A SPECIAL COURT FOR SPECIAL CASES

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The Special Circumstances Court, Brisbane

The Special Circumstances Court[1] is a special court list for defendants experiencing (or at risk of) homelessness or impaired decision-making capacity. The list is administered within the Brisbane Magistrates Court, and is aimed at rehabilitating adult defendants who have committed low-level criminal offences. The charge must have arisen in circumstances that are connected to the defendant's homelessness or impaired capacity. To be eligible to participate, defendants must plead guilty, or indicate a willingness to plead guilty to the offences as charged, and they must give informed written consent.

Homelessness is defined in accordance with the Chamberlain and MacKenzie[2] definition of homelessness; that is, a person may be homeless in the primary sense (because they are sleeping rough or in an improvised dwelling), the secondary sense (because they are living in a shelter or some other form of temporary accommodation), or in the tertiary sense (because they are living in a boarding house or hotel). Those at imminent risk of becoming homeless are also included within the court's definition of 'homeless'.

Impaired decision-making capacity refers to intellectual, psychiatric, cognitive or neurological impairment, or a combination of them, where this results in a reduction of the person's capacity for communication, social interaction or learning and a need for support.

Once a person is deemed eligible for acceptance into the list, the magistrate and the 'Court Case Coordinator' will work together to assess their suitability for the program. The Court Case Coordinator is a court liaison officer whose position is dedicated to the Special Circumstances List. The Court Case Coordinator is responsible for performing an initial assessment to determine the defendant's

eligibility; undertaking a formal assessment interview; making recommendations to the court regarding the type of treatment, rehabilitation and support options that may be appropriate for and available to the defendant; and monitoring the defendant's progress while they are within the program.

At the hearing, the magistrate considers the recommendations of the Court Case Coordinator and may:

- adjourn the matter to a later date;
- grant bail or vary or extend a grant of bail to the defendant under the condition that the defendant participate in certain programs;
- sentence the defendant; or
- refer the defendant to another court to be sentenced.

At present, the Special Circumstances Court convenes on Wednesdays, Thursdays and Fridays. Two magistrates are dedicated to the Special Circumstances List and they preside over the Special Circumstances Court on alternate weeks. If for some reason they are unable to attend, another magistrate will be allocated to the court for that day. Generally, however, defendants will appear before the same magistrate each time they attend the court.

Defendants are rarely seen by the court once. Rather, they constantly report back to the court – most often once a week, once a fortnight or once a month – so that the court can monitor their progress, they can receive regular support, and they can receive the services delivered by and at the court. Representatives from a number of community organisations, government departments and charities are present on court sitting days specifically to provide services and support to Special Circumstances Court defendants.

Once the defendant is sentenced, they are taken to have completed the program. Defendants will generally spend a number of months within the program. Indeed many defendants have remained within the program for years.

Courts Solving Problems: The Special Circumstances Court in Context

Problem-solving courts

Problem-solving courts expand the role of the criminal court beyond the adjudication of guilt and sentencing to encompass a range of practices and techniques aimed at addressing the causes of defendants' offending behaviour. Those within the court – the magistrate, defendant, prosecutor, defence lawyer and others – work together to bring about positive changes in defendants' lives, to address any problems defendants might have and to improve their life chances. This benefits the defendant, but also the broader community as it is expected that a reduction in offending behaviour will occur, thereby promoting community safety.[3]

Problem-solving courts must be distinguished from 'specialist courts' such as family courts and children's courts. 'Specialist' courts deal with complex areas of law, while problem-solving courts are concerned with complex social problems that require a multidisciplinary approach.[4] Problem-solving courts set themselves apart by employing an innovative approach to court proceedings, where the judicial officer leads a team of court players in finding solutions to defendants' problems.[5] In short, problem-solving courts may be described as 'specialized courts that develop expertise with particular problems.'[6]

Problem-solving courts implement a form of case management. All cases coming within the eligibility criteria are transferred to a separate docket to be dealt with by a judicial officer, or officers, dedicated to that particular list. In most problem-solving courts, defendants will be required to plead guilty to the charge to be eligible to participate. The rationale behind this is that then the court can 'get on with its real business' of working with a defendant to address the causes of his or her offending

behaviour.[7] It also allows the court to capitalise on a moment of crisis in the life of the defendant; defendants are told that if they do not take this opportunity to engage with the court, they will be dealt with in the ordinary way, which may mean that a sentence of imprisonment is imposed.[8]

At the commencement of proceedings in a problem-solving court, the judicial officer inquires into the circumstances of the offence, including the nature of the defendant's lifestyle and the extent to which individual characteristics and life chances influenced the defendant's behaviour. The judicial officer then works with the defendant to develop a plan to address the causes of his/her offending behaviour. Most often, this will involve close monitoring by, and regular visits to, the court; participation in programs; and attendance at welfare or treatment services. Often, a variety of other professionals including court liaison officers, psychologists and social service providers contribute to the rehabilitation plan and the sentencing process. Thus, problem-solving courts seek to fill a 'therapeutic void' in the delivery of social and welfare services by mandating the delivery of services to individuals with complex needs.[9]

The principles of therapeutic jurisprudence are said to underlie problem-solving courts and their practices.[10] Therapeutic jurisprudence broadens the focus of the law and legal processes to include the individual circumstances and needs of individuals impacted by them. Winick states (in the context of mental health law) that therapeutic jurisprudence is an approach to law that 'uses the tools of the behavioural sciences to assess the law's therapeutic impact' and 'reshape[s] law and legal processes in ways that can improve the psychological functioning and well-being of those affected.'[11]

The creation of problem-solving courts was influenced by increasing court case loads and escalating imprisonment rates. It was hoped that problem-solving courts would provide a less expensive alternative to imprisonment for low-level offenders. Many judicial officers within arrest courts recognised the relationships between mental illness, homelessness and offending, and expressed personal frustration and job

dissatisfaction as a result of the criminal justice system's 'revolving door'.[12] These judges felt that the coercive power of the court could be used to link defendants to services, and that providing assistance rather than punishment might be a more effective response.[13]

A brief history of problem solving courts

Drug courts are the oldest and most well-known form of problem-solving court. The first drug court was established in Florida in 1989 and, since then, thousands of drug courts have been established in the United States and around the world.[14] The original purpose of drug courts was to assist drug users, address the causes of drug-related crime, and provide an alternative to severe mandatory sentencing regimes.[15] The idea was that the legal authority of the court could be used to impose therapeutic interventions rather than punitive sentences, and that both the defendant and the community would benefit as a result.[16] The development of other problem-solving courts, based on a similar philosophy, soon followed.

