Children’s Court Magistrates’ Views of Restorative Justice and Therapeutic Jurisprudence Measures for Young Offenders

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Abstract

Restorative justice and therapeutic jurisprudence measures have recently been introduced into youth justice systems. As gatekeepers to these measures, Children’s Court magistrates play a crucial role in their success. However, little research has been undertaken on magistrates’ views of these measures. This article addresses this gap by presenting results of interviews undertaken with Children’s Court magistrates in New South Wales, Australia. Our research suggests that magistrates are enthusiastic about the philosophy of both restorative and therapeutic measures, but are reluctant to embrace them if they consider them under-resourced, poorly understood and/or poorly implemented. The implications of these findings are discussed.

Keywords

Children’s Court magistrates, problem-solving courts, restorative justice, therapeutic jurisprudence, youth justice conferencing, youth offending

Introduction

In recent decades, restorative justice (RJ) and therapeutic jurisprudence (TJ) measures have been introduced into the youth justice system in New South Wales (NSW), Australia. Two key measures introduced in this context were youth justice conferencing (YJC), introduced under the Young Offenders Act 1997 (NSW) (the YOA), and the Youth Drug and Alcohol Court (YDAC), introduced in 2000 (Hannam and Crellin, 2010; Turner, 2011). While these measures are quite distinct in their aims and practice (as described below), they can be understood as part of a broader shift towards what King (2008) has referred to as ‘more emotionally intelligent and less adversarial approaches to resolving legal disputes’ (p. 1096).

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A number of individual Children’s Court magistrates in Australia have expressed general support for RJ and/or TJ measures (Grant, 2008; Hannam, 2009; cf. Potter, 2010). However, little prior research has been undertaken on the views of Children’s Court magistrates in relation to these measures. The research reported in this article begins to address this significant gap in the literature. The research was part of a national study of Children’s Courts in Australia about a wide range of topics (Borowski, 2013a, 2013b; Sheehan and Borowski, 2013). The NSW component of the study included semi-structured qualitative interviews with all 12 Children’s Court magistrates in NSW. The present article builds on other findings from the NSW component of the national study (see Bartels et al., in press; Fernandez et al., 2013, 2014), and presents the findings of interviews with magistrates in the NSW Children’s Court (the NSWCC or Court) in relation to RJ and TJ in general, and YJC and the YDAC in particular.

This article is presented in five main parts. Section ‘Overview of the NSW Youth Justice System’ provides an overview of the NSW youth justice system, as well as an introduction to RJ and TJ principles and the YJC and YDAC initiatives. Section ‘Judicial Officers’ Views on RJ and TJ Measures for Young Offenders’ presents the extant literature on judicial officers’ perceptions of RJ and TJ. Section ‘Methodology’ outlines the methodology for the national study of Australian children’s courts, as well as the methodology for the NSW component of the study, from which this article stems. Section ‘Findings’ presents the key findings from the thematic analysis of interviews with magistrates in the NSWCC. Finally, Section ‘Discussion’ considers the implications of these findings for youth justice policy in NSW. The article concludes that the scope of offences eligible for YJC should be expanded and the YDAC (which was abolished in 2012) be reinstated. In addition, there should be better resourcing of, and judicial education about, these measures.

**Overview of the NSW Youth Justice System**

The age of criminal responsibility in NSW (as in all Australian jurisdictions) is 10 years (Children (Criminal Proceedings) Act 1987 (NSW): s 5; see discussion in Sheehan and Borowski, 2013). Like most other Australian jurisdictions, the NSWCC hears criminal matters in relation to children aged between 10 and 17 years inclusive at the time of the alleged offence. As is also the case in other Australian states and territories (see Cunneen et al., 2015), NSW emphasises the principle of diversion (for discussion, see Richards and Lee, 2013; Weatherburn et al., 2012). Specifically, section 7(c) provides that ‘criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter’. Accordingly, placing a child before the Court is clearly presented as the option of last resort, and the YOA seeks to ensure that, where possible, a system of warnings, cautions and youth justice conferences precede court appearances.

The NSWCC deals with the vast majority of offences alleged to have been committed by young people that have not been resolved under the YOA, but does not have jurisdiction over serious indictable offences (i.e. homicide and offences punishable by 25 years’ or life imprisonment). The Court sits in three designated courthouses located in Parramatta, Glebe and Broadmeadow. The Court also sits on a permanent basis at non-specialist courts...
in six other locations. In non-metropolitan areas outside of these locations, NSWCC hearings are conducted by non-specialist Local Court magistrates, except when specialist magistrates are on rural ‘circuit’ and available to hear matters (NSWCC, 2016).

