making power on contact is that this will keep statutory department caseworkers separate from these orders and therefore potentially foster better working relationships between statutory department caseworkers and the parents of the children in their system. Some participants however expressed support for the statutory department making decisions on contact, noting that statutory department caseworkers have more knowledge about the children and parents in their system and are better placed to make judgements about the 'best interests' of the child with respect to contact and allocate resources to managing these decisions on contact.

6.2.3 Rights and 'best interests' in practice

Some research participants spoke of inadequate efforts on the part of the Department to engage more fully in early intervention to prevent escalation of care and protection matters and consider reunification as a permanency option.

You've also had six years of this going on where they haven't done the early intervention, they haven't assisted those parents. (Care and Protection Solicitor 01)

So that's been the huge shift across. So where we used to be involved in voluntary undertakings, or undertakings to the Court, with structured supervision orders, or plans where children remain in the house actually when it goes to Court, it's the removal or long term orders. So it's shifted into a very different way of working. (Practitioner 02)

Restoration in the Children's Court is getting rarer by the day. (Practitioner 03)

Concern for children's and parents' rights was also mentioned in relation to several aspects of decision making. There was concern amongst participants that 'permanency planning' is prioritised over 'restoration'. The provision of resources and support needed by parents to meet restoration requirements was raised. Research participants also highlighted that parents are often given inadequate time to make the necessary changes in their lives to meet restoration requirements. Non-government service providers indicated they were often asked by the statutory department to assist parents in making changes in short and unrealistic time frames. Research participants stated that, when parents responded with changes the reality and permanency of these changes were challenged in Court by the Department in order to persevere with their original plan and recommendations. The following quote is illustrative:

So the fact that we get referred to create change, and then aren't allowed the time for that change, and then the change is not acknowledged because it creates a bit of a kerfuffle in the whole system of 'well, we were trying to get the kids to this carer'. It's a huge pressure for us in that we're forced to create change for everyone very quickly, almost to the point that they (the statutory department) don't expect it and it's not valued, or it's not hoped for. Then when it does happen, we've created a bigger problem for them. It's like: 'oh, she's drug free; 'oh, she's left him'. It's like: 'oh, why now'. Then you've got these changes that the court and the people don't acknowledge as real or that will last. You have kids that can see the change in their parent and still can't go home. (NGO practitioner 05)

Furthermore, parents and their legal representatives often have inadequate time to prepare for Court because the statutory department frequently submit their Court documents just before the hearing, leaving little time for these to be reviewed and responded to.

Research participants who practice in the 'care and protection' field emphasised that too often, statutory department intervention only occurs once the 'risk' has increased to a level where there is no alternative to removing the child, at least temporarily. Also raising concern in relation to parents' rights is a lack of transparency from the statutory department about how 'risk' is assessed and how requirements for restoration are set. Parents are often unaware of what they have to do in order to meet requirements for restoration suggesting these should be given to parents in writing. The implications of having explicit communication from the statutory department for other professionals who report to the Children's Court (for example, the Children's Court Clinic) were also raised. Participants asked for timely information from the statutory department about how 'risk' is assessed and how requirements for

restoration are set as this is essential information needed for making their own family assessments.

Issues in relation to parents' rights were raised in terms of pre-natal 'child at risk' reporting and the removal of children at birth. Decisions to remove children at birth are frequently justified on the basis that the parent has other children who have been removed. Research participants argued for such decisions to be grounded in an assessment of the parent's current situation. Other research participants noted that there is also lack of transparency about time frames when children are removed at birth:

They don't know anything about time frames and when they could possibly get their baby back; I think they often feel misled a little bit. They think they can just go to the Children's Court and explain what's happening and they'll get their child back. They don't realise it's a four week process; that the child is going to go into temporary foster care. (NGO practitioner 03)

The lack of knowledge of court processes impacts on parents' decision making about getting legal advice. Delays in getting legal advice can hamper preparation for court hearing. The lack of knowledge about processes affects the accessibility of the Court process to parents and their comprehension of Court deliberations and outcomes.