While it is generally acknowledged that the introduction of the first drug courts can be attributed to a handful of 'hardworking and charismatic judges',[17] the proliferation of problem-solving courts has been the result of a number of 'grass-roots' movements.[18] Problem-solving courts have been devised to address a range of issues and problems and have included domestic violence courts,[19] community courts,[20] homelessness courts,[21] and teen courts.[22] Generally, such courts are established in response to a belief that traditional court processes are unable to adequately address the issues associated with a particular socio-legal problem.[23]

'Community courts' represented the first application of the drug court philosophy to complex problems of a different nature – the first community court was established in Manhattan in 1993.[24] Community courts were established to deal with community-based problems, and address offending behaviour, with the involvement of the local community. At community courts, defendants are offered alternative sentencing, including community service, which has some relation to the offence or

the place where the offence was committed.[25] The court also assists defendants to access the services they need to address the causes of their offending behaviour. It is the relationship between the court and the local community that distinguishes community courts from other problem-solving courts. There is close interaction between the court and 'the community', usually in the form of a panel or board of representatives. The community is encouraged to provide feedback on the practices and outcomes of the court and to make suggestions on strategies the court could use to address crime.[26] The court is expected to be responsive to the interests and wishes of the community. Indeed, many community courts receive financial support from local businesses, which may solidify this expectation.[27]

In Australia, a court based on the community court model was established in Yarra, close to the inner-city of Melbourne, in 2007. The 'Neighbourhood Justice Centre' (NJC) is aimed at encouraging 'local justice' solutions, engaging the public in dealing with community justice issues, and facilitating empathy between parties to proceedings, particularly victims and offenders.[28] The strength of the NJC is that the courtrooms are co-located with a community legal centre, Legal Aid office, mediation facilities and counseling and referral services. All legal and related services are thereby brought under a single roof providing a 'one stop shop' for defendants and litigants. The enabling Act states that when sentencing offenders, NJC magistrates may take into account statements and submissions provided by court liaison officers, health and community service providers, and anyone else considered appropriate. NJC magistrates are given the power to sentence defendants to participate in programs, and to defer sentencing to allow for programs to be completed.[29]

Homelessness courts are another type of problem-solving court that grew alongside the community court model in the United States. The first Homeless Court was established in San Diego in 1989. Homeless courts are similar to community courts in that appropriate, community-based sentencing alternatives are applied in less formal, therapeutic court proceedings. However, instead of being held in a courthouse, homeless courts are held within the premises of welfare services. Also,

defendants can be required by the court to participate in programs (such as life skills programs, drug and alcohol treatment, literacy classes and counseling) within their own shelter program. It has been reported that the practical support offered by these programs has resulted in high levels of compliance and reduced recidivism rates.[30]

Special Circumstances Courts

The formation of the Special Circumstances Courts in Australia was influenced significantly by these initiatives in the United States. The first Australian Special Circumstances Court was created within the Melbourne Magistrates Court in 2002. It was initially targeted at defendants with mental, cognitive or psychiatric impairment but, in 2006, the definition of 'special circumstances' was expanded to include homelessness where the defendant's homelessness resulted in them being unable to control the conduct which constituted the offence.[31]

The Brisbane Special Circumstances Court, which is the focus of this report, was established in 2006. This court was based on the Melbourne model although, unlike the Melbourne court, its focus was initially on homelessness. At its commencement, it aimed to provide an alternative means of addressing the 'offending' behaviour (particularly public order offences) of people experiencing homeless, or at risk of homelessness, who had impaired decision-making capacity at the time of the offence. Over time, the eligibility criteria expanded to include persons who are homeless *or* have impaired decision-making capacity, where their homelessness or impaired capacity contributed to the commission of the offence.[32]

At the Brisbane Special Circumstances Courts, magistrates work closely with defendants to find practical solutions to the difficulties they face to reduce their offending behaviour. As in other problem-solving courts, defendants are required to plead guilty, or indicate an intention to plead guilty, in order to be eligible for inclusion, and they must submit to an initial assessment. Once they are accepted into the program, they are required to regularly report to the court (often on a

weekly or fortnightly basis) so that their compliance with requirements imposed upon them by the court can be monitored. Such requirements might include engaging in processes to secure accommodation, attending drug or alcohol treatment, participating in counseling, and other self-help activities. The magistrates within these courts lead a team comprised of court liaison officers, the defence lawyer, the prosecutor, and a range of social service providers, all of whom work together to develop a case plan for each defendant. The case plan addresses defendants' individual needs and is aimed at preventing further offending. Research conducted in 2006 indicated that the most common penalties imposed on defendants within the Brisbane Special Circumstances Court were a combination of court attendance and participation in courses or treatment, and often in the form of a good behaviour bond with conditions imposed.[33]

The defendants who come before the Special Circumstances Court have invariably had experiences with a wide range of services and systems in the past. Having been homeless, many have spent time in supported accommodation facilities. Many have dealt with the Department of Housing in an attempt to obtain public or community housing. Many have accessed mental health and drug treatment services in the past. Many were children in care, or have had their children removed from their care, so they have dealt with child protection services. There have been many opportunities for positive interventions in the lives of these individuals. Despite this, there is a cohort of individuals who have not received the support they require in the community and, for whatever reason, they end up appearing before the criminal courts. The Queensland Supreme Court spoke of the Brisbane Special Circumstances Court in *Re AAM; Ex parte A-G (Qld)*; McMurdo P said:

> 'It seems unsatisfactory that the laws of this State make no provision for the determination of the question of fitness to plead to summary offences. It is well documented that mental illness is a common and growing problem amongst those charged with criminal offences. The Magistrates Court has attempted to meet this problem through its Special Circumstances Court Diversion Program which apparently presently operates only in the Brisbane

> area. This program assists categories of vulnerable people including those with impaired decision-making capacity because of mental illness, intellectual disability, cognitive impairment, or brain and neurological disorders. This commendable initiative, which allows for suitable compassionate supervisory and supportive bail and sentencing orders to be made in appropriate cases, may well be effective in assisting these vulnerable people. But it does not and cannot provide a satisfactory legal solution where people charged with summary offences under the criminal justice system are unfit to plead to those charges. The legislature may wish to consider whether law reform is needed to correct this hiatus in the existing criminal justice system.'[34]

