Child protection proceedings in the Childrens Court in Queensland: Therapeutic opportunities lost

Clare Tilbury*

This article examines the extent to which the child protection jurisdiction of the Childrens Court in Queensland has adopted the principles and practices of therapeutic jurisprudence. Data were obtained from the Queensland section of an Australia-wide study on children's courts, which drew upon documentary sources plus interviews with judicial officers and other stakeholders. Five characteristics of a therapeutic approach are considered. Results show that while there are some therapeutic principles evident in the focus of the court on the best interests and well-being of the child, reforms of substantive child protection laws in Queensland have had little impact on court proceedings, which remain adversarial. More could be done to use the authority of the court productively in responding to the significant social welfare needs of children, young people and families who are parties to child protection proceedings and whose lives are so profoundly affected by its decisions.

Introduction

Children’s courts in Australia are specialist courts that deal with child welfare and juvenile justice matters. From their inception at the turn of the 19th century, the courts dealt with abandoned, neglected and maltreated children as well as ‘delinquents’, who were generally regarded as lacking adequate parental guidance. Today, each state and territory has separated youth justice and child protection legislation and service delivery arrangements. While the child protection divisions of the courts operate differently in each state, there are similarities. All have enshrined the principle of the best interests of the child in decision-making, all use some form of alternative dispute resolution, such as family group conferencing or pre-hearing conferences, and all have adopted relatively informal procedures. However, they all still follow a predominantly adversarial model, in which the ‘facts’ are adjudicated and the state as the applicant must establish significant harm to a child and parental incapacity to protect, in order to obtain an order to intervene to protect a child.

Children’s court processes affect children’s and parents’ understanding of court decisions, as well as outcomes for children whose care and protection

* Clare Tilbury, PhD, Life Without Barriers Carol Peltola Research Chair, Griffith University. This research was supported by the Australian Research Council, Discovery Project DP0987175 led by Professor Allan Borowski and Associate Professor Rosemary Sheehan. I wish to thank colleagues who provided feedback on an earlier draft of this paper.
1 In Queensland legislation, the name of the court is ‘childrens’, not ‘children’s.’
arrangements the court is determining. This article examines the operation of the child protection jurisdiction of the Childrens Court in Queensland. It considers the extent to which the court has adopted the principles of therapeutic jurisprudence, recognising the social and psychological needs of children, young people and families involved in proceedings before the court. In doing so, it draws upon findings from a recent Australia-wide study of children’s courts, conducted in every state and territory, which explored the challenges the courts face and opportunities for reform from the perspectives of judicial officers and other stakeholders.4

Specialist, therapeutic and problem-oriented courts

A specialist court is one with limited or exclusive jurisdiction in a field of law and ‘presided over by a judge with expertise in that field’.5 Specialisation within court systems has been around for some time, tailored to population groups or specific areas of law. For example, civil, criminal, children’s, industrial, and coroner’s courts were established in most Australian jurisdictions in the early 1900s. Later, family courts, land and environment courts, and others were set up, with more recent examples being drug courts and Indigenous courts. It is argued that specialist courts provide better and more efficient decision-making than traditional courts because of judicial officers’ familiarity with the law and the subject matter.6 While specialist courts do not always adopt therapeutic principles, they have been positioned as an alternative to traditional courts because they pay special attention to the parties who appear and the nature of the legal problems for which a remedy is sought, and they may adapt court procedures to make them more informal and participatory.7

Therapeutic jurisprudence is a perspective that considers how the legal system itself could be a therapeutic agent and promote positive change in the wellbeing and behaviour of people involved in proceedings.8 The concepts of therapeutic jurisprudence originated in the USA in the late 1980s and are still emerging internationally, as innovations are legislated or developed. The therapeutic approach proposes that for some individuals, responding to the needs that are the cause of their legal problems is more effective than traditional adversarial methods9 or actions aimed at deterrence, punishment or adjudication. Therapeutic principles can be applied to many areas of criminal,
civil or administrative law,\textsuperscript{10} but have typically been applied to laws involving people with certain difficulties or circumstances (such as homelessness, mental illness, addictions, or intellectual impairment), when these are considered to be part of the reason that people appear in court. By resolving the underlying problem, it is anticipated that offending behaviours will reduce.\textsuperscript{11} The therapeutic approach has been implemented in Australian jurisdictions mainly through specialised courts using innovative court practices when hearing matters.\textsuperscript{12} The innovations mainly relate to sentencing, as therapeutic jurisprudence has generally been applied in the criminal justice system after a person pleads guilty to an offence.\textsuperscript{13} More informal proceedings, involving both defendant and victim, plus links to support services are also common. Examples include drug courts, Indigenous courts, domestic violence courts and mental health courts, all of which have been established in Australia.

Therapeutic jurisprudence recognises that the courts may be dealing with ‘complex social problems that law alone is unable to resolve’,\textsuperscript{14} for which decision-makers require special knowledge and personal attributes.\textsuperscript{15} Thus, therapeutically-oriented courts may require different roles and skills sets for judicial officers and other court users, such as ‘an understanding of the treatment languages that go along with the particular problem the court has been established to address, a capacity to manage inter-agency dialogue, and an ability to remain engaged with cases’.\textsuperscript{16} Rottman\textsuperscript{17} argues that the rationale for such courts is to address legal cases involving people who are socially marginalised, and to achieve this, knowledge of the law as well as from the fields of mental health and psychology is essential.