As discussed below, two key changes to youth justice in NSW in recent decades have been the introduction of YJCs, and the introduction (and subsequent abolition) of the YDAC.

**RJ and YJCs**

As Richards (2010: 1, see also Bolitho, 2012) has noted, there are many definitions of RJ. However, the following definition by Marshall (1996) has gained widespread acceptance: ‘[RJ is] a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future’ (p. 37). Generally speaking, RJ measures ‘seek to repair the harm caused by crime, to actively involve offenders, victims and communities in the criminal justice process and to provide a constructive intervention for juvenile offending’ (Richards, 2010: 1). A primary aim of RJ measures in Australian youth justice systems is to divert young people from the more formal and severe aspects of the system.

Referrals to YJC can be made by police (usually a Youth Liaison Officer), a NSWCC magistrate or the Director of Public Prosecutions. Historically, just over half of annual referrals come from magistrates, with the remainder coming primarily from police (Juvenile Justice NSW, 2014; Taussig, 2012). Young people are eligible for YJCs if they committed a summary offence (or the matter can be dealt with as a summary offence) and have entered a guilty plea at court. Managed by the State’s Department of Justice, conferences are facilitated by community members who live within the same geographical area as the young offenders and who, following initial training, are employed on a casual basis to conduct this work (Clancey et al., 2005). Victims of crime are invited to participate in the conference, and offenders and victims can bring a support person to the meeting, which is facilitated and held in the community. Conferences follow a loosely scripted process, whereby the participants discuss what happened and why, and the impact of the offence, before developing together a legally enforceable ‘outcome plan’ that aims to repair the harm and prevent future offending. Outcome plans typically include verbal and written apologies, restitution and the young person engaging in services that address their areas of need.

In 2013–2014, 1085 YJCs were facilitated in NSW (Juvenile Justice NSW, 2014). However, this represents only a small proportion of cases of youth offending, with 7401 young people finalised in the NSWCC in 2013 and 6769 in 2014 (NSW Bureau of Crime Statistics and Research (BOCSAR), 2015). This accordingly reflects earlier criticism that YJCs are under-utilised in NSW (Noetic Solutions, 2010; Richards, 2010).

**TJ and the YDAC**

The concept of TJ ‘focuses attention on the … law’s considerable impact on emotional life and psychological well-being’ and sees the law as ‘a social force that can produce
therapeutic or antitherapeutic consequences’ (Winick and Wexler, 2003: 7). This approach ‘directs the judge’s attention beyond the specific dispute before the court and toward the needs and circumstances of the individuals involved in the dispute’ (Rottman and Casey, 1999: 14). Key features of TJ therefore include actively using judicial authority to solve problems and change offenders’ behaviour, and a more interventionist role for the judicial officer than is the case in a traditional court process (see generally Bartels, 2009; Blagg, 2008; King, 2009). As Bartels and Richards (2013: 1; see also Blagg, 2008; King, 2009) have explained, one of the key ways TJ practices have evolved in practice is through the development of problem-oriented courts, which aim to use the courts’ authority and structure to further therapeutic goals (e.g. by dealing with an offender’s anger management or substance abuse issues).

The NSW YDAC was a clear example of this model (Daly and Marchetti, 2011; Turner, 2011). As set out by Turner (2011; see also Eardley et al., 2004; Hannam, 2009; Hannam and Crellin, 2010), the YDAC was established first as the Youth Drug Court as a pilot project in 2000, following a recommendation of the 1999 NSW Drug Summit. It was expanded to include alcohol-related offending and renamed the YDAC in 2003, following the NSW Alcohol Summit. The YDAC involved collaboration between the NSWCC, Legal Aid NSW, Justice Health, the NSW Department of Community Services (responsible for care and protection matters) and the NSW Department of Education and Training. Unlike YJCs, the YDAC was never legislated; rather, it was operated as a programme of the NSW Attorney-General’s Department.

To be referred to the YDAC, a young person was required to

- Have entered a plea of guilty to (or been found guilty of) all charges against him or her (all sex offences were excluded from the YDAC programme);
- Have a demonstrable drug and/or alcohol problem;
- Have been aged between 14 and 18 years at the time of the commission of the offence;
- Have committed an offence that can be dealt with to finality within the Children’s Court;
- Reside in, have committed the offence in or otherwise identify with the greater Sydney Metropolitan area;
- Be ineligible to be dealt with under the YOA (NSWCC, 2009).

Young offenders on the programme also received ongoing judicial supervision and casework support, counselling and educational, vocational and/or health treatment. Other components included dental and optical care, hearing tests, assistance with obtaining Medicare cards and music and living skills programmes (Hannam and Crellin, 2010). If the programme was completed successfully, the young person was given a non-custodial sentence and had no conviction recorded against their name. If the programme was not completed, the young person was sentenced in the usual manner. The programme generally ran for 6 months, although there was scope to extend this.