Criticisms of problem-solving courts

The Australian literature is generally supportive of problem-solving courts. For example, in its comprehensive analysis of Australian 'court intervention programs',[35] the Western Australian Law Reform Commission concluded that most have had successful evaluation outcomes, and some have proven to be cost effective.[36] A 2007 evaluation of the Brisbane Special Circumstances Court concluded that there was evidence that 'the involvement of the court can be a catalyst for behaviour change.'[37]

However, in the United States, there is a substantial body of literature that is hostile towards problem-solving courts. While agreeing that traditional criminal justice methodologies for dealing with the 'offending' behaviour of defendants with complex needs are inappropriate, many commentators disapprove of certain features of problem-solving courts. In particular, these commentators have expressed concerns regarding the denial of defendants' civil rights in problem-solving court proceedings, and the stifling effect that the focus on self-responsibility can have on broader debate regarding the structural causes of poverty and its criminalisation.

Malkin argues that problem-solving courts entail 'an unusual expansion of state power' and that defendants divest themselves of many fundamental rights when agreeing to be dealt with by a problem-solving court.[38] The protections that an adversarial approach to criminal proceedings offers are stripped away in favour of a 'team-work' approach.[39] Rather than merely having their guilt or innocence determined, a defendant may feel coerced, under threat of incarceration, to be 'transformed' into a 'productive citizen.'[40] Thompson says the result may be that proceedings 'devolve into an unrecognizable caricature of a courtroom'.[41] The question he poses is: do defendants lose too much in the exchange?[42]

Certainly, the radical overhaul of the roles of the court actors in problem-solving courts has a number of ethical ramifications. Under an adversarial approach, judges are, at least in theory, impartial adjudicators. However, within problem-solving courts, the judicial officer is transformed into a case manager, broker of services, encourager and, sometimes, friend. This means they may become personally invested in the cases, and lives, of individual defendants, which may reduce their capability to remain unbiased in their determinations.[43] The role of the defence lawyer is transformed from partial advocate to team player, with a focus more on defendants' rehabilitation than their instructions.[44] Indeed, often the role of the defence lawyer becomes marginalised as much of the dialogue occurs between the judicial officer and the defendant.[45] Without independent legal advice, defendants might not be aware of potential means of challenging decisions, or indeed the charge itself.[46]

Malkin alleges a neglect of structural influences by problem solving courts when dealing with defendants. She argues that the court's individualised approach, which characterises defendants as 'empty vessels waiting to be reformed', means that society's contribution to their 'offending' (by failing to provide adequate social and economic support, or countenancing police practices that impact disproportionately on disadvantaged people, for example) is ignored in the process.[47] This is not only theoretically unjust, she says, but can impact adversely on defendants in the longer term, because although they may be 'armed with new selves' after the court's

intervention, all their practical problems (including unemployment and poverty) remain.

Thomson says that the requirement to plead guilty also stifles any debate about the circumstances that led to the arrest or charge, further reducing the accountability of police officers.[48] Indeed, it has been argued that the existence of problem-solving courts might encourage police officers to make arrests in circumstances where they otherwise might not have, because they know that the 'offender' will be dealt with appropriately.[49] Concerns have also been raised regarding proportionality in sentencing. Therapeutic interventions, particularly when they are combined with regular court attendance, are often experienced by defendants as more onerous, and punitive, than ordinary penalties such as small fines.[50] In situations where the defendant would have been discharged without penalty if they were not dealt with by the problem-solving court, the potential for injustice is more apparent.[51]

The possibility of mainstreaming

A difficulty with problem-solving courts which is universally recognised is that their scope is inherently limited, and only a small percentage of 'needy' defendants are dealt with by them. There is also general agreement that, regardless of the threats to procedural safeguards that problem-solving courts pose, many more defendants could benefit from the kinds of services that such courts broker and provide.

There are two ways in which the scope of problem-solving courts could be widened to encompass more defendants. First, more problem-solving courts could be established. While most commentators agree that this would be ideal, it is an expensive way of delivering services.[52] Having said this, many have argued that cost benefits accrue in other areas such as a reduction in the costs associated with imprisonment and, if the defendant is stabilised to the point where they can enter into employment, the welfare and social service costs associated with supporting a person who is unemployed.[53]

Alternatively, the methods and practices of problem-solving courts (or at least some of them) could be implemented in all generalist courts where the circumstances suggest that this is appropriate. For example, judicial officers presiding over all criminal courts could impose requirements upon defendants, where appropriate, to access treatment and welfare services, and could monitor defendants' compliance by requiring them to report back to the court on a regular basis. The possibility of 'mainstreaming' problem-solving approaches in this manner is embraced by some and rejected by others. Some commentators argue that this is the next step in the implementation of 'incremental improvements' to the traditional criminal court model.[54] Others are skeptical as to whether judicial officers in generalist courts would be willing, or able in the context of time and resource constraints, to apply problem-solving methods in every applicable case.[55]

In one American study, judges were asked to comment on whether they supported the mainstreaming of problem-solving techniques.[56] While the judges felt that integrating social service delivery was an effective practice within problem-solving courts, they felt that this would be difficult to do in a generalist court setting due to the lack of additional staff and case management services. The judges also noted the importance of building relationships with defendants, and they felt that the time constraints, and the rotation of judges, within generalist courts meant that this feature could not be replicated in that setting. Having said this, they agreed that some features of problem-solving courts were transferrable. For example, the judges said that taking a more proactive role in court proceedings, including seeking out more information on defendants' circumstances to better inform their deliberations, was something which could easily be done in a generalist court setting. The judges also noted that probation orders could be used to impose treatment plans on defendants, and that defendants could be required to report back to court for monitoring even though they might not necessarily see the same judge.

If it is agreed that problem-solving courts serve their defendants well, then the capacity for its techniques to be applied in generalist courts should be examined. This research involved the collection of information, in the form of court observation

and interviews, on the procedures and outcomes of the Brisbane Special Circumstances Court. During the course of the research, defendants and professionals who work within the Court were asked whether they thought the practices of the Special Circumstances Court were effective, and whether they could or should be mainstreamed. Their views are reported on here.