6.2.4 Mandatory Reporting

While none of the research participants stated that they were opposed to mandatory reporting of children at risk, several problems were identified in terms of its implementation and implications for practice. Some argued that mandatory reporting was being used in place of supportive interventions and had in practice, translated to less professional engagement with families about care and protection issues. For example one participant commented:

People purely see that their professional duty is to make a report and then do nothing else with that. So it stopped the discussion and the conversation with families about risk to their children. It's just gone: 'I've ticked that box, I've done my deed, I've made my report and that's it'. Unsubstantiated allegations are put forward as evidence and truth to the Court when it's just a report that needs to be followed up. ...no one has actually checked it out or asked anyone about it. (NGO practitioner 02)

The unintended consequences of mandatory reporting noted were that it encouraged the practice of initiating intervention only once a certain threshold of 'risk' has been reached. This was perceived to direct intervention away from early and supportive help and use of the Children's Court as a statutory department case management tool. Research participants highlighted the purpose of the Children's Court as being the provision of an impartial forum for statutory department recommendations and statements from families and other relevant parties to be heard. Participants from both jurisdictions stressed that early intervention from child care and protection services is central to addressing the issues facing the children, families, parents and young people who present in the Children's Court.

6.2.5 A National Framework

There was some support amongst the research participants for a national framework for care and protection legislation. This support was based on the need to make decisions more consistent and transparent and to make the system more efficient overall. A key point that was raised by some of the research participants is that the current state system does not work in the best interests of children who move interstate or have parents in two states:

Especially when we've got people who have moved interstate or there are issues where parents are separated and one parent is somewhere and the other parent is somewhere else, or something has happened in another state and we don't have information here. (Solicitor 02)

However, there was also concern that the implementation of a national framework for care and protection legislation might increase the level of bureaucracy. The difficulty of reaching agreement on a national approach and minimum standards to which the states could agree was also acknowledged. Those who supported a national framework for care and protection legislation suggested it be modelled on Victoria's system.

6.3 Criminal Jurisdiction Themes

6.3.1 Police Prosecutors

Participants expressed mixed opinions about the role of police prosecutors in the Children's Court. On the one hand, police prosecutors were seen as 'expert', 'fair', and effective contributors to the Court process. On the other hand, when police prosecutors were seen as inexperienced and partial, research participants suggested that there should be no police prosecutors in the Children's Court. A magistrate elaborated:

Police prosecutors, if they present their case well are invaluable. Just like a solicitor is invaluable if they present their case well, but if they don't then that is hopeless...But police prosecutors I think often are ill prepared, haven't had a chance to look at their brief. I am sometimes concerned about their level of legal training and their knowledge of their function as an officer of the court in presenting their cases fairly. So I think something needs to be looked at in training police prosecutors. (Magistrate 02)

6.3.2 The crime-welfare nexus

A number of research participants commented on the interplay between welfare and criminal issues. This was seen to relate to systemic, structural issues. The young people appearing in the Children's Court for criminal matters usually have complex family and mental health problems and come from a background of socioeconomic disadvantage and are often unable to access services that could keep them out of the juvenile justice system.

What is happening in the Children's Court is kids being placed on really onerous bail conditions, that are often way out of proportion to the seriousness of the offence. They're often imposed for welfare reasons really. They're criminalising kids really for having problems that are beyond their control. (Crime Solicitor 01)

This particularly disadvantages young people with a mental health problem or intellectual disability. The following quote is illustrative of the impact of these issues of disadvantage:

One legal diversion option is Section 32 of the Mental Health and Forensic Provision Act (1990)...to put offenders on a treatment plan if they suffer from intellectual disabilities or mental health issues. However, this section states that a psychiatrist/clinical psychologist must write a report for this option to be viable. Young people do not have the money to commission such a report, and there are limited psychiatrists and psychologists available to do pro-bono work. (Crime Solicitor 01)

It is also important to note the role of Juvenile Justice Officers in the Children's Court. Research participants commented that Juvenile Justice Officers play a crucial role in assisting young people in the Children's Court by connecting them to support services and accommodation.

Juvenile justice officers are fantastic overall. Again it depends on their level of training but at this court we couldn't func-

tion without them. So often I read facts and alarm bells are going off, and I request the juvenile justice officer, 'can you just have a word with this child', because if I just throw him out on the streets, that's exactly where he'll be. And the juvenile justice officers step in, with their limited resources and time, but come up with magnificent plans, often that stop the homelessness that I can see as potential. A child is committing crimes because they have no money to buy food because mum's kicked them out or whatever. (Magistrate 02)

Some research participants noted that whilst Juvenile Justice Officers generally provide useful reports to the Court and are able to make recommendations about the rehabilitation that a young person requires based on research evidence, they at times compromised their role by trying to unduly influence judicial decisions. Research participants were clear that Court processes and orders should be impartial.