In 2004, Eardley et al. completed a preliminary evaluation of the YDAC, which found, inter alia, that
An estimated 60 percent of participants appeared in court on new charges while on the programme;

Approximately 35 percent of participants had no record of offending after they departed or completed the programme, but the post-programme offending data were incomplete and available for only a brief time after the pilot programme had concluded;

Compared with those who did not complete the programme, graduates demonstrated lower re-offending rates, increased motivation to reduce drug use and longer term improvements in mental health (particularly for young women);

Most participants reported a decrease in their drug use compared to 3 months prior to programme entry;

The programme achieved a positive, significant impact on the participants’ lives;

The programme was more cost-effective than keeping the participant group in custody.

In July 2012, the YDAC was ‘closed down at short notice’, reportedly on the basis that its ‘price tag was too much’ (Harvey, 2012). According to an editorial in the *Sydney Morning Herald* (SMH) (2012), the decision to end the programme was reportedly based on ‘[a] number of reviews … conducted to evaluate [YDAC’s] effectiveness in reducing re-offending. Unfortunately none of these evaluations have been positive enough to justify it continuing and regrettably the program closed as of [July 1]’.

The decision was met with significant criticism. In particular, the magistrate formerly in charge of the YDAC, Hillary Hannam, ‘rejected as offensive the suggestion that the widely admired and imitated program didn’t work to reduce reoffending’ (SMH, 2012). She also described it as “fundamentally incorrect” to suggest that “a number of reviews” found the program wanting’ (SMH, 2012). She asserted that the only review of which she was aware, conducted in 2004, recommended that the programme ‘be continued and possibly be expanded to selected other geographical areas’ (as quoted in SMH, 2012; see Eardley et al., 2004: v).

**Judicial Officers’ Views on RJ and TJ Measures for Young Offenders**

As stated above, little prior research has been conducted on judicial officers’ views of RJ and TJ measures or the philosophies that underpin them, particularly in relation to young offenders. This section provides a brief overview of the existing research literature on magistrates’ views of RJ and TJ measures. Following this, an overview of findings from the national study of children’s courts in Australia on judicial views of RJ and TJ is provided.

The limited existing research indicates cautious support for RJ among magistrates. For example, Stephens (2007) conducted interviews with 12 judges from Toronto, Canada, half of whom had experience in the youth court jurisdiction (as judges or lawyers). The respondents expressed support for youth diversion generally and were cautiously supportive of the use of RJ measures for young people and Indigenous people. Naudé and
Prinsloo’s (2005) survey of 69 magistrates and prosecutors from six magisterial offices in South Africa found widespread support for RJ generally, with the majority of respondents agreeing that it could contribute to community building (83%), make the offender aware of the harm caused to the victim (81%), hold the offender accountable for his or her behaviour (77%), involve community members in the criminal justice process (73%) and contribute to the offender accepting responsibility to set things right (70%). There was greater support for RJ for young offenders than adults: one-quarter believed that restorative measures were suitable only for juveniles, compared with 16% who believed that such measures were only suitable for adults.

Respondents to these studies also expressed some concerns about RJ measures. Chief among these was the issue of resources. Two-thirds of respondents to Naudé and Prinsloo’s (2005) study agreed with the statement that ‘restorative justice can be problematic because inadequate community resources could render it ineffective’. Judges interviewed for Stephens’ (2007) Canadian study also raised resources as a key problem. In particular, they raised a lack of stable, long-term funding for restorative initiatives, and a lack of information about community resources as tempering their support for RJ. In addition, Bazemore (1998) conducted research on the views of 20 juvenile court judges in the United States about increasing victim involvement in court procedures through RJ. He found that many respondents were concerned about protecting the rights of accused young people, and ensuring fairness and uniformity across cases (see further Bazemore and Leip, 2000).

There is only limited literature seeking to systematically examine a sample of judicial officers in relation to their perspectives on TJ. Chase and Hora’s (2000) research with 194 judicial officers from drug treatment and family law courts in the United States demonstrated higher levels of job satisfaction among judges in problem-solving courts (see also Hora and Chase, 2009). In Australia, Roach Anleu and Mack have conducted extensive research with judicial officers. They found that magistrates’ experience of judging in dedicated problem-oriented courts was limited, with 42 percent of respondents indicating they had not sat in such jurisdictions in the previous year (Mack and Roach Anleu, 2011; see also Roach Anleu and Mack, 2007). Notably, none of this research specifically considered the perspectives of judicial officers about TJ in the youth justice context.