Cases Before the Brisbane Special Circumstances Court

Research methods

From 3 June 2010 until 25 November 2010, court observation was conducted at the Brisbane Special Circumstances Court. During this six month period, students of The University of Queensland's TC Beirne School of Law attended the Special Circumstances Court every Thursday with the aim of recording every case that came before the court on those days. The students attended the court for a total of 26 days. Three students undertook this task between them (hereafter, they are referred to as 'the observation team'); one member of the observation team attended the court on each Thursday within the study period.

The observation team entered their observations into a template; they collected the following information in relation to each court appearance, to the extent that the information was available:

- Defendant's surname, so that their subsequent court appearances could be matched up. The collection of defendants' names presented ethical issues related to confidentiality and privacy. To address this, the only people with access to the identified data were the observation team, the data entry assistants and the principal researcher. All identified data was stored on password-protected computers. It is noted, however, that all information collected was (technically) in the public domain, since the Special Circumstances Court is an open court.[57]
- Gender.
- Nature of any representation, legal or otherwise.

- Identification as Aboriginal or Torres Strait Islander. This identification had to be explicitly mentioned during the court proceedings for it to be recorded by the observation team. As a result, the final result may be an underestimate.
- Presence of mental illness or intellectual disability. This was recorded as definite where this was mentioned in court. Where there was other evidence to suggest the presence of mental illness or intellectual disability (eg. where it was mentioned in court that the defendant had accessed mental health services) the observation team recorded this as a possibility.
- Age, if stated during court proceedings.
- Housing and income source, if this was explicitly referred to during court proceedings.
- Charge(s).
- Penalties imposed. In some cases a global penalty was imposed by the court, while in others, penalties were imposed for each separate offence.
- Whether a conviction was recorded or not.

Ethical approval for this and all other aspects of the research project was obtained from The University of Queensland's Behavioural and Social Sciences Ethical Review Committee. Permission to undertake the study was also obtained from the Chief Magistrate. The research was funded by the Australasian Institute of Judicial Administration (AIJA) and The University of Queensland.

Defendant characteristics

During the 26 day study period, a total of 185 defendants were observed to come before the Special Circumstances Court. The total number of court appearances observed was 375. Ninety three (93) defendants appeared before the court multiple times. Of these, 43 appeared twice, 26 appeared three times, 13 appeared four times, and 11 appeared more than four times.

Male defendants were over-represented with men making up 68% of defendants. Fourteen percent (14%) of defendants were recorded as being of Aboriginal or Torres Strait Islander descent, however as noted above, this is likely to be an underestimate as only those cases in which the defendant explicitly identified as Aboriginal or Torres Strait Islander were counted.

Most of the defendants were younger adults: 31% of defendants were aged 17-25 years and 42% were aged between 26 and 35 years. Most of the remaining 27% of defendants were aged 36 or over, however three (3) of these defendants were aged less than 17 years. The reason for the presence of these children in the Special Circumstances Court is unknown.

Mental illness was discussed during the appearances of 53 defendants (29%) and there was evidence to suggest that a further 45 defendants (24%) also struggled with mental illness. Thus, it is likely that over half of the defendants observed during the study period suffered from mental illness.

Intellectual impairment was identified during the court appearances of 16 defendants, and there was evidence to suggest the existence of mental impairment in a further 19 cases. Thus, it is likely that around 18% of defendants observed coming before the court had intellectual impairment. Eleven (11) defendants had both mental illness and intellectual disability.

In the vast majority of court appearances, the defendant was represented; in only 13 observed court appearances was the defendant unrepresented. In 82% of the court appearances observed, the defendant was represented by the duty lawyer or a legal aid lawyer. In 10% of cases, the defendant was represented by the Aboriginal Legal Service. In seven (7) cases, the defendant was represented by a private lawyer. Further, in five (5) cases, the defendant was accompanied by a non-legal support person.

Defendants reported being accommodated in a wide variety of living situations. The vast majority of defendants (88%) came within the Chamberlain and MacKenzie definition of homeless.[58] Information on income source was not available in respect of most defendants as it was not always explicitly mentioned in court. However, of the defendants for whom this information was available, around three quarters received the Disability Support Pension or an unemployment benefit (Newstart or Youth Allowance). Some (11% by court appearance) were gainfully employed. (See Tables 1, 2 and 3)

Charges and penalties

The most common charges heard by the Special Circumstances were:

- public space offences, including public nuisance, contravention of a police direction and begging;
- theft offences, including shoplifting, unlawful possession of stolen property, unlawful dealing with shop goods, receipt of stolen goods and tainted property; and
- minor drug offences, including use of a prohibited substance, possession of small quantities of a prohibited drug, and possession of a utensil. (See Table 4)

Other common charges included wilful damage, breach of probation or bail, fraud, prostitution and fare evasion.

For most defendants (92%), the matter was adjourned. These defendants were required to report back to the court, and to undertake certain self-help activities including attendance at counseling or treatment services, and housing and welfare services. Other common penalties included bail (3%) and good behavior bonds (3%). Two defendants were imprisoned during the study period. (See Table 5)

Notably, no fines were imposed, there were no suspended sentences, and no defendants were discharged without penalty.

Throughout the study period, only nine convictions were recorded against defendants.

Table 1: Demographic characteristics of defendants

Gender	
Male	121 (68%)
Female	57 (32%)
Age range	
Under 17 years	3 (2%)
17-25 years	53 (31%)
26-35 years	71 (42%)
36-49 years	33 (19%)
50+ years	10 (6%)
Aboriginal and Torres Strait Islander (Identified in court)	26 (14%)
Presence of mental illness	
Confirmed in court	53 (29%)
Some evidence to suggest this	45 (24%)
Presence of intellectual impairment	
Confirmed in court	15 (8%)
Some evidence to suggest this	19 (10%)

Table 2: Housing type by all court appearances and by first court appearance

Housing type	**By court appearance (n=291)**	**At first court appearance (n=132)**
Primary homeless		
Sleeping out	32 (11%)	18 (14%)
Squatting	15 (5%)	4 (3%)
Secondary homeless		
Hostel or shelter	21 (7%)	8 (6%)
Staying with friends (couch surfing)	74 (25%)	30 (23%)
Tertiary homeless		
Boarding house	114 (39%)	55 (42%)
Private rental	23 (8%)	12 (9%)
Public housing	1 (<1%)	1 (<1%)
Other 'own accommodation'	1 (<1%)	3 (2%)
Other	5 (2%)	2 (2%)