6.3.3 Diversionary Measures

Many research participants expressed their support for diversionary and alternative measures, highlighting that some of the cases heard in the Children's Court could be dealt with by other means. Children's Court magistrates who participated in the research specifically pointed to the need for the criteria for Community Service Orders to be expanded, for Youth Justice Conferences to be available for more serious offences, and for the criteria for Work and Development Orders to be more flexible. However, this must be coupled with an increase in services for young people to be referred to, addressing the causes of juvenile crime. There was also support for the implementation of therapeutic case management, and restorative justice practices. One research participant suggested:

I think the restorative justice process and youth justice conference, by and large, make it more likely that a young person will be able to develop some empathy, show some empathy and take responsibility for their behaviour, than through the traditional sentencing process. (Justice health worker 01)

6.3.4 The Bail Act

There was consensus amongst the research participants for the Bail Act to be significantly amended or repealed. The Bail Act was seen to be punitive, treating adults and children virtually as equals, and therefore undermining the role of the Court to act in the 'best interests of the child'. Under Section 22A of the Bail Act children and young people (similarly to adults) can only apply for bail if they had no legal representation when the initial ruling was made or if there is new evidence pertaining to their case. Further, the Bail Act was viewed as counterproductive in terms of its accommodation criteria, which results in more young people being in custody. When a young person's bail is conditional on the statutory department finding accommodation that will support the young person in meeting their bail requirements and this accommodation cannot be arranged, the young person will be held in custody. As there is a shortage of youth accommodation services, this results in many young people being held in custody unnecessarily¹. This follows the NSW Law Reform Commission's Report on published in 2012. New Bail laws were announced in 2012.

6.3.5 Technical issues around offence type

Research participants also identified administrative aspects of the juvenile justice system that are problematic. One of these issues relates to the Children's Court not having jurisdiction over driving offences committed by young people over the age of sixteen. These young people will not have their matter dealt with in the children's court. However, if a young person over the age of sixteen commits a driving offence at the same time as committing another offence that does fall under the Children's Court jurisdiction, then both matters are dealt with in the children's court. As young people in the juvenile justice system have the benefit of specialised staff, and then access to particular youth services, this inconsistency in the system can produce serious inequities.

¹ In 2012 the NSW Law Reform Commission published a Report *Bail* Number 133. [http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/vwFiles/r133.pdf/\\$file/r133.pdf](http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/vwFiles/r133.pdf/$file/r133.pdf)

7 DISCUSSION: KEY FINDINGS, IMPLICATIONS AND RECOMMENDATIONS

The interview data reveals that the strength of the Children's Court lies in the specialised knowledge of magistrates and judicial officers and the independence of the Court to provide children, young people and parents with an impartial decision making process. However, it is clear that the Children's Court is facing a number of challenges in terms of its scope and effectiveness. These challenges are interconnected and relate to the complexity of problems faced by the children, young people and parents who appear in the Children's Court, issues with resources, legislation, training and professional practice. Indigenous children young people and parents face a range of systemic disadvantages that make them more likely to be in contact with the statutory department and/or the NSW police systems, and consequently in contact with the Children's Court (Cunneen and White 2011). Moreover, children, young people and parents of non-English speaking and refugee background are also disadvantaged in terms of experience of the system and access to appropriate support services (Douglas and Walsh 2009). The implications of these challenges for the Children's Court and its capacity to operate in the 'best interests of the child' are discussed below. The discussion will focus on four main themes from this study relating to power and rights, the best interests of the child (care and protection), the best interests of the child (welfare and justice), and future directions (evidence-based practice).

7.1 Power and Rights

The challenges facing the Children's Court in the current context have serious implications for the rights of the children, young people and parents in contact with the statutory child protection, NSW Police and the Children's Court. One of the primary issues raised by the interview data was how the accessibility of these systems can be disempowering for children, young people and parents. This relates to the adversarial nature of these systems, lack of advocacy and support staff, and varied legal representation. This also relates to lack

of transparency and explanation around assessments and recommendations (in the care and protection jurisdiction), legislation, court processes and decisions. This finding is supported by the literature, which indicates that parents frequently feel confused and alienated in the care jurisdiction of Children's Court processes (Sheehan 2003). Literature on the crime jurisdiction of the children's court is less clear; McGrath (2009) conducted a longitudinal study in the NSW Children's Court interviewing 206 young offenders. He found that not all young people in NSW felt stigmatized by their court experience, though when they did, this was associated with further reoffending (Harris, 2001). McGrath also found that perceptions of fairness were reasonably high, based on this he concluded that magistrates were "doing an admirable job under difficult circumstances" (2009:42).