The national study of children’s courts in Australia, from which this article stems, aimed to address this gap. Findings from this study specifically concerning attitudes to RJ and TJ have been reported in relation to Victoria, Queensland, Western Australia, South Australia and the Australian Capital Territory (ACT). TJ and RJ issues were not discussed in the analyses for Tasmania (Travers et al., 2013) or the Northern Territory (West and Heath, 2013).

Overall, support for RJ and TJ in the youth justice context varied. In Victoria, the 20 magistrates interviewed (including six specialist Children’s Court magistrates) supported the idea of the Children’s Court being, in essence, a ‘therapeutic jurisprudence-informed problem-solving court’ (Borowski and Sheehan, 2013: 387) and adopting ongoing case management type approaches. In Western Australia, interviews with 74 stakeholders, including 12 magistrates, six of whom were attached to the Children’s Court, likewise indicated support for diversion and early intervention (Spiranovic et al., 2015). Similar support was found in the ACT, where the 46 stakeholders interviewed identified RJ as a
major strength of the Children’s Court. RJ was perceived as less formal and more conducive to open communication among young people, their families and the court (Camilleri et al., 2013: 202). In the ACT, while some respondents mooted the possibility of more therapeutically oriented courts (in particular, drug courts), the consensus was that increasing resources for measures that prevented children and young people from entering the court, and for rehabilitation after court appearances, were the priority. In South Australia, 15 stakeholders (including seven members of the judiciary) noted they already had some discretion to take a TJ-type approach (e.g. through-call backs to court), although a more explicit TJ approach was discussed as a potential reform, there was agreement that, as it stood, there were insufficient resources and not enough cooperation among likely stakeholders (King et al., 2013). In Queensland, the findings (based on 47 stakeholders, including 12 judicial officers) were mixed. While there was general support for diversion, early intervention and RJ (in the form of youth conferencing), the Children’s Court was primarily conceived of as a space within which to dispense ‘justice’, rather than as a space to address the needs of young people coming before it (Tilbury and Mazerolle, 2013: 71).

The focus of this article is the findings from the NSW component of the study, the method for which will be described below.

**Methodology**

The national study from which this article stems was unique in gathering comparative data on all states and territories in Australia, and for its focus on the views of judicial officers, as well as other relevant stakeholders, which no prior study had done (see Borowski, 2013a, 2013b). The study aimed to address three main research questions:

- What are 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 judicial officers and other key stakeholders?
- What issues and challenges do judicial officers and other key stakeholders believe the Children’s Court will face over the next decade?
- What are the judicial officers’ and other key stakeholders’ assessments of, and degree of support for, child welfare and youth justice jurisdiction reforms that have recently been canvassed in Australia and overseas?

The present article focuses on the findings from the interviews with NSWCC magistrates, which were conducted in 2010–2011. In NSW, all practising Children’s Court magistrates agreed to be interviewed (n = 12). Interviews were semi-structured and lasted approximately an hour, covering approximately 17 questions relating to the purpose of the court, personnel, structure, cases and ‘clients’, and directions for reform. Magistrates were specifically prompted to comment on the impact (if any) of changes and reforms they had witnessed during their involvement with the Court, including the YDAC, the Pilot Child Sexual Assault Court, warnings, cautions and YJCs under the YOA, and other specialist interventions such as the Safe Aboriginal Youth Plan. Interviews were transcribed verbatim.
Thematic analysis of the transcribed interviews was then undertaken. Thematic analysis can be understood as ‘a method for identifying, analysing and reporting patterns (themes) within data’ (Braun and Clark, cited in Vaismoradi et al., 2013: 400; see also Grbich, 2013). Following Mason (2002), the process of analysis focused on both common themes and counter themes, and on points of consensus and divergence among participants. Examples of the themes identified below include the under-utilisation of YJCs and support for the YDAC’s intensive case management model.

**Findings**

This section outlines the findings of the NSW component of the national study in relation to magistrates’ views about RJ and TJ measures for young offenders, especially YJCs and the YDAC respectively. It shows that, with some exceptions, magistrates expressed support for both these initiatives.