Table 3: Income source by all court appearances and by first court appearance

Income source	**By court appearance (n=137)**	**At first court appearance (n=65)**
Disability support pension	73 (53%)	34 (52%)
Newstart	30 (22%)	14 (22%)
Youth Allowance	6 (4%)	2 (3%)
Age pension	4 (3%)	2 (3%)
No income	7 (5%)	1 (2%)
Employed	15 (11%)	11 (17%)
Other	2 (1%)	1 (2%)

Table 4: Most common charges by court appearance

Charge	Number and percentage of cases that involved certain charges
Theft offence - including shoplifting; unlawful dealing with goods; possession of stolen property	140 (37%)
Minor drug offence – including use of a drug; possession of small quantities of a drug for personal use	106 (28%)
Public nuisance	83 (22%)
Contravention of police direction	55 (15%)
Wilful damage	48 (13%)
Breach of probation or bail	36 (10%)
Possession of utensil	35 (9%)
Obstruct police	32 (9%)
Fraud offence	25 (7%)
Prostitution offence	21 (6%)
Evasion of fare	18 (5%)
Begging	17 (5%)

Note: These percentages do not add up to 100% because many defendants were charged with more than one offence.

Table 5: Most common penalties imposed

Penalty	Number of cases in which penalty was imposed (n=375)
Adjourned	344
Court to supervise	38
Bail enlarged	10
Bond without conditions	6
Good behaviour bond	5
Probation with conditions	2
Bail varied	2
Bail	1
Bail forfeited	1

What defendants say about the Brisbane Special Circumstances Court

Research methods and participant characteristics

In December 2010 and January 2011, **20 defendants** at the Brisbane Special Circumstances Court were interviewed regarding their personal experiences of the court. The interviews were conducted either by a social worker or the principal researcher, also a social worker (hereafter 'the interview team'). On the days the interviews took place, defendants at the court were informed that some research was being done at the court. They were invited to participate and were told that their participation would be remunerated with a $30 grocery voucher.

Potential participants were informed that their responses would remain completely confidential and that no identifying information would be collected from them. Understandably, defendants present at court on criminal charges are often reluctant to engage in research, or indeed to engage with anyone for any purpose that does not relate to their proceedings. For this reason, and out of respect of them and their concerns, demographic information was not collected regarding the participants. All participants were informed that their participation or non-participation would have no impact whatsoever on their sentence, the services provided to them, or any other aspect of their court experience.

The interviews with the defendants (hereafter 'defendant participants') each lasted around 30 minutes. The interviews were tape recorded and transcribed, and the qualitative date yielded was analysed thematically using pattern coding in accordance with Miles and Huberman's methods.[59]

The sampling technique was not random. Some defendant participants were encouraged to participate by the court liaison officer, the magistrate or other professionals present at the court. Others self-selected. Clearly, the sample cannot be considered representative. It provides only a snapshot of possible view points.

Having said this, a wide variety of responses regarding the court were obtained from the 20 defendant participants. The age range was wide (from early to late adulthood) and there was an even split between male and female participants. Defendants reported that they had been coming before the court for between two months and 18 months.

The defendant participants necessarily shared some key characteristics. All defendants coming before the Special Circumstances Court are homeless or at risk of homelessness, or have impaired decision-making capacity. Often both are applicable. Further, defendants who appear before the court have pleaded guilty to the offences they have been charged with. The offence(s) must be 'trivial' and non-violent in nature. Most often, the defendant participants reported that they had been charged with public nuisance, public drunkenness/drinking alcohol in public, or drug possession. Most of the defendant participants stated that they struggled with a drug or alcohol problem.

General findings

None of the complexities associated with problem-solving courts were lost on the defendant participants. They acknowledged the resource implications of a court of this nature; they emphasised the role that personal responsibility plays in individuals' capacity for change but also recognised the structural causes of offending; and they were aware of the role conflicts faced by the various players within the courtroom.

But the clearest message that was expressed by the defendant participants was that, if not for the presence of the court in their lives, their path would have been a very

different one. Whilst the defendant participants identified a number of aspects of the court that could be improved, on the whole, they expressed gratitude for the assistance that the court had provided them with, and they were hopeful that others in similar situations would have the benefit of the court's assistance in future.

Past experiences of the criminal justice system

For most of the defendant participants, court appearances had become a regular occurrence in their lives. Many described prior experiences of prison, and almost all of the defendant participants said they had received fines from courts in the past. None of the defendant participants admitted to committing serious crimes; rather, they described being charged with public space and other relatively minor offences including public nuisance, possession of a prohibited substance, begging and public drunkenness.

Some of the defendant participants stated that court-ordered fines were an inappropriate response to the kind of offending behavior they engaged in, and they were extremely cynical about the capacity of fines to alter their behavior. Four of the defendant participants made these comments:

> 'I've just been going to court for so long, like court was just – I don't know – all I was thinking about was just more fines. I wasn't expecting to go to jail… Most times, I don't even go. You can just send in a letter or you can just not appear and you get an extra $50 and stuff like that. Add onto your fines. I was just looking at it like that – just say "guilty, guilty", whatever, get it over with.'

> 'What's the point of fining people that are on benefits, which is only going to make their lives harder down the track, and they're just going to keep reoffending? There's no logic. It's set up that if you do something wrong, bad boy. But there's no support afterwards to stop from reoffending.'

> 'Like, if you're on a pension, how the bloody hell are you supposed to afford that? But then people say "why go out and steal?" Well, why? Why people steal is because they can't afford things. And they say "get a job" but it's easier to say "get a job", when who wants to employ someone?... I want to get a job, but just nobody wants you.'

> 'I've been charged three times for begging alms, which means asking people for change on the street. Now how does that justify the first two times I was fined hundreds of dollars? So I sit back and think, "who's really making the money out of this?" I'm only trying to survive. This court is a lot different. I've not seen the magistrate fine anyone, because it's not about the money here.'

Similarly, they felt that imprisonment did not address the problems associated with their offending behavior. Indeed, their experience was that imprisonment made it more difficult to break the cycle of offending. Three defendant participants said:

> 'They say that jail's for rehabilitating – that's bull shit. The simple fact of the matter is that you don't pay bills there, you don't do this, your medication's regulated. Everything's done for you – do you know what I mean? And then you come out and thrown straight back into your life, then you're supposed to get a job, you're meant to pay bills. It's very overbearing.'