In the care jurisdiction, the literature shows that parents, and particularly mothers, of children in the child protection system "demonstrate a lack of information and understanding about the relevant processes and laws and an inability to advocate for themselves when dealing with departmental staff" (Douglas and Walsh 2009, p.213; Fernandez, 1998). Furthermore, the statutory department for child care and protection has increasingly overlooked the social disadvantage and vulnerability of parents with children in the system, which in turn has increasingly placed constraints on parents in accessing and negotiating with statutory systems (Fernandez, 1996, 1998; Thomson and Thorpe 2003; Thorpe 2008). Research in the United Kingdom has produced similar findings (Dale, 2004). Studies with child protection practitioners reveal that these workers highly value participatory principles, and experience their statutory role as obstructive to promoting the participation of parents in decision making processes. Child protection practitioners must operate within the constraints of institutional processes, large caseloads, lack of support services to refer to, and their statutory responsibilities. These constraints make it difficult to develop supportive and trusting relationship

with parents due to lack of time and the adversarial communication encouraged by the child protection caseworker role. Moreover, participatory practice can be constrained by lack of cooperation from parents (Darlington et al, 2010).

Douglas and Walsh (2009) argue that addressing the access problems faced by parents involved in child protection system needs to account for the particular needs of the parents involved. The participants in their research (community-based lawyers and human-services workers) suggest that parents would benefit from a formal, step-by-step statutory department protocol for information provision. This may result in parents being more aware of their rights and inclusion of safeguards to ensure that parents were not only provided with information but that they understood this information. When parents do not have an advocate to help them navigate the system, this is essential. Increasing the accessibility and transparency of the care and protection system may also reduce the levels of mistrust that parents feel towards statutory caseworkers. While all parents with children subject to statutory department intervention could benefit from this it is especially relevant for parents with limited education, parents of non-English speaking backgrounds and parents belonging to refugee and immigrant communities. For these parents, lack of information and understanding can cause them not to access support services out of fear that it will impact on their visa. Addressing the disempowerment of parents in the child protection and Children's Court system requires providing training to assist these systems in applying participatory principles in practice (Darlington et al 2010).

This study confirmed that stakeholders working in the NSW Children's Court are concerned about the over-representation of children and young people of parents with a mental illness in both the care and crime jurisdictions. The data analysis highlighted that there is crucial need for increased mental health services as an early intervention measure that could divert matters from the Children's Court in both jurisdictions or increase the referral options avail-

able to magistrates in the Children's Court. In the care and protection jurisdiction, increased mental health services for parents could prevent children of parents with mental illness from becoming clients of the statutory system or from being removed from their homes (on emergency, temporary or permanent orders). In the juvenile justice jurisdiction of the Court, increased mental health services could support better outcomes for young people with a mental illness in terms of accessing and negotiating the juvenile justice system and providing support to young people that may reduce the likelihood of recidivism. Moreover, mental health services are essential to addressing the overlap of these jurisdictions in that young people in the juvenile justice system are usually past (or present) clients of the care system. This is supported by research with practitioners in these two service systems, which suggests that a coordinated response is required in order that needs of parents with a mental illness are understood and provided for in the interests of safeguarding children. This requires effective management of the parent's mental illness in addition to long-term and flexible family support. Therefore effective communication between the two systems to promote collaboration is essential and is supported by literature in this area (Darlington and Feeney 2008).

The findings from the study suggest that resources are needed in rural areas to increase the number of specialised staff in these parts of NSW. Access to specialised staff is essential to the role, scope and effectiveness of the Children's Court in terms of treating young people fairly and appropriately; in line with international human rights standards (King et al, 2011). This is also especially relevant for the rights of Indigenous young people. Cunneen (2008) highlights that despite the minimum standards set out in the *Bringing them Home* report (Human Rights and Equal Opportunity Commission 1997) to increase the self-determination of Indigenous communities and to address the overrepresentation of Indigenous young people in the juvenile justice system this has not occurred (see also Noetic Solutions 2010). The minimum standards set out in the