**Respondents’ views on RJ measures**

RJ measures, and specifically YJC, were overwhelmingly supported by the magistrates interviewed for this study. A number of interviewees expressed this support in general terms, stating for example that ‘youth conferences are fantastic’ (Magistrate 2), and ‘youth justice conferences I like’ (Magistrate 5). However, some magistrates expressed their concern about what they saw as the under-utilisation of YJCs in NSW, and a desire to see conferencing expanded to include more serious offences, and better cater to non-metropolitan areas. Other magistrates made the following comments:

One of my big concerns is the lack of use of the [YOA] and conferencing … some [police Local Area Commands] just do not use them at all; some use them too much, at a pretty high rate – which is good to see. But others just don’t use them … you go out to the country and again you see some where it’s just nonexistent, one or two [conferences] in a year. (Magistrate 1; see Ringland and Smith, 2013, for discussion of this issue)

I’d like to see that we could refer more, I wish that they didn’t have excluded matters such as robbery and aggravated break and enters, because sometimes they’re not particularly serious examples, but they are what we’re seeing in court, and they’d be good for conferences. (Magistrate 3)

In addition, Magistrate 6 expressed frustration at the legal advice often given to young people – especially Indigenous young people – to not admit offences to the police, which can result in these young people being denied a caution or conference under the YOA.

In other cases, magistrates articulated their support for YJCs in more specific terms. For example, a number of those interviewed for the study believed that conferences enable young people to take greater responsibility for their offending than the traditional court process, with Magistrate 2 stating that ‘[in a YJC] you have to take some individual responsibility’. Magistrate 4 likewise stated,
I think the restorative justice process and youth justice conferences, by and large, makes it more likely that a young person will be able to develop some empathy … and take responsibility for their behaviour, than through the traditional sentencing process.

These magistrates also premised their support for YJCs on their belief that these restorative processes encourage young people to develop empathy (as set out above), and face the consequences of their crimes. Magistrate 2 went to some lengths to argue that YJCs can better achieve this aim than the traditional court process:

It’s very hard to avoid having a child [get] the impression that you come to court … that they just had a slap on the wrist because they go out with a caution … or a [good behaviour] bond, you have to be on good behaviour for [a] year, or six months, or a bond with supervision, and then you find out that because it’s only a bond, that [the Department of] Juvenile Justice because of the resource problem doesn’t really monitor [these bonds]. They’ll only really start intensive monitoring with a probation order. So [a] youth justice conference … I think is probably more valuable, even than a bond.

Only one magistrate expressed criticisms of YJCs. This magistrate was reluctant to embrace conferencing, due to concerns about its limited capacity to reduce recidivism: ‘reoffending rates … for juvenile justice conferencing, given that they are largely either first … offenders, or minimal offenders, actually they weren’t all that flash’ (Magistrate 10). Magistrate 10 also expressed a legal concern about the potential for YJCs to produce inconsistent outcomes for young offenders, as conferences deal with young offenders ‘according to the offence they have … committed, irrespective of their background or their record’ (see also Bazemore, 1998; Bazemore and Leip, 2000).

In addition, both Magistrates 10 and 11 expressed concern that conferences were no longer implemented in the way they were designed to be. Magistrate 10 expressed frustration about what might be understood as the ‘McDonaldisation’ (see Bohm, 2006; Umbreit, 1999) of YJCs – meaning that young people’s outcomes plans tend to be very similar to one another and have little regard for the offender’s individual needs – as well as their limited influence on young people’s criminogenic needs:

the original philosophy I suppose [was] that we were going to have these wonderful conferences where we were going to sit down with the child, the school teacher, the counsellor, someone from the community, the police officer, or the caring grandparents, and of course the victim, and we’re going to sit down examine this problem and come up with this very insightful … program which is going to change this child’s life around. What happened in practice in so many cases, was that the victim didn’t want to come anyway or didn’t [actually come]. … The outcome plan basically was to write a letter of apology to the victim, who probably didn’t want to get it anyway, in a form that was worked out – ‘I’m sorry, I won’t do it again’ … it involves a fair amount of time and resources to get that sort of wishy-washy, totally ineffective outcome.

Magistrate 11 echoed these sentiments, and expressed similar concerns that YJCs, while designed to demonstrate to young offenders the consequences of their actions, often fall short of this in practice:
I mean you can send them to a [YJC], but that depends on what is decided at the … conference. Sometimes they’re apologising for doing it. It doesn’t really address the matter sufficiently. I think it needs something more than just writing the letter [of apology to the victim], and even that children don’t even get round to. It’s really not enough I think to bring home to them what they’ve done and to make some sort of contribution back to the community.

The concerns about YJCs expressed by Magistrates 10 and 11 are only partially supported by the research. For example, Taussig’s (2012) research found that an apology was the most common outcome of YJCs in NSW (in 80% of cases). However, this research also found that 80% of young offenders were required to complete two or more tasks, and that the vast majority of outcome plans (89%) were completed. In relation to the observations about victim participation and satisfaction with the outcome, it is acknowledged that only 59 per cent of conferences in 2013–2014 with an identifiable victim proceeded with a victim or victim representative present. However, of those victims who do participate, satisfaction is consistently high; Wagland, Blanch and Moore (2013) found that with 89 percent of victims indicating they were satisfied or very satisfied with how the case was handled and 96 percent indicating they would recommend YJCs to others. In relation to the issue of resources, another BOCSAR study (Webber, 2012) found that the YJC programme was as a whole more cost-effective than court.