The premise of problem-oriented courts is that some types of legal problems may require remedial or preventative solutions in addition to legal solutions. In problem-oriented courts, the court and related processes are used to promote the resolution of a legal problem and its causes.\textsuperscript{18} This involves integrating treatment with sentencing, ongoing judicial monitoring of clients, multidisciplinary input and collaboration with social welfare providers.\textsuperscript{19}

\textsuperscript{10} Wexler and Winick, above n 8.
\textsuperscript{11} Freiberg above n 7 at 198.
\textsuperscript{15} Rottman, above n 9, at 22.
\textsuperscript{16} Blagg, above n 14, at 25.
\textsuperscript{17} Rottman, above n 9, at 22.
Courts link individuals to support services that can address underlying problems, sometimes gaining priority access or mandating treatment.\textsuperscript{20} The authority of the court can be used to address the problems that contributed to the offending and structural problems of the justice system, recognising that individual problems may have broader economic or social causes such as unemployment or homelessness.\textsuperscript{21} The term ‘problem-oriented’ does not imply that the court solves problems:\textsuperscript{22} more precisely, emphasis is placed on identifying ways to respond to underlying needs and problems, as well as any wrongdoing on the part of the person subject to the proceedings. For example, in courts in which judicial monitoring occurs, interaction between the judge and client may involve the judge acknowledging progress, offering praise and encouragement for successes, and admonition for lack of progress.\textsuperscript{23} The prestige and authority of the judge is harnessed to promote positive behaviours.

A number of difficulties have been identified with implementing therapeutic courts. Firstly, it takes time for the court to be informed of the social circumstances of offenders and to make links with treatment services, which is resource intensive and therefore more costly.\textsuperscript{24} Secondly, the tyranny of distance poses challenges in ensuring that people presenting with the same problem (such as drug offences) have equitable access to therapeutic courts and related treatment services, regardless of their location.\textsuperscript{25} Third, the cultural shift from an adversarial to a therapeutic stance is significant. There are perceived tensions between the traditional, neutral roles of judges in making decisions based on the evidence, in contrast to the therapeutic role whereby judges are active in brokering welfare services and monitoring compliance. Prosecution and defence lawyers are also required to work in less adversarial ways and to promote client understanding of, and participation in, decision-making.\textsuperscript{26} Finally, evaluations show that while the therapeutic or restorative justice approach increases offender and victim satisfaction with the justice process, so people perceive the process as fair and are therefore more likely to accept the decisions of the court, it has not been so successful in reducing recidivism.\textsuperscript{27}

**Approach and methods**

The establishment of children’s courts in Australia predated the therapeutic jurisprudence movement by almost a century. The main question considered in this article is whether the children’s court in Queensland has kept up with the ‘therapeutic turn’. The children’s court is specialist, in that it has a limited jurisdiction. Further, it would appear to be a perfect candidate for adopting therapeutic legal principles, given the nature of its jurisdiction: the crossover between legal and child welfare issues being considered; the clientele of the

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\textsuperscript{20} Rottman, above n 9, at 22.

\textsuperscript{21} See Berman and Feinblatt 2001 cited in Freiberg, above n 5; Freiberg, above n 7.

\textsuperscript{22} See Freiberg, above n 5.

\textsuperscript{23} King and Tatasciore, above n 18, at p 81.

\textsuperscript{24} Freiberg, above n 7, at 21.

\textsuperscript{25} Freiberg, above n 6, at 22; Bartels, above n 12.

\textsuperscript{26} Freiberg, above n 6, at 23.

\textsuperscript{27} K Daly and E Marchetti, above n 13; Freiberg, above n 6, at 9.
court coming from socially disadvantaged families; the primary goal of an application to the court being the protection of a child, rather than the punishment of parents; and the desirability of ensuring that children and families understand the court process. To provide a framework for examining the operations of the children’s court in Queensland, five characteristics of therapeutic courts have been identified from the literature:

- The court has limited or exclusive jurisdiction.
- Judicial officers and legal practitioners have specialised expertise in the field.
- The court has a therapeutic purpose and adopts less formal processes.
- The court hears and considers advice from multidisciplinary sources.
- The court has links to social welfare agencies available to provide interventions and services to parties subject to the proceedings.

Following a brief outline of the history of the court in Queensland, the court is assessed in respect to these five characteristics to determine the extent to which it may be considered therapeutic.

Data for the present study were obtained from the Queensland section of an Australia-wide study on the child protection and juvenile justice jurisdictions of the children’s court. The initial data collection drew on legislation, government reports and policy documents to establish the history and contemporary status of the court. Subsequently, interviews were conducted with a purposive sample of judicial officers and other stakeholders to ascertain their views about the purpose and operations of the children’s court, current and future challenges, and opportunities for reform. In Queensland, interviews were conducted with 22 people and seven focus groups were conducted with 25 participants. Six judges, 6 magistrates and representatives from government agencies and non-government legal and social welfare services participated. Interviewees were based in Brisbane and regional centres. This article contains information and opinions about the child protection jurisdiction only.