Bringing them Home report relate to: consultation with Indigenous organisations about diversion and bail; minimising the use of arrest; notifying an accredited Indigenous organisation whenever an Indigenous young person is arrested or detained; protection during police interrogation; minimising bail and detention in police cells; and prioritising the use of community-based sanctions (implemented by the appropriate Indigenous community). However, 'widening processes of criminalisation' have undermined these principles and resulted in increased differential treatment of Indigenous young people (Cunneen 2008, p.47). Indigenous young people are also less likely to receive a 'caution' or 'court attendance notice' than non-Indigenous young people. In turn, Indigenous young people are more likely to be arrested. Statistics from NSW in 2004 reveal that 45.7% of Indigenous young people were proceeded against with arrest compared to 17.1% of non-Indigenous young people (Cunneen 2008, p.48-49; Chan and Cunneen 2000; Cunneen et al 2006). Further, because Indigenous young people are more likely to be arrested, they are more frequently the subjects of police decisions about bail. Indigenous young people are refused bail more often than non-Indigenous young people, resulting in disproportionate numbers of Indigenous young people in police custody and/or in juvenile detention centres on remand. From 2000 to mid-2005, the population of Indigenous young people on remand rose from 30% to 50% of the entire NSW remand population (Cunneen 2008; Cunneen et al 2006). Furthermore, when bail is not refused, bail conditions are often unrealistic, resulting in the young person breaching bail and needing to appear in Court. Finally, Indigenous young people are less often referred to Youth Justice Conferencing than non-Indigenous young people, although this differential treatment occurs more frequently in police practice than in the Children's Court. Nonetheless, Indigenous young people are more likely to be sentenced with a custodial order, NSW having the highest number of Indigenous young people in custody. While this may be attributed to committing particular types offences more often associated with custodial sentences, this is also explained

by Indigenous young people having more 'prior offences' and being more likely to have their matters heard in non-specialised rural courts (Cunneen and White 2011, p.165-168). Thus, Indigenous young people face systemic disadvantages that increase the possibility that they will be detained.

The final point about power and rights relates to resources and Court processes. The research participants were concerned that children, young people and parents in the Children's Court frequently do not understand Court processes and orders. This is disempowering, as it limits the possibility for these persons to negotiate the systems that are impacting on their lives. It may be at times that the high workload experienced by practitioners in the Children's Court leaves less time for magistrates to explain orders. It may also be that the highly charged emotional content of the proceedings affects young people and their parents and what they hear may be not understood because of fear, anger, distress, intellectual impairment or just feeling overwhelmed. Delays in the Children's Court mean that children can spend longer periods in temporary statutory care while waiting for final orders. In turn, this can negatively impact on assessments of the possibility of restoration (Fernandez, 2013; Thorpe, 2008). Alternately, young people in the juvenile justice system may spend time in custody until their Court hearing. Without adequate legal representation young people in the juvenile justice system may also spend unnecessary time in custody because their opportunities to apply for bail are diminished once they have been sentenced (Haesler, 2008). These outcomes undermine the 'best interests of the child' principle; this will be discussed in the ensuing sections.

7.2 Best Interests of the Child (Care and Crime)

The openendedness and malleability of the concept of the 'best interest of the child' has been a source criticism in terms of its operationalization. Concern here is about value diversity in that state agents including judges and caseworkers are likely to draw on their values to determine 'best interests' and that the

concept carries potential to provide a cloak for bias and paternalism (Fernandez, 1996). Further, Dickey (2002) highlights that in the current pluralist and multicultural context there will be multiple meanings of 'best interests of the child'. While courts may not ignore the values and beliefs of different cultural, ethnic, social and religious groups, and seek to be impartial, these decisions are ultimately subjective, based on the personal perceptions and moral judgments of magistrates and the persons who report to the court, including statutory caseworkers (Dickey 2002, p.401-403). This raises questions as to whether impartiality is guaranteed for groups who are structurally disadvantaged by social systems. The 'best interests of the child' principle can be interpreted in a variety of ways (Brown and Alexander, 2007; Dickey, 2002; Sheehan, 2001) and may exclude the voices of children for whom 'care and protection orders' are sought (Sheehan, 2003).

In the past decade, the 'best interests of the child' principle has been interpreted by the care and protection systems such that the emphasis of practice has been on 'child rescue' over 'family support' (Fernandez, 2005; Thorpe 2008; Hansen and Ainsworth 2007; McConnell and Llewellyn, 2005; Tilbury et al, 2007). This has occurred against the background of government inquiries and subsequent media attention where child protection services have been found lacking in meeting their responsibilities to remove children from abusive and/or neglectful homes (Fernandez, 2005; Cashmore and Ainsworth 2004). As a result, the number of staff in child protection services has been increased and the powers of child protection workers to remove children 'at risk' from their families have been expanded (Douglas and Walsh 2009). At the same time, there has been a significant increase in the number of children in OOHC (Australian Institute of Health and Welfare 2011; Special Commission of Inquiry into Child Protection Services in NSW 2008).