In summary, NSWCC magistrates were generally supportive of YJCs, with some expressing concern that YJCs had shifted from their intended purpose and become somewhat ‘watered down’ in practice.

**Respondents’ views on TJ measures**

Magistrates expressed a great deal of support for TJ measures and, more specifically, the NSW YDAC. As noted above, the YDAC operated from 2000 to 2012, and was therefore operational at the time of our research. Magistrates stated, ‘I support them [TJ measures], they’re terrific’ (Magistrate 7) and ‘I push the Youth Drug Court every day’ (Magistrate 3). Another commented that

I think it’s really good. I think the [YDAC] is a good move even in cases where kids don’t become model citizens – they tend to get better equipped and enabled to do the right thing more often. (Magistrate 4)

Some magistrates’ support for TJ measures was premised broadly on a view that addressing youth offending requires a multi-agency, wraparound approach that traditional courts cannot provide:

the [YDAC] team comprises of police and housing and other agencies, health … all coming together and trying to come up with some appropriate intervention, targeted intervention for that particular person, in that kind of team approach. That works well … (Magistrate 1)

… what’s exceptional about that program [the YDAC], those children who come before that court then often have a lot of mental health issues, and really down to dental hygiene, that court
can then arrange for them to be linked into services that are out there … suddenly you’ve got a caseworker who says ‘you’ve got problems with your teeth, we’re going to fix those up, or with your hearing, or with your eyesight, or with your ability to read and write’. Because someone is actually looking into it, saying, he’s illiterate but … maybe there are TAFE [Technical and Further Education] programs or whatever that can look at other skills that the offender can acquire despite their illiteracy. (Magistrate 2)

In some instances, magistrates’ support for TJ approaches, such as the YDAC, was premised on more specific grounds. For some, TJ measures provide a more intensive response to youth offending than the traditional Children’s Court model can achieve. It also provides a mechanism for unique relationships to be formed. For example, Magistrate 3 claimed,

I think one of the really, really fantastic parts about Drug Courts that works is the consistent involvement of someone in authority who actually cares about your progress, and we’re talking like 6-12 months’ involvement and the kind of relationships that build up.

Magistrate 1 likewise commented that ‘kids need a much more focused intervention [than the Children’s Court can provide]’. As Magistrate 3 pointed out, this is somewhat ironic, given that many magistrates adhere to the principle of reducing young people’s contact with the court system (as discussed above): ‘in the normal courts, the view seems to be the less contact you have with the court the better, whereas in … [the YDAC] … they’re involved with the court for 6-12 months’.

Other interviewees nominated aspects of procedural justice as informing their support for TJ measures for young offenders. For example, Magistrate 3 spoke at length about the genuine involvement in the process that young offenders can have in a therapeutic context (cf. Bartels and Richards, 2013) that is often unavailable to them in a traditional court setting:

… they often don’t know what’s going on in court. People speak in jargon, they often get different lawyers assigned every single time they come to court. I don’t think they often understand the seriousness of the offences they’ve been charged with. Often it appears to me that the only thing they understand at the end of the day is whether they’re getting custody or not, and if so how long. On the other hand, 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 … Those discussions end up being very frank and in language that they can really involve themselves.

Procedural justice relates to fairness in the processes for resolving disputes, including court processes. In this context, Tyler’s (2006) research indicates that offenders who are accorded procedural justice are more likely to respect legal authority figures and to comply with their orders. Procedural justice is regarded as a key concept within both the TJ and RJ literatures (see, for example, King, 2009).

Despite magistrates’ support for TJ approaches, a small number expressed concern that these were poorly understood by Children’s Court magistrates and other relevant professionals. Magistrate 1 claimed that
some of the time, the practitioners wouldn’t even think of it … this would be a case that could be referred to the [YDAC], and the lawyer wouldn’t think of it. So you just have to keep it on the radar.

Magistrate 3 argued that more education for magistrates was necessary for better uptake of TJ practices:

I wonder if other law schools are teaching these things. I think they are a little bit, but … it requires a whole change of mindset and institutionally for less conventional [approaches to be accepted] … there are a whole lot of things that we just do intuitively because that’s the way it’s always been done.

Others argued that better resourcing was required for therapeutic measures such as the YDAC to be more fully embraced, with Magistrate 9 noting that it was ‘[one of] a number of areas which I guess get a lot of lip service but really need to be maybe better funded and better resourced’.