> 'I've been in jail quite a few times – you go into jail, get out, back in the old routine, jail, out, back in the old routine.'

> 'If we give that person a break then maybe they won't lose everything and they won't get out and start back to scratch and trying to do things to get reestablished, you know what I mean? And that's what a lot of my trouble's been. By going to jail, being in there that long, and I lost everything. And to start again with a dole cheque is really, really hard.'

Many defendant participants were resentful towards the court system, and the criminal justice system as a whole. They felt that they had been misunderstood, and treated unfairly, by judicial officers in the past. They also felt that they had been humiliated and patronised in the generalist courts. Their comments regarding the treatment they received in the generalist courts reflected a sense of frustration with the system, as well as personal 'hurt':

> 'The other courts, they called me a serial pest… I guess I am in a way. 'Cause he said, you know, he's got more concerning things to worry about than people like me fronting court. Those other courts, they don't help you.'

> 'I found the other courts, they just don't even want to listen to you, you know?'

> 'The judge doesn't know who the hell you are. He just looks at your criminal history and makes judgement on that. They don't know any of the circumstances behind why you're here. This court does. I'm 42, I've been drinking since I was eight. Those other courts don't know that.'

> 'In normal courts, you're just a charge sheet.'

> 'Like a number, and an unimportant entity in the court room that's just taking up people's time, and they wish we'd just go away. That's how I felt in the past.'

Some defendant participants noted that courtroom experiences, and the resentment and frustration they engender, could in themselves be counter-productive in terms of reducing offending behavior. They said that the expectation of a prison sentence can remove the incentive to remain 'clean'. Two of the defendant participants said:

> 'Just knowing that you're not going there… Like, if six months ago, the judge is like "yeah, in six months time you're going to get sentencing of 10

> months", I would have stayed on the drugs and alcohol and I would have just bludged around until the six months was up to go inside.'
>
> 'People who are in and out and reincarcerated all the time, they give in on themselves. Whereas they do something small wrong, and they've given up on themselves – and before they've gone to court, they've got another 30 charges because they've already given up on themselves and they're thinking about going back to jail.'

Dignity and respect

By the time defendants reach the Special Circumstances Court, they have experienced a great deal of rejection, dehumanisation and humiliation both within and outside the court system. The defendant participants in this study had experienced a significant amount of trauma in their lives. Many struggled with drug addiction, mental illness or both. All had experienced poverty and homelessness. Many had spent protracted periods in prison. Many had been victims of abuse, as children or adults.

For these individuals, the dignity and respect that they were shown by the staff of the Special Circumstances Court – the magistrates, the court liaison officers, probation officers and service providers – was the most 'shocking', confronting and gratifying aspect of their experience at the court. Aside from the treatment or services they received, or the sentence they were ultimately given, the manner in which they were spoken to was described by many as the most outstanding feature of the court. Comments to this effect included:

> 'The respect that's given to people, the freedom to come and go as you are – there's no entrapment side of things. People talk to you as you're a human, not a number. I've never been in a system like this ever before. I can see very easily that this is only going to do good for people… they speak to you as a person. They don't hurry you along.'

> 'They certainly helped me quite a bit by just talking to me normally… They did a lot of listening and they communicated with me and find strategies on how I could cope.'

> 'The best thing about the court is when the judge talks to you and finds out what you really – how you're really feeling, what you really want. The judge just basically speaks to you really nicely and lets you know that they're there for you to help and whatever help you need to get back on track – what your life was supposed to be.'

> 'It's put a human face on the courts for me. And I can deal with human beings any day. I can't deal with bureaucracy. I can't deal with the machine. It overwhelms me.'

For many, the experience of being spoken to 'as a person, not a number' had a profound effect upon them. As one defendant participant said, 'it shocks the hell out of us because we expect to be treated as we've always been treated.' Some defendant participants responded to this regard and support in a very personal way. They described the court as a place they felt comfortable in – a place where they felt cared for – and for many, this was a unique experience. They said:

> 'This isn't a court – it's a place for people to come. This is a place where you actually get respected as a person.'

> 'I like the way they judge is more of a friend than someone in a suit behind the bench.'

> 'We've never had that, I guess, in our life… they actually give you a fair go. The judge will come down from the bench and sit down in front of you and talk to you like a human being. It's magic.'

> 'I've always found [X] to be absolutely brilliant and helpful. She gives good advice and even if you're not going to court, if you just need advice or help with something, [X] actually helps you.' … '[X] gives me phone calls during in between times, just to make sure I'm ok, like in between court dates.'
>
> 'I've seen [the magistrate] pull her chair down and go sit right in front of [a defendant], like we're sitting now, and say '[X], what can I do for you?'

Indeed, many defendant participants described the court, and staff members within in court, as 'more like a family'. They said:

> 'It's like a parent sort of, but not a parent. You get to sit and talk and try to work out things and explain it. But then they yell at you like a parent. … It's more like Christmas dinner, you know? Family sit down and talk, and bicker, and have a fight and, you know, fucking one of you walks out. More like that … It makes you want to come. Makes you want to come in. It's like friends you haven't seen for a while.'
>
> 'It's like the judge is the [parent] and everyone down there is the children. And then you have like your aunties and uncles – you know, the prosecution or whatever. And then the [community service providers] are like Nanna, "have the coffee, have the biscuits here – eat – here, more, more" and then sit and talk to you like a Nanna.'
>
> 'They really encourage you in practical ways to turn your life around for yourself – for you, not for anyone else. I've had a whole field of people assisting me. I don't know how to cope with that. I've never had anyone in my life assisting me. I'm an only child without a mum or a dad. And, yeah, now it feels like I have 20 mums sometimes. It's just pretty special, really. I feel really lucky.'

> 'He's a bit of a father figure… I'm sure 99% of us need that from time to time.'

Notably, much of the advice and assistance that the defendant participants reported receiving from the court was much more practical than legal in nature, which is again reflective of the unique relationship between the court staff and the defendant in this context. For example, one defendant participant said:

> 'If I drink, I go and sit in the park or something, getting drunk, try and walk home, get picked up by the coppers, charges are laid. [They] actually told me, they said "Peter, if you're going to drink, drink at home!" That's what I – well, I haven't been drinking in parks and I haven't been in trouble. That was just one little bit of advice.'