Thus, concerns have been raised about the emergence of another 'stolen generation' of poor, and disproportionately Indigenous children (Thorpe 2008, p.6; Hansen and Ainsworth

2006). In the current 'care and protection' arena, there is an adversarial atmosphere of vigilance and risk avoidance (Harries et al 2007; see Parton 2008 for discussion on how this has also occurred in the UK context), which has led to parents reporting experiences of feeling 'demonised' by the system (Thorpe 2008, p.5; also see Healy et al 2011). In managing the increasing numbers of children in OOHC there has been a focus on 'permanency planning' with marginal attention to fostering supportive and collaborative relationships with parents to support ongoing contact, and where appropriate reunification

While the Children's Court determines whether a removal order and reunification is in the 'best interests of the child', these judgments are based on whether parents have the capacity to care for their children. For many parents this will be dependent on access to support services from the statutory department and other service systems (Fernandez and Delfabbro, 2010, Delfabbro et al., 2013). For Indigenous families and families of non-English speaking background, this will also depend on the cultural competence of caseworkers and judicial officers. As Indigenous children continue to be overrepresented in the OOHC population, and given the harmful consequences of family separation for this vulnerable group, it is imperative that child protection practitioners receive education and training on the needs of Indigenous families and culture sensitive approaches to working with them. This is essential for the identity and resilience of Indigenous children and young people (Bamblett, 2006; Bamblett and Lewis, 2006).

In the care and protection jurisdiction, the scope and effectiveness of the Children's Court could be enhanced by more evidence-based and consistent approaches and transparent interventions. Recent audits of research on child abuse prevention, child protection, and OOHC reveal that there is a lack of consistency in how 'abuse' and 'neglect' are defined. Several commentators have argued that a 'national child protection research agenda' should therefore be implemented in order provide state child care and protection services with evidence-based information

on the determinants of child abuse and neglect, and the outcomes of child abuse and neglect (Bromfield and Arney, 2008, Tomison, 1999) this could support the effectiveness of the Children's Court by making care and protection practice more evidence informed. At the same time, however, this needs to be accompanied by collaboration between Children's Court magistrates, judicial officers and other stakeholders so that the integration of 'evidence-informed' practice in the Children's Court decision making can be achieved. Collaborative, multidisciplinary research on Children's Court decision making and care and protection interventions can enhance this knowledge base. (Lawrence et al, 2010)

Despite the 'get tough on crime' rhetoric of the last decade, recent research indicates that judicial officers view the purpose of the Children's Court as balancing welfare and justice and addressing the 'criminogenic needs' of young people (King et al 2011). This is consistent with the interview data presented, which reveals that judicial officers in NSW see the Children's Court as part of the broader child welfare system acknowledging the overlap between welfare and juvenile justice, and recognizing the majority of young people in the children's court present with a range of complex social problems and a history of statutory department involvement. In line with this view, there was broad support amongst the research participants for other practices such as therapeutic jurisprudence, diversionary measures, resources to increase early intervention services, better coordination of services, monitoring of service provision by the Children's Court, and case management approaches. Moreover, research participants indicated the need for services that address the specific needs of Indigenous families and increased participation from Indigenous communities in developing these services.

However, the capacity of the Children's Court to achieve its desired intentions - balancing welfare and justice - is to some extent contingent on a number of factors including availability of appropriate services and programs for young people who have committed an offence. For example, it has been noted that

due to lack of social support services (and especially accommodation) there are large numbers of young people in custody because they do not meet the criteria for bail. Thus, a significant number of young people are being held in custody unnecessarily, and therefore needlessly subjected to increased risks relating to recidivism (Cunneen and White 2011; Uniting Care Burnside 2009; Vignaendra et al 2009). This undermines the role of the Children's Court and the 'best interests of the child' principle. Coppins et al (2011) argue that there is an inconsistency between the adoption of 'best interests' principles in state legislation and the statistics on young people in custody or detention in the state (Coppins et al 2011, p.29). For example, whilst NSW has a number of diversionary measures (warnings, cautions and youth justice conferences), there are also more young people in custody in NSW compared to other states of comparative population size (Australian Institute of Health and Welfare, 2014).