The Children’s Court in Queensland

The first Queensland children’s court was established in 1907, formalising procedures for treating children separately to adults in court. In conjunction with the court, the State Children’s Act 1911\(^\text{28}\) established a government department with responsibility for the administration of matters dealing with youth offenders, ‘delinquent’ youth, and neglected and orphaned children up to the age of 18 years. The state’s first modern child welfare legislation, the Children’s Services Act 1965,\(^\text{29}\) also defined children’s welfare broadly, containing both child protection and juvenile justice provisions. Under this Act, children could be subject to ‘care and protection’ orders if they were maltreated or neglected or ‘care and control’ orders if they had committed an offence, were ‘uncontrollable’ or ‘in moral danger’. Aboriginal and Torres Strait Islander children were dealt with under laws relating to Indigenous people, and were not subject to the same child welfare laws and processes as

\(^{28}\) State Children’s Act 1911 (Qld).
\(^{29}\) Children’s Services Act 1965 (Qld).
non-Indigenous children until administrative arrangements changed in the 1970s. It was not until the late 20th century that child protection (‘needs’) and juvenile justice (‘deeds’) became separated in both legislation and administration, with major legal reforms to both child protection and juvenile justice taking place in the 1990s. The new Childrens Court Act 1992 coincided with the introduction of the Juvenile Justice Act 1992 (now known as the Youth Justice Act), shifting the philosophy of juvenile justice away from a welfare model to a justice model, in which the emphasis is to hold children who break the law individually responsible for their behaviour and to deter offending through appropriate punishment. Reforms to child protection came later with the Child Protection Act 1999 and the Adoption Act 2009, which provided significantly more court oversight of decisions about children’s welfare than had existed under the old Acts. Previously, care and protection orders granting guardianship to the state automatically had effect until the child turned 18 years but could be administratively discharged. The current legislation provides for time-limited protection orders and judicial oversight of case plans at the time an application for an order is made to the court. Adoption orders, previously made administratively, are now made by the court.

The Childrens Court Act created the two-tiered system of children’s courts which exists today in Queensland. At the lower court level, children’s court proceedings are closed to the public. There is one purpose-built specialist children’s court located in Brisbane city which hears matters originating in inner-city suburbs. The majority of proceedings are heard at suburban and regional centres when the local Magistrates Court is closed and convened as a Childrens Court. The Chief Magistrate has a power under the Magistrates Act 1991 to allocate functions to particular Magistrates, which includes power to allocate general Magistrates to preside in the Childrens Court jurisdiction, but the Chief Magistrate has no powers or authority under the Childrens Court Act. Magistrates are appointed to 32 centres, circuiting to another 86 locations across Queensland. The court dealt with 3,959 applications for child protection orders in 2010–11 and there were 596 court ordered conferences.

At the District Court level, the Childrens Court of Queensland is an open court. It sits in Brisbane and six regional centres, with judges travelling to hear matters as required in rural and remote areas. The Childrens Court of Queensland deals with serious offences involving defendants less than 17 years of age at the time of the offence, and appeals from both child protection and juvenile justice decisions made in the lower-level children’s court. The President is responsible to ensure the orderly and expeditious exercise of the jurisdiction of the Childrens Court of Queensland and to

30 Childrens Court Act 1992 (Qld).
32 Child Protection Act 1999 (Qld).
33 Adoption Act 2009 (Qld).
35 Magistrates Court of Queensland, above n 34.
provide an annual report to the Attorney-General on the operation of the court.\textsuperscript{37}

The appointment of a district court judge as President of the Childrens Court of Queensland was intended to convey a significant upgrading in the status of the childrens court. It was designed to improve the status and credibility of the court and ensure the court structure reflected the importance of decisions being made about children.\textsuperscript{38} But the higher level court deals primarily with youth justice matters: there were only 12 child protection matters heard in 2010–11, and 14 in 2011–12.\textsuperscript{39} In practice, because few child protection decisions are appealed, most judges, including the President, have little involvement with the child protection jurisdiction. It is notable that despite the major overhaul of substantive child protection laws in 1999, and two high-profile public inquiries\textsuperscript{40} that resulted in further changes to the Child Protection Act, there were no changes to the Childrens Court Act.

### Therapeutic principles

The paper now turns to the question of the extent to which children’s courts in Queensland can be regarded as therapeutic. Five characteristics of the therapeutic approach are considered.