Only one magistrate was reluctant to support the YDAC, due to its low volume of cases: ‘there’s been 150 graduates … in 10 years of operation. I mean that’s not really making a huge impact on the world … 150 in 10 years doesn’t seem to be a great result to me’ (Magistrate 5). Presumably, it was this sort of thinking that influenced the then NSW Attorney-General, Greg Smith SC, in his decision to abolish the YDAC, with a spokesperson noting that ‘[t]he costs of $4 million a year for an average of 17 graduates a year were not convincing figures’ (SMH, 2012).

**Discussion**

The foregoing views of NSWCC magistrates address an important gap in the existing research, which to date has provided little insight into judicial support for RJ and TJ measures for young offenders. As the preceding section demonstrates, respondents were mostly supportive of both RJ and TJ measures, but this support was premised on different grounds. YJCs were supported as magistrates believed they can help young people develop empathy, face the consequences of their actions and take responsibility for their behaviour. In contrast, the YDAC was supported on the grounds that it provided young people with an intensive, multi-agency response to their complex offending-related needs. Although magistrates raised some concerns about both these measures, these were largely related to their implementation, rather than their aims or philosophies. As such, key criticisms of YJCs were that they had moved away from their intended aim and were not used consistently across the state, while a key criticism of the YDAC was that it was poorly understood and required the judiciary to be better informed. Magistrates considered both YJCs and the YDAC to be under-utilised and poorly resourced.

These views were in turn largely premised on the belief that the traditional Children’s Court is circumscribed in what it can achieve with young offenders. Magistrates in this study generally expressed concern and frustration that the Court is very limited in the ways in which it can respond to the young people who come before it, and suggested that early intervention programmes, and non-judicial measures that address young people’s
complex needs, are needed. For example, magistrates commented on the importance of community-based education and health programmes to address issues such as substance abuse, mental health and cognitive functioning, and domestic violence: ‘Early intervention is the best thing … ADHD [Attention Deficit Hyperactivity Disorder], Aspergers, autism, there has to be a more structured approach to dealing with these problems’ (Magistrate 7).

In summary, respondents believed that early intervention measures that keep young people out of trouble in the first place were preferable to court. Furthermore, they believed that young people already in trouble require an approach that intensively addresses their offending-related needs (e.g. health, education, substance abuse) via an intensive, well-resourced, coordinated multi-agency approach.

Importantly, although this research suggests that while there is widespread support for YJCs and the YDAC among magistrates, such support does not necessarily translate into judicial officers referring high numbers of young people to these measures (see also Naudé and Prinsloo, 2005). As noted above, while magistrates make over half of all referrals to YJCs, this practice is still considered under-utilised (Noetic Solutions, 2010; Richards, 2010), particularly in relation to Indigenous young people (Allard et al., 2010; Snowball, 2008). Furthermore, the YDAC was criticised in relation to the low volume of young offenders it dealt with (see discussion above). For both practices, this under-utilisation is undoubtedly partly a result of what Blagg (2009) has referred to as ‘justice by geography’ (p. 24). The YDAC was only (previously) available in metropolitan Sydney, and although YJC is a state-wide programme, there is evidence to suggest that it is used inconsistently across NSW (Johnstone, 2015; for similar findings in Victoria and Queensland, see respectively Jordan and Farrell, 2013; Stewart and Smith, 2004).

Four preliminary recommendations stem from our analysis. First, we recommend that the eligibility criteria of YJCs be revisited, with a view to enabling YJCs to be used to respond to a wider range of offences, including more serious and violent offences, than are currently eligible. This recommendation reflects magistrates’ comments that they would like YJCs to be expanded to include more serious offences. Importantly, our proposal reflects research that suggests that YJCs are most effective in reducing recidivism when they are used in relation to violent youth offending (McCold and Wachtel, 1998; Sherman et al., 2000; Strang et al., 2013; cf. Weatherburn et al., 2012). Furthermore, relaxing the eligibility criteria of YJCs may begin to address criticisms that they often exclude Indigenous young people, who are over-represented among those who commit violent offences (Kenny and Lennings, 2007).

Second, we recommend the reinstatement of the YDAC in NSW. Magistrates interviewed for this study were overwhelmingly supportive of the programme, notwithstanding some concern that it dealt with only small numbers of young people. While the YDAC may indeed have responded to the offending of only small numbers of young offenders, it is precisely with this group of young offenders – with multiple, complex needs and entrenched patterns of offending – that interventions can be most beneficial both socially and financially. This should be seen as a priority as this small cohort of offenders is responsible for a large proportion of youth offending (Cunneen et al., 2015). Furthermore, even when TJ initiatives have not been found to reduce recidivism, they have been found
to result in a range of other benefits, including increased Indigenous participation in the criminal justice process, and increased trust in the justice system (see, for example, Borowski, 2009; Morgan and Louis, 2010). The observations on procedural justice above should be noted in this context. Importantly, findings from the early evaluation of the YDAC suggested that the eligibility requirements likely affected the number of referrals and acceptances into the programme (which were both lower than expected) (Eardley et al., 2004). As such issues were not insurmountable, the abolition of the programme may have related more to its perceived political palatability (Fishwick and Bolitho, 2010).