Many defendant participants described their relationships with court staff in a very personal manner, and some said that it was these personal relationships that motivated them to make positive changes in their lives. They said:

> 'Because I hold a lot of the people in such high esteem, their accolades mean a lot to me… I'm not going to reoffend – I'll make her proud. She's worked so hard for me, I can do that for her.'

> 'I basically – you know – had a connection with her, talking basically with her, found out she's willing to help you, and if you're willing to put the time in and do some hard work with her, get with her, pretty sure you're able to fix some of the problems.'

> 'She listens to me. She understands when I've put in effort, so she acknowledges the effort I've put in.'

> 'I've spent 17 years in jail. I'm 45. So I didn't get many chances. And these people have given me a chance. And I'm doing all I can to prove to them that I'm worthy of that chance. I want to be worthy of it.'

Having said this, some defendant participants were uncomfortable with the nature of the relationships and interactions being encouraged within the court. In particular, some defendant participants felt pressured to reveal personal details about themselves that they would rather have withheld. Some said they felt their privacy was being invaded, particularly in view of the fact that the Special Circumstances Court is an open court. One said:

> 'I don't like sitting there with all the other people sitting behind me listening to my stuff. I think that's a bit of an invasion of my privacy, especially in this type of court. Cos I don't think people open up as much as they really could… I don't really think those other people need to be in that court… when you walk out, the next person can come in. Why does everybody else need to be in there? What, to put you on show? I don't like that.'

> 'My lawyer asked me to recount the terrible things that have happened in the last 15 years, you know. And always reliving – that gets me a bit distressed.'

As one participant noted, the privacy implications are particularly acute in circumstances where the defendants know each other, and have had illicit dealings with one another in the past.

> 'To tell you the truth, I avoid people when I come here because, like, everywhere I go – I used to deal drugs, you know, so I run into people a lot. I'm trying to stay away from – get out of that, you know, sort of thing. But sometimes it's a bit of a hindrance when you come to court and you get, "[X], what you doing, man?"'

Failures of the service system

The overwhelming sense from the defendant participants in this study was that the service system had failed to provide them with the support they needed in the community. Many commented that their engagement with community services in the past had not been successful. Some said they were bemused by the service system and what it had to offer them. They related many examples of instances in their past where they had reached out for help, but had not received the assistance they needed. For example, one defendant participant related this experience:

> 'I've been to [homelessness service] once before. They said "alright, ring up housing commission – there's a phone there." Rang up housing commission, they said "nup". They said "go and see [homelessness shelter]", and they did nothing. All they did was say "go and see [another homelessness service]". Nobody wants to help you – just pass the buck to the next charity group. What happens when you've gone through them all?'

Others said they had not attempted to engage with community services because they had concerns related to their privacy or because they were cynical regarding their capacity to help.

For these participants, the court offered them a new method of engagement. The services seemed more easily accessible to them, the assistance they received seemed more intensive, and many reported successful outcomes.

> '[Coming to the Special Circumstances Court has] meant that I've been able to get easier access to support organisations whereas I probably wouldn't have known where to start otherwise.'

> 'A lot of the people is, you know, is the reasons they're committing crimes, because they are homeless and they're struggling, they don't have money, they don't have, you know, support in the community, or family support –

> they've got issues, drug issues, family issues, relationship issues. So it's not just one thing, it's a whole range of things, and that's why having a whole range of people in all different areas of life and in the community… It's really important to have that so that people can come to court and be sent into whichever directions they need to be so that hopefully in the future, they can address those issues and avoid coming back here altogether.'
>
> 'These guys were on to it like a snap of a finger. Twenty four hours, I was out of a disgusting thing (I don't know what it was, a squat) and straight into a place with a bed. I never had a bed for three months before I got that.'
>
> 'They've got everything you need, like lawyers, psychiatrists, case workers, Salvation Army – cover most aspects of the problems people have.'
>
> 'They all work as a good team. I've noticed that, the days I've been here. The judge says something and the others are already there with the things ready to, you know, help out.'

In addition to the assistance they received from the range of service providers present at court, defendant participants described a number of concrete ways in which the court was able to assist them. Many defendant participants said they had been provided with grocery vouchers, mobile phone cards and other types of practical assistance. Others described situations in which the court had assisted them to obtain their birth certificate, be put on the 'ultra-high priority list' for public housing, or secure drug and alcohol treatment. For other participants, the court had provided letters of support for accommodation and employment purposes. One defendant participant explained that the court had been able to obtain a bike for him as a means of solving his transportation difficulties so he could maintain his employment.

Some defendant participants commented that had they received appropriate support and services earlier in their lives, they might have avoided the path they ultimately took:

> 'I wasn't in a place until I went through homeless court. I ended up getting a place through homeless court which made me act better, think better [then I was able to] work from nine to five so I wasn't drinking from nine to five.'

> 'Things like access to foster families and stuff like that would've been more appropriate than waiting til my late age of 29 and then intervening in my life through the court systems and trying to rectify my life then at this late stage. I left school fourteen years ago, so that's a long time to just frazzle away doing nothing.'

> 'I've learnt that a lot of great services here really help. It's just a shame that we never really have the chance to use them til it's too late.'

The court as case manager

Many defendant participants spoke about the role the court played in maintaining regular contact with them, through regular court appearances as well as telephone contact with court liaison officers and service providers. Many believed that the regular court appearances, which were most often scheduled on a fortnightly basis, were central to their progress. They made comments including:

> 'I went to court maybe once a fortnight for the next six months… just to track my progress, to see how I was doing… What they did was they helped me move on – every time I come to court, every time I come to court they said a little bit of how I was doing, what's been going on with my life, and stuff like that, and told me to do something else… They tracked me down all the time and looked at my record and saw how I was doing, and told me not to get into no more trouble.'

> 'It's more a program than a court – they just sort of check up on you. They sort of give you a chance, and if you can show them that you're trying… It's just sort of good to have them keep an eye on you.'
>
> 'It's given me motivation because they're checking up on what I'm doing.'