**Limited or exclusive jurisdiction.** The children’s court certainly has a limited jurisdiction, dealing exclusively with child protection and youth justice matters involving children and young people under 18 years. The court’s focus on children and young people is apparent in its recognition of their vulnerability and needs, requiring a separate forum to adults. Hearings are closed to the public, and only certain people are allowed to be in attendance. These include the child, the child’s legal representative, the separate representative (if appointed), the child’s parents and their legal representative, and representatives of the statutory department. If a child is Aboriginal or Torres Strait Islander, a recognised Indigenous child welfare agency representative can also be present. Child protection matters are highly sensitive and personal in nature. Media representatives cannot be present during proceedings under the Child Protection Act.\textsuperscript{41} The closure of the court recognises that children have a special status and rights, and minimises the possibility of stigma from being labelled ‘abused’ or ‘neglected’, which could carry into adulthood, especially if matters were reported in the media. Participants advised that procedures tended to be more informal, and time was taken to explain decisions and processes in plain English, avoiding legal jargon. Judges and magistrates generally sat behind the bench, elevated from other parties. At the Childrens Court of Queensland, participants observed that most judges did not wear a wig, but usually wore legal robes.

\textsuperscript{37} Childrens Court Act, s 10 and s 24.
\textsuperscript{38} Queensland Legislative Assembly, Hansard, 18 June 1992, p 5928.
\textsuperscript{39} Childrens Court of Queensland Annual Report 2011–12, Brisbane, 2012.
\textsuperscript{41} Childrens Court Act 1992, s 20(2)(c).
The Brisbane Childrens Court, located in the city, was purpose-built in the 1990s. It is a modern, spacious facility, with vibrant artwork and colourful seating. This court deals with a fraction of the total children’s court work, as it services only inner Brisbane suburbs. Most children’s matters are heard in ordinary outer-suburban or regional courts, in imposing buildings designed to convey the authority of the law. In such locations, at a designated time, the courtroom will be closed and persons not entitled to be present must leave. But the courtroom itself remains the same as that dealing with adults, and parties to child protection proceedings may be seated in the waiting room along with any others having general court business. There are no meeting rooms or other facilities to ensure the privacy of parties or meet the special needs of children and young people. The Brisbane Childrens Court has a practice that parties remain seated when addressing the court but this is not necessarily standard practice at any other place that a children’s court is convened. Most participants in the present study did not regard court facilities as problematic, even though in many problem-oriented courts considerable attention is paid to courtroom design and layout to meet the special needs of clients. It was felt that pragmatic impediments of costs, geography, and a decentralised population would make it expensive for government to provide purpose-built children’s courts in more locations across Queensland.

Judicial officers and other legal practitioners have specialised expertise in the field. While the court is specialised to the extent that children are seen as having special needs and rights of their own, it is not specialised in terms of requiring judicial officers and other legal practitioners to have a knowledge base in children’s law, child development or child maltreatment. There are 24 District Court judges with commissions to hear children’s matters in the Children’s Court of Queensland. In recommending the appointment of Judges ‘the Attorney-General must have regard to the appointee’s particular interest and expertise in jurisdiction over matters relating to children’.

Magistrates are not required to have a particular interest or expertise to preside in a children’s court. The Brisbane Childrens Court magistrate is the only judicial officer who deals exclusively with children. Therefore, in practice, most Queensland magistrates and judges are generalists involved with both adult and children’s courts. There is no systematic training or professional development available to judicial officers in relation to children’s law generally or child protection specifically. Participants in the study were divided as to whether specialised knowledge of children’s issues was necessary. Some magistrates said there was sufficient training and professional development (mainly through annual conferences) to equip them for the child protection jurisdiction. They were of the view that the court’s role is to assess and weigh up evidence given by statutory officers and other professionals who have expertise in children’s development and welfare. Thus they saw themselves as making legal decisions, not ‘welfare’ decisions. Yet many magistrates expressed concern about the quality of the evidence and details of available services or programs that were presented to them. Some magistrates advised they had addressed this issue locally by providing courses on

42 Childrens Court Act, s 22(2).
advocacy and admissible evidence, resulting in significant improvements in the quality of applications.

Participants pointed out that the child protection jurisdiction is like none other in the state arena. In determining whether to grant an order, judicial officers are required under the Act to be satisfied that a child is in need of protection — that is, a child has suffered harm, is suffering harm, or is at unacceptable risk of suffering harm and does not have a parent able and willing to protect the child. These are complex decisions with many factors to be taken into account relating to the nature of child maltreatment and its effects. The judge or magistrate must be sure that the current case plan is appropriate for meeting the child’s care and protection needs and that any orders are appropriate in respect to type and duration. If a long-term guardianship order is sought, a determination is required that there will be no parent able and willing to protect the child in the foreseeable future, or the child’s need for emotional security will be best met in the long term by making the order. While there are similarities between criminal proceedings for children and adults, and most magistrates are familiar with dealing with criminal matters of a minor nature, they are on less familiar territory with child protection. For these reasons, many study participants asserted that increased specialisation is both possible and necessary. They pointed to the gravity of decisions being made about removal or return home, the complexity of factors affecting children’s development (psychological and social, parent-related, child-related and community-related), and the inherent uncertainty about predicting what may happen in future. They noted the lack of practice guidelines for judicial officers and lawyers in children’s court proceedings. Some regional courts deal regularly with children’s matters, and therefore may accumulate knowledge about the child protection system, however two-thirds of courts hear fewer than ten children’s matters each year.