The effectiveness of the Children's Court in upholding the 'best interests of the child' principle in the criminal jurisdiction is therefore dependent on how 'rehabilitation' is defined, services that support 'rehabilitation' and provide the practical assistance that young people need to help them avoid re-offending, consultation with young people and families about what these needs consist of, the capacity of the statutory department to find accommodation for young people in the juvenile justice system where a 'reside as directed' order has been made, and the range of (alternative) sentencing options available. Findings from this study and commentary in the literature advocate the promotion of alternative sentencing options. Moreover, there is a need for increased evaluation of diversionary measures, applying a range of research methods and looking at alternative outcome measures to recidivism rates.

8 CONCLUSION

The interview data reveals that the strength of the Children's Court lies in the specialised knowledge of magistrates and judicial officers and the independence of the Court to provide children, young people and parents with an impartial decision making process. Practitioners associated with the Court see each other as competent professionals, they speak with respect for their varied roles, and share a core belief in the importance of this work. Practitioners speak of their motivation to continually develop new knowledge and wanting to strive for better outcomes that meet the needs of young people coming before the courts. While generally positive about potential new innovations, practitioners are cognisant of the fact that the primary challenge lies in the complex systems of disadvantage facing many of their clients.

Indeed this study has found that the primary challenge identified by stakeholders working in the NSW Children's Court system is the complexity of problems faced by the children, young people and parents who appear in the Children's Court. Common in both care and crime was distress about the over-representation of Indigenous children and families and a recognition of the problem for people from non-English speaking backgrounds. Indigenous children, young people and parents, are particularly disadvantaged in their treatment by the system and access to resources to assist them in addressing this. Moreover, Indigenous children, young people and parents face systemic disadvantages that make them more likely to be in contact with the statutory department and/or the NSW police systems, and consequently in contact with the Children's Court (Cunneen and White 2011). Children, young people and parents of non-English speaking and refugee background are also disadvantaged in terms of experience of the system and access to appropriate support services (Douglas and Walsh 2009).

The findings from the study suggest that resources are needed in rural areas to increase the number of specialised staff in these parts of NSW. Access to specialised staff is essential to the role, scope

and effectiveness of the Children's Court in terms of treating young people fairly and appropriately; in line with international human rights standards (King et al 2011).

The professionalism of the Children's Court practitioners and their common concern for children was noticeable in the responses made in this study. In general participants wanted more knowledge and training in order to do their work more effectively. There was concern about efficiency and use of resources and, in turn a plea for more resources so that clinic assessments could be available more quickly, and to provide more privacy for legal representatives and their clients. The participants were proud of the achievements coming from the specialization of knowledge in children's law.

There was a consistent recommendation for more resources and this was not only in terms of providing more personnel and improvements to physical resources. In some interviews there was a sense that the workload and the pressure of work was high. There was consistency in the comments about the difference between city and rural for availability of services in a variety of areas, such as mental health services and early intervention services.

Another key challenge is the nexus between care and crime matters. Many young people enter the care system, and then later enter the crime jurisdiction. For some these jurisdictions are experienced concurrently. Stakeholders are at present unsure how best to meet this challenge; further collaboration across jurisdiction including sharing of data may be one avenue to explore.

Participants from the care jurisdiction raised issues about rights. The tension between the perceived power of the statutory department as opposed to the less influential non-government agencies, and the parents, was evident in many comments. Many discussed rights: the rights of the child to be heard, the rights of parents to have full information and a chance to have the evidence tested, the statutory caseworkers/non-government practitioners wanting to have rights to decide about contact regimens

because they know the children best. In the care group contact issues were one of the most frequently raised matters. The implications of recent amendments restricting the Court to time limited contact orders for twelve months with subsequent decision making after the twelve months period elapsed vested in the Statutory Department are of some concern. Restricting the use of long term contact orders by the Children's Court will make it difficult for parents to challenge these decisions, or have recourse to independent processes to pursue their needs and rights. This is problematic when considered in the context of reports suggesting parents' confusion and alienation with Children's Court and statutory processes (Sheehan, 2003), and in the context of research findings indicating that parents feel 'silenced' by child protection systems (Family Inclusion Network, 2007; Fernandez, 1996, Fernandez and Atwool, 2013; Klease, 2008; Sheehan, 2010; Thomson and Thorpe, 2003). Furthermore, Sheehan's (2010) research on children in the child care and protection system with a parent currently in prison highlights the lack of information gathered about parents for court records by the child care and protection system, and how this fails to address the parenting responsibilities of parents in prison and their need for contact (Sheehan 2010, p.175). It has been estimated that in 2001, 60,000 children less than sixteen years of age had experienced parental incarceration. This represents 4.3% of all children and 20.1% of Indigenous children (Quilty et al 2004). These statistics highlight the vulnerability of these children and parents, and in particular the vulnerability of Indigenous children and parents, in relation to the operation of the care and protection system.