Having said this, other defendant participants experienced the repeated court appearances as unduly burdensome. One said:

> 'It's so hard, especially where I'm – I'm travelling from Logan to here once a fortnight, and with TAFE as well, I'm missing every fortnight on a Friday – missing out on a whole day of class. That's what I would change, the dates. To like once a month or something like that – a bit easier to manage.'

Two of the defendant participants in this study expressed significant frustration with the case management role of the court, and questioned its effectiveness. Further, a number of defendant participants noted that there was 'a lot of waiting around' prior to each court appearance, and some said that they felt they did not need the level of intensive supervision they were subject to. One of the defendant participants said:

> 'What are they actually doing for me, the court here? Keep adjourning my sentence til, for what? If it's only [the court liaison officer] that's going to be the only one helping me, why keep fronting up here for? Oh I don't know – I just wish it was over and done with instead of all this. I don't know what they're doing… A bit frustrating, I guess.'

Still others presented a balanced perspective which acknowledged the burden the constant reporting to court placed on them, but also recognised the value and importance of the court appearances. Two defendant participants said:

> 'It's good coming in here all the time but it's also kind of annoying at the same time because I've got to come from a long way and it's a long train ride.'

> 'I got really put off by this court at first because I wanted to get my sentence over and done with, so I didn't really care about a more harsher penalty. I just, I didn't want to come in every bloody fortnight, or whatever… So after I come for, you know, a couple of weeks, couple of months sort of thing, well, that all started to change. I became more open and willing.'

Taking personal responsibility

A number of defendant participants admitted that it had taken some time before they had decided to 'engage' with the court, and that for a time they had resisted the court's intervention. However, most of the defendant participants interviewed in this study had subsequently come to the conclusion that the court could only help them if they were willing to help themselves. For example, some said:

> 'I've got another new about 10 or 20 mates in here – they're in and out of here in a week or two because they don't know how to utilise the court, utilise the services. I guess they're not really willing to open up to the courts about anything so I guess that's their own fault as well because you can't say that the people aren't here to help them use these services. They've got to help – they've got to want it themselves.'

> 'It depends on how you use that information – if you use it wisely, or if you don't use it at all. If you use it to support yourself, then you're helping the court do its job.'

> 'If you want to be responsible, and you want to make a difference, this court can help you do that, but you've got to be with it – you've got to go with them because if you don't, there's no point.'

> 'If people want to get better, they will get better here but, if they don't, well then they'll find out for themselves. That's what I like about the way this works, this is here for the people that want to go forward.

Some defendant participants questioned the motives and credibility of other defendants. One defendant participant likened other defendants to sales people with a script that they follow to get what they want:

> 'I notice these people going through the Special Circumstances Court, it's a bit like, you know – it's how they're talking, you know, like: "I've realised that I've been wrong all along and I need help, and I'm trying to help myself" and all this, while still selling sticks and shooting morphine.'

Alongside this rhetoric of personal responsibility, however, many defendant participants expressed the belief that individuals' circumstances are complex, and that people are often influenced by factors aside from their personal intentions. For example, some defendant participants spoke of the unique pressures of addiction, and noted that a personal desire for change is not always enough to enable a person to stay clean. Some noted that individuals' struggle with mental illness militated against their ability to make decisions that would bring about a positive change in their life circumstances. Others spoke of the structural barriers faced by people who are homeless. Still others discussed the impacts of institutionalisation on people they knew, coming to the conclusion that some people simply cannot survive 'on the outside'. Comments of defendant participants to this effect included the following:

> '[Some defendants] don't want to hear anyone else's success stories, 'cause they're going through hell. And it's their well-being, and it's because the courts are getting in and putting their – not putting their nose in it, but – they're trying to help the individuals stop something they love, but also vouch for their well-being in the future. They have no idea about the poor guy's future, girl's future. Guy and girl are just sleeping in a car and they've

> woken up and come to court with a kid in their car still. The dude's still drunk and the chick's kicked the drinking three months earlier and got a black eye and stuff like that, you can't – you can't predict the future of that type of person and it seems to me that's what the court does a lot.'

> '[The magistrate] sent her back [to prison], but [the magistrate] thought it was best for her. And I think in a way it probably was. Like, because she was homeless out here and being taken advantage of. In jail, she has done a lot of jail, and she does it easy. She's got friends there and she's got routine. And sometimes routine's really good.'

Pleading guilty

In order to be eligible for inclusion in the Special Circumstances Court program, a defendant must plead guilty. Two of the defendant participants took issue with this feature of the court. They expressed discomfort with the fact that the 'evidence was not tested' and they felt the injustice of this because, in their view, the police had behaved badly towards them and they did not deserve the charge. Related to this, some defendant participants were critical of duty lawyers because they felt they had not acted as zealous advocates on their behalf.

> 'Normally, other lawyers, they've got some idea of what's going to happen – like, sentencing wise – but these, they don't. Won't even tell you what's going to happen.'

Many defendant participants raised issues related to policing, and the injustices they felt had been perpetrated upon them. Many claimed that police had 'lied' about what they had done, or that they had been charged with an offence in circumstances where their behavior was not criminal, or harmful, in nature. Yet, notably, the sense of injustice that these defendant participants expressed did not necessarily detract from their acceptance of the premise that taking personal responsibility for their circumstances and life choices was critical to their 'success' within the court.

The success of the Special Circumstances Court

Ultimately, the defendant participants measured the success of the court in terms of the changes it had brought about in their lives. For some, the fact that they had obtained housing after a long period of homelessness, had reduced their drug use or stopped dealing drugs, had finally separated from a violent partner, or had achieved an educational or training milestone indicated that the court had 'succeeded' with them.

> 'My drug use has probably decreased by about 20 times – my pot use is 10 times smaller and my amphetamine use if down to zero.'

> 'I'd still be homeless if it wasn't for this court.' … 'It's the first time I've had my own place in 17 years, and I wouldn't have it if it wasn't for this court.'

Many said that they believed they would be in jail, homeless or even have died, had they not come across the Special Circumstances Court.

> 'When I first came to this court, I was homeless, very mentally ill. For the past six to eight months, I've been going with the courts along to progress and progress and progress. Now I've completed the course, I've got a place where I can live and call home, I'm working and I'm keeping down on my addictions properly, so I'm doing much, much better than I was before I went to this court – yeah, much better.'

> 'It's just changed everything in my life. My first bit of stability so, yeah, it's changed everything.'

> 'Before, I didn't give a fuck about anything, but now I