Many participants suggested that police, prosecutors, legal practitioners, child protection workers, magistrates and judges all require expertise in their own fields plus an appreciation of, and ready access to, the disciplinary knowledge of other professionals in the court. Similarly the 2012 inquiry into the Victorian child protection system recommended ‘that the accreditation and training process for specialist lawyers must involve a substantive component on infant and child development, child abuse and neglect, trauma and child interviewing techniques in order to be able to assess capacity. Training requirements for independent children’s lawyers in the statutory child protection system should be aligned with the training required of, and provided to, independent children’s lawyers practising in the family law jurisdiction’. Several participants stated that the low status of the children’s court within the court hierarchy accounted for why many lawyers did not develop expertise in this area, and pointed out that the minimal involvement of the Childrens Court of Queensland constituted by a Judge in the child protection jurisdiction meant that it did not benefit from the increased

43 Child Protection Act, s 10.
44 Magistrates Court of Queensland, above n 34.
status that the President’s role was designed to achieve. The nature and extent of specialisation, expertise and training necessary for judges to undertake the problem-oriented role has been noted in previous studies,\(^46\) along with the challenge of ensuring the court does not become isolated from mainstream courts, especially as the work may be considered less prestigious than generalist courts.\(^47\)

Also limiting the development of expertise in the child protection jurisdiction is the limited jurisprudence or case law. The vast majority of child protection matters are heard at the magistrate’s court level, and appeals are rare. Consequently, decisions are generally not written or reported. This is quicker, because preparing written reasons for decisions take time, but it also means there is little analysis or review of decisions, or opportunities for judicial officers and others to examine reasons for decisions in cases other than those with which they are directly involved. This changed in June 2011 when online reporting of decisions commenced, but by October 2012 there were fewer than ten child protection decisions publicly available.\(^48\)

**The court has a therapeutic purpose.** Embracing a therapeutic focus requires recognition of the consequences of court processes and decisions on clients (that is, not only that the law is applied properly). Courts adopting therapeutic jurisprudence principles are likely to be less adversarial, less formal, more participatory, provide options for alternative dispute resolution, and include the voice and experience of ‘victims’ and ‘perpetrators’. There may be an effort to personalise communications between a judicial officer and a defendant or other party, to acknowledge any difficulties they have encountered in life, and to encourage them to acknowledge their mistakes and make positive choices in the future.\(^49\)

When hearing applications for child protection orders, the court’s primary aim is a child’s protection, not punishing parents who have been unable or unwilling to provide adequate care. In this study, participants regarded the court as part of a broader child protection system in which the main goal was protecting children from harm. It was also seen to have a rehabilitative function, in that the implication of making a short-term order for out-of-home care is that if the parents can make improvements to their family situation, then the child could be returned to parental care. Similarly, making a supervision order implies that parents can look after their child provided they receive supervision and the situation is monitored.

While recognising the complexity of underlying family problems that led to applications in the children’s court, judicial officers mostly defined their role in the traditional legal manner, as a decision-maker in accordance with legislation. They sought to make balanced decisions about the best interests of the child by considering the evidence put before them, and ensure fairness and transparency when the state intervenes in family life. Some saw the court as having a responsibility to ensure that the statutory child protection agency

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\(^{46}\) Freiberg, above n 5, at 23.

\(^{47}\) Freiberg, above n 7.


fulfilled its obligations to both children and parents, but this was not a proactive role in linking children or families to intervention services. Generally in legal proceedings, the paramount purpose is that the parties should have their rights according to law, and in such cases the procedures, including the rules of evidence, are framed to serve that purpose. However, in child protection proceedings, the procedures should serve the paramount purpose of the welfare of the child. That is, child protection proceedings are not simply a conflict between two parties, they have an administrative character, in which the purpose is the welfare of the child. Where a judge sits as an arbiter between two parties, s/he considers only the evidence put before the court. But in the interests of making decisions about the protection of a child, the court may benefit from considering additional material. Current legislation provides for child protection proceedings to be more inquisitorial. The Act provides that the childrens court is not bound by the rules of evidence, but may inform itself in any way it thinks appropriate. The Explanatory Notes of the Child Protection Bill 1998 in relation to this section state:

The court is inquisitorial, and may use whatever means it wishes to inform itself. For example, the court may accept a submission from interested family members, or may ask to speak to the child in the magistrate’s office. Generally, this does not happen in practice. In fact, several stakeholders expressed a concern that becoming too informal or too ‘involved’ can undermine the judicial role of neutral arbiter.