Similarly, the literature demonstrates that parents of children in the care and protection system are persistent and resilient in their efforts to maintain contact with their children and work towards restoration in the face of considerable social and structural barriers (Klease 2008; Fernandez 2013). Research about contact between children in OOHHC and their birth parents indicates the importance of contact for children's emotional well being and identity even if restoration is unlikely (Fernandez 2007; Mason and Gibson 2004; Thomson and Thorpe 2003).

Further, research on children leaving care indicates that the majority of these individuals re-establish contact with their birth families (Cashmore and Paxman 1996; Hansen and Ainsworth 2009). Furthermore, frequent contact is a strong indicator of successful restoration (Cleaver 2000; Haight et al 2005; Triseliotis et al 2000). In order to protect children's rights and ensure appropriate levels of family connection decisions are best mediated by the Children's Court (Hansen and Ainsworth 2009, p.22).

Throughout this review several issues emerge, not the least about the connection between disadvantage and child protection and crime, especially in vulnerable Indigenous communities. While the Children's Court, therefore, is an appropriate jurisdiction for dealing with the outcomes of disadvantage it is not equipped to address its causes. The pressure on resources becomes apparent with respect to adequate servicing of rural and remote communities and to the stress experienced by officers serving the Children's Court in dealing with social complexities for which they claim limited education and training. By the same token, community services both government and non government, believe they are under-resourced and under-qualified, especially in legal complexities. While the participants in this sample of respondents in the field agree that the Children's Court is the appropriate instrumentality to deal with child protection and juvenile justice, they have raised a number and variety of concerns outstanding amongst which are resources, participatory process and education and training to enable the system to function adequately for the well-being of children and young people, their families and for the wider community.

9 RECOMMENDATIONS

A number of recommendations have been devised to further support and strengthen the operation of the NSW Children's Court.

- To maintain the specialisation of court affiliated staff
- To strengthen specialist knowledge by consistent, continual provision of training and professional development relevant to understanding children and young people for non specialist Magistrates and other court staff to assist bridge the divide in rural and regional areas of NSW
- To begin addressing the pervasive nexus of care and crime matters there needs to be commitment to long term inter-agency collaboration through joint training, professional development, and possibly the sharing of data
- Training and professional development needs to focus on understanding the ways that disadvantage can intersect leading to entrenched social problems. Understanding indigenous culture, mental health issues, and the impact of low socio economic status (for example on parenting, health & housing) are integral to working in the Children's Court.

10 UPDATE FOLLOWING DATA COLLECTION

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

With the change of NSW government in 2011 another round of reform provisions were planned and these were enacted in 2014 in the *Child Protection Legislation Amendment Act (2014)*. These most recent amendments to the CAYPCPA will commence on 29 October 2014 and they will bring in significant changes in relation to the use of guardianship orders and the use of adoption as mechanisms to reduce the number of children in OOHC.

Permanent placement principles have been incorporated into the Act in section 10A. This provision expands on the requirement for permanency planning for children and specifies a priority order for determination of the best interests of the child by the Children's Court. The first priority is for restoration of children to parents. If that is not practicable for the safety and welfare of the child then the second priority is a guardianship order for children to be placed with extended family or some other person. The third priority is for adoption and this can be applied to Aboriginal children. The final option is long term orders allocating parental responsibility to the Minister.

The priorities specified will change the decision making of the Children's Courts and actively promote adoption as a route out of care. Parents of babies under 2 years of age will have only 6 months from the initial interim orders before the court is able to remove their parental rights by making a finding as to whether there is or is not realistic possibility of restoration of the children to parents. Parents of older children will have that decision made by the end of 12 months. Kinship placements using guardianship orders will be preferred over long term foster care. Guardianship orders and their operation are defined by Section 79A.

The Wood Reform legislation proposed to amend the Children's Court's jurisdiction to make contact orders. While that has not been implemented the new reform legislation enacted in 2014 curtails the use of contact orders. The amendment to Section 86 allows the court to make orders for 12 months only when there is a finding that there is no realistic prospect of restoration to parents.

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