Third, both YJCs and the YDAC (if reinstated) need to be better resourced. Adequate resourcing is a key feature of programmes that report consistent success and mainstreaming such as youth conferencing in Northern Ireland. A key concern raised by this research is whether magistrates will refer young offenders to programmes of this nature if they perceive them to be poorly resourced and implemented – even if they largely agree with the aims and philosophies of RJ and TJ measures (see also Naudé and Prinsloo, 2005; Stephens, 2007). Better resourcing could also begin to address judicial officers’ concerns that YJCs have become ‘McDonaldized’ and no longer adequately address young people’s criminogenic needs or respond to their unique circumstances in the way originally intended. Better resourcing would begin to enable more individualised responses to young people’s offending, and may in turn address the concerns of some magistrates about their limitations in this regard.

Finally, better education and training is required for magistrates on both RJ and TJ measures. Magistrates in this study identified enthusiasm for, but a lack of understanding of, such measures, which ought to be addressed via targeted information and training.

Conclusion

Understanding magistrates’ views about ‘emotionally intelligent and less adversarial’ (King, 2008: 1096) measures such as RJ and TJ is vital, as they are key gatekeepers to these measures (Bazemore, 1998). However, very little research has been undertaken on this topic. The research presented here therefore begins to address a key gap in existing knowledge.

In general, NSWCC magistrates are supportive of RJ and TJ measures for young offenders, predominantly because they view these approaches as better equipped to respond to youth offending than the traditional Children’s Court process. The few magistrates who expressed reticence about YJC and the YDAC did so not because they disagreed with the aims and underlying philosophies of these measures but due to concerns about their implementation.

A number of implications stem from these findings, including the need for more and better resourcing, training and education for judicial officers, and the broadening of eligibility criteria for YJCs. Most significantly, however, the findings presented in this article demonstrate considerable judicial support for the now-abolished YDAC. As both existing research (Eardley et al., 2004) and our findings suggest, the documented limitations of the YDAC were not insurmountable. Given the evidence base for problem-solving courts in Australia (see, for example, Borowski, 2009; KPMG, 2014; Morgan and Louis, 2010;
Weatherburn et al., 2008) and the literature on drug courts from United States (see, for example, Aos et al., 2006; Koetzle Shaffer, 2006; Wilson et al., 2006), as well as Eardley et al.’s promising results from the early YDAC evaluation discussed above, the decision to close the YDAC is perplexing and problematic. In light of this evidence, and magistrates’ enthusiasm for the YDAC, a key recommendation of this article is that consideration be given to reinstating the NSW YDAC.

This recommendation has broader implications beyond NSW. In particular, the decision to abolish the YDAC was, as discussed above, motivated in large part by the perception that it was not a good use of public money. Our findings also highlighted magistrates’ concerns about inadequate resourcing of RJ and TJ measures. Accordingly, this points to an ongoing need to properly resource these interventions. Indeed, this is a problem across many jurisdictions (e.g. South Africa (Naudé and Prinsloo, 2005), Canada (Stephens, 2007) and England and Wales (O’Mahoney, 2012)) that prima facie support RJ and TJ measures, but do not allocate sufficient funding, leading to problems in the implementation and utilisation of these approaches. This is in contrast to jurisdictions such as Northern Ireland where RJ is ‘at the very core’ (O’Mahoney, 2012: 554) of the youth justice system. This has led to high levels of RJ use and positive outcomes (O’Mahoney, 2012). This may present a model for NSW and other jurisdictions to emulate.

Funding

The author(s) disclosed receipt of the following financial support for the research, authorship, and/or publication of this article: This work was supported by an Australian Research Council Discovery Grant (DP0987175).

Notes

1. This differs from international jurisdictions such as in Northern Ireland where youth conferencing is a mainstream component of the youth justice system (O’Mahoney, 2012; O’Mahony and Campbell, 2005).
2. The Australian Capital Territory (ACT) findings were not disaggregated by role, but included magistrates.
3. Ethics approval for the New South Wales (NSW) study was granted by the University of New South Wales (092135).
4. The third author (J.B.) conducted a number of interviews in the criminal jurisdiction component of the study.

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