A related aspect of a therapeutic approach would be that judicial officers are involved in ongoing monitoring of cases subject to proceedings, to ensure that actions recommended or required to ameliorate problems are addressed. This does not occur in Queensland — each time a matter is mentioned or comes before the court, a different magistrate may preside. Applications regarding different children in the same family may even be heard by different courts, if the children are placed in foster care or residential in separate locations. While not set up for the purpose of monitoring individual cases on a periodic basis, there is a requirement on judicial officers to review a child’s case plan prior to making an order, to ensure the least intrusive order is made and the state is not excessively intervening in family life. The plan should have been developed through a family group meeting in which the views of the child and family are taken into account. There is a tension between hands-off, impartial approaches and hands-on court-ordered interventions that are monitored by the court. While some participants supported the court filling a case management role, others suggested that this would be contrary to the core responsibility of dispensing justice as the neutral decision-maker, and it was thought that a more active case monitoring role would require significantly more resources than are currently available for children’s courts throughout the state. In a ‘case management’ or ‘docket’ system, the same judicial officer hears the case every time, obtains progress reports, monitors the client’s

50 The UK case of Official Solicitor to the Supreme Court v K (infants) [1965] AC 201; [1963] 3 All ER 191; [1963] 3 WLR 408 explained the nature of care proceedings. This case was followed in the Queensland case Dale v Scott: Ex parte Dale [1985] 1 Qld R 406.
51 Child Protection Act (Qld), s 105.
progress and has all of the relevant information on which to make further
decisions. In some child welfare proceedings in the United States, for
example, a court officer reviews each case at least six monthly to assess the
appropriateness of the case plan, progress toward goals and whether the plan
or goals require revision.53

A tenet of procedural justice is that people who have the chance to put their
views in what they perceive as a fair process are more likely to feel listened
to and accept the decisions.54 King and Tatasciore55 assert that involving
participants in court decision-making processes means they have the
opportunity to present their case and have it listened to, and in doing so the
court demonstrates that their views have been taken into account. According
to the Act, the children’s court must, as far as practicable, ensure the child (if
present), the child’s parents and other parties to the proceeding understand the
nature, purpose and legal implications of the proceeding and of any order or
ruling made by the court.56 The legislation stops short of the principle of
children and parents participating, instead recognising that they should
understand the process. Most participants in this study agreed that currently,
legal representation for parents is uncommon (frequently due to a lack of legal
aid). This constrains parents’ capacity to understand and participate in the
legal process, furthering the imbalance of power between parents and the
State. If they cannot obtain legal representation, it was suggested by some
participants that parents were therefore more likely to consent to an order.
Parents may contest an order without legal representation, but if the court is
to be accessible and functional for unrepresented parties, major adjustments
are required, because courts are making decisions with much less information
than they would have when parties have lawyers who can marshal evidence
and examine witnesses.57

The principle of children being able to have a say in decisions that affect
their lives is becoming more recognised in Australian policy and practice. As
well as advancing the rights and interests of children, their participation
avoids misunderstandings, frustration or hurt that can arise for children if
important decisions are made without an opportunity to provide input, or in
their absence.58 The question of how children could participate in the family
court jurisdiction has been examined, such as meeting directly with a judge or
providing input to a court report.59 A foremost consideration is to ensure
children are ‘listened to’ without having to make a choice between alternative

53 Child Welfare Information Gateway, Understanding Child Welfare and the Courts,
54 Freiberg, above n 5, at 9.
55 King and Tatasciore, above n 18, 82-3.
56 Child Protection Act, s 106.
Journal of Children’s Services 5, p 52.
58 A Graham and R Fitzgerald, ‘Exploring the promises and possibilities for children’s
participation in Family Relationship Centres’, (2010) Family Matters No. 84, Australian
Institute of Family Studies.
59 M Fernando, ‘What do Australian family law judges think about meeting with children?’
living arrangements. The Charter of Rights for a Child in Care in the Act gives children the right to be consulted about and take part in making decisions affecting them. However, in practice children’s voices are not often heard in court and decisions are generally made for them, without their input. A report on the experiences and understanding of children’s court processes in Queensland found young people wanted an opportunity to have a say in decisions, either directly, in writing, or via a third party (such as a lawyer, social worker or advocate), and they thought their views were essential to inform decisions about their ‘best interests’. Even children with separate legal representation may not be asked for their views; rather the separate representative is informed by professional reports obtained about the children. It was noted by participants that the level of separate representation in child protection proceedings in Queensland is low (727 orders for separate representatives were made in 2010–11) and the level of direct representation of children is even lower. Yet children facing criminal charges are regarded as capable of giving instructions to a lawyer. Participating in child protection proceedings is sometimes viewed as contrary to a child’s welfare (for example, it may be harmful for them to hear allegations about their parents presented to the court) and where the child’s views and wishes do not coincide with those of the professionals, children are unlikely to be heard. Masson warns that children’s real participation can be undermined by guardians, solicitors and professional assessments focusing on perceptions of their welfare, as opposed to children exercising their rights to contribute to decisions about their future.

Decisions that are being made about children need to attend to children’s development and milestones. Thus, if the process moves too slowly or decisions are constantly postponed by matters being adjourned, it becomes difficult for the court to reach meaningful and lasting decisions for children’s futures. This issue was raised by many legal participants, who felt that contrary to policy that requires the state to be a ‘model litigant’, decision-making in the children’s court was frequently delayed due to unsatisfactory practices, including late filing of affidavits and documents, withholding information, highlighting negative aspects of parental behaviour and ignoring positive aspects, last-minute adjournments because one party (often the department) is not ready to proceed, as well as unrepresented parties. Several participants argued that increasing legal representation does not necessarily mean the process becomes more adversarial, because there are many areas of law in which lawyers are involved in alternative dispute resolution. It was argued that lawyers can remedy the power imbalance and promote cooperation because parties feel they have been heard, not ignored, thus providing a stronger voice for children (and parents) than currently exists.

The use of alternative dispute resolution mechanisms is consistent with

60 Graham and Fitzgerald, above n 58.
61 Child Protection Act, Charter of Rights for a Child in Care.
62 Create Foundation, Children and Young People’s experiences and understanding of the Children’s Court processes, Create Foundation, Brisbane, 2011.
63 Department of Communities, Child Safety and Disability Services, above n 36.
therapeutic principles, reducing legalism and adversarial proceedings. Alternative dispute resolution is concerned with developing a compromise solution, ensuring the family has all relevant information and knows ‘the case’ against them. There are two forms of alternative dispute resolution in Queensland Childrens Courts. Under s. 59, a child protection order cannot be made unless the court is satisfied that the child’s case plan has been developed in a ‘family group meeting’. A copy of the child’s case plan must be filed with the court, and the plan is assessed by the court as to whether it is appropriate for meeting the child’s assessed care and protection needs. Under s. 69 a court ordered conference is required when an application for an order is contested. These give parents, legal representatives, and the child’s advocates the opportunity to agree on a settlement that would make a trial unnecessary. Court-ordered conferences are convened by specially-appointed officers from the Department of Justice and Attorney-General. All parties, except the child, must attend and can be legally represented. The recognised Indigenous child welfare agency may also attend if the matter concerns an Aboriginal or Torres Strait Islander child. The chairperson files a report of the conference in the court, following which proceedings are resumed. But participants argued it is critical to ensure parental understanding of agreements reached in pre-court conferences, as they felt some parents consented to agreements without fully understanding their implications. They also suggested the introduction of practice standards and accreditation for pre-court conferences in the children’s court, similar to those in the Family Court of Australia.

The court hears and considers advice from multidisciplinary sources. The Childrens Court is not bound by the rules of evidence. In a therapeutic approach, a multidisciplinary model encourages non-legalistic solutions to be found for child welfare problems. The Victorian Law Reform Commission recommended enhanced inter-professional collaboration in the children’s court to facilitate decision-makers having access to information on child development, so that rather than judicial officers being expected to have knowledge and expertise in children’s well-being, expertise can be readily obtained from other professionals. Currently in Queensland, advice to the court is received from the statutory department (generally in the form of affidavits from officers involved in the case), social assessment reports (requested by a magistrate or submitted by one of the parties), and reports from other professionals (for example, medical evidence). The recognised Indigenous child welfare agency may also make submissions. Direct evidence is given by departmental officers, sometimes police, and parents. Rarely do children or young people, even those who are older, give direct evidence. Other states such as New South Wales and Victoria have children’s court clinics, the purpose of which is to provide psychological and psychiatric assessments of children and families upon request from the judge or magistrate to assist them in making decisions. This is an independent report

to the court, unlike reports that are tendered as evidence by one of the parties in Queensland. The calling of experts is implicit in a specialist or therapeutic approach in respect to the court hearing advice from multidisciplinary sources and the Act provides for ‘expert help’ to be provided, whereby the court may appoint a person having a special knowledge or skills to help the court.\textsuperscript{67} However, there were no study participants who knew of cases where this had occurred. Most participants saw a need for an integrated, multi-disciplinary team of trained professionals with expertise in child development working together with other court personnel to assist children and young people. As outlined, the expertise of statutory child protection workers was not highly valued by judicial officers or lawyers, who criticised the quality of evidence and case plans presented to the court.

The court has links to welfare agencies available to provide interventions and services to the parties subject to the proceedings. Fundamental to the success of problem-oriented courts is whether they can mobilise support services to address underlying problems. Services must be available locally, specialised and effective if the court’s role and contribution are to be realised. Overwhelmingly, the children and parents involved with the childrens court were seen to have complex needs related to poverty, lack of education, unemployment, alcohol and substance misuse, intellectual disability, domestic violence and mental illness. Furthermore, Aboriginal and Torres Strait Islander children and families are significantly over-represented in the childrens court, reflecting the social disadvantage experienced by these families. The need for treatment programs and preventative services for children and at-risk families was raised by most participants. The court is serviced by the statutory department, which makes assessments and provides services to children, young people and their families. Nevertheless, compared to other specialist therapeutic courts, study participants regarded the childrens courts as poorly served in respect to the range of services they can offer children and families. In particular, quality placements for adolescents and supportive interventions for parents to assist them to resolve or alleviate their problems were seen as lacking. The challenges in regional areas where services are often more limited was acknowledged. Providing better prevention services or intervening earlier with children and their families was believed more effective than tertiary level interventions by the courts. These approaches require courts to collaborate with government and non-government service providers in planning and developing the child and family service system.

Another area in which the disconnect between courts and services was seen as problematic was in relation to ‘cross-over kids’,\textsuperscript{68} young people who are in the protective care of the state, and also charged with offences. There were several areas of concern raised by participants indicating greater collaboration between child protection and youth justice systems is needed. These relate to criminalising the behaviour of children with welfare needs, such as children who are homeless or suspended or excluded from school who come to the

\textsuperscript{67} Child Protection Act, s 107.

\textsuperscript{68} J Cashmore, ‘The link between child maltreatment and adolescent offending: Systems neglect of adolescents’ (2011) 89 Family Matters at 36.
attention of police, and young people with aggressive or angry behaviour in residential care who are charged with offences for misbehaviour at the residential (for example, minor property damage). Also raised were child protection officers who fail to attend court when a child on their caseload is appearing in a youth justice matter and child protection officers who recommend a young person in care be held in custody due to a lack of placement options, without due regard to the detrimental effects of detention on children. It was argued by many participants that these young people have significant needs that should not be dealt with in the criminal justice system. In terms of therapeutic jurisprudence, such actions are contrary to the philosophy of addressing underlying issues and needs that give rise to legal problems.

Discussion and conclusion

The child protection jurisdiction of the children’s court in Queensland is a somewhat neglected field. Significant reforms of substantive child protection laws and successive inquiries have not touched the operation of the court, except to make it busier. The majority of the research that has been undertaken about children’s courts in Australia has focused on juvenile justice rather than the court’s child protection powers. Sheehan investigated judicial decision-making in the Victorian court’s child protection division in order to identify the factors taken into account in deciding case disposition, finding that the adversarial system and emphasis on deciding the facts detracted from children’s best interests; and that magistrates relied on their own personal knowledge in decision-making, because submissions usually did not contain theoretical or research knowledge about child maltreatment and there was limited case law. The operation of children’s courts has also been considered by public inquiries, including the 1999 Commission of Inquiry into Abuse of Children in Queensland Institutions and the 2012 Protecting Victoria’s Vulnerable Children Inquiry. A 2004 report about options for reforming the court process in Victoria’s child protection system suggested therapeutic practices including ‘non-adversarialism, access to services, ongoing judicial supervision (or at least a form of case management), more direct interaction between the court and the parties, and inter-agency co-operation’. Likewise, the 2010 Victorian Law Reform Commission report into protection applications suggested options for court reforms that would ‘minimise disputation and maintain a focus on the best interests of the child’.

72 P Cummins, D Scott and B Scales, above n 45, at 387.
73 Kirby, Freiberg and Ward 2004 cited in Freiberg, above n 7, at 216.
However, there has been little attention in research or policy to the child protection division of the children's court in Queensland. While most participants in this study did not think law reform was necessary to improve the court’s functioning, implementation of existing legislation was seen as creating difficulties. For example, legislative provisions regarding obligations to assist families, family group meetings, and children’s participation in decision-making were regarded as adequate but not properly implemented or resourced. This severely constrains the capacity of the system to resolve matters outside of court proceedings. The main factors identified as not working well with the Queensland children's court were:

- Limited specialisation or expertise amongst judicial officers and legal practitioners in relation to children’s matters;
- Inconsistent decision-making across the State, and consequently variable thresholds for state intervention in family life;
- Children, young people and parents with complex or multiple needs (particularly related to mental health, intellectual disabilities and substance abuse) who were failing to receive the assistance they need before or after court proceedings;
- Parents who are not aware of their rights, who are intimidated and powerless in court and other legal proceedings, and do not have legal representation;
- Lack of children’s voice, participation and understanding of court processes;
- Inadequate case planning, poor quality evidentiary material and limited access to independent expert professional advice for judicial decision-makers; and
- Under-developed court procedures and processes, the highly adversarial approach, and a lack of positive working relationships between stakeholders in the court.

These are serious concerns that could be tackled through a more therapeutic and less adversarial approach, exploring opportunities for innovation and change within the present court system. Many changes would require a different focus but not necessarily more resources. There are aspects of the court that are consistent with therapeutic principles, such as the court’s aim of promoting the best interests of the child. But there are lost opportunities to make the court more responsive to children and families. This includes a more problem-solving approach to enhance procedural justice, improving mechanisms for conciliation and settlement, professional development to encourage a shift away from adversarial practices, better links with therapeutic and support services, increased access for judicial officers to multidisciplinary professional knowledge about child maltreatment and child development, and strengthening children’s participation. It would involve fostering a team approach and encouraging judicial officers to take a proactive role in creating better, well-coordinated services for clients.75 The principles and practices of therapeutic jurisprudence are clearly well-suited to the children's court. Initiatives are needed to improve court operations and

parents’ and children’s experiences of court. In turn this is likely to have a positive impact on both child well-being and family functioning. Not every court throughout the state may be able to have access to specialist practitioners or multidisciplinary input. But a small number of specialist courts could be a focal point, undertaking research, training and evaluation and pointing the way to best practice.

Given the nature of decisions made by the court, their life-long implications, and the complex human emotions involved, it is vital that the process is more satisfactory for the children, young people and families involved, that they feel listened to and understood, and that the court is perceived to be fair and just. The existing adversarial approach seems to be a relic of the early days of dealing with child protection and youth offending interchangeably in the court. Reform is now overdue for the court to keep pace with the therapeutic turn and advances in non-adversarial models in dealing with child protection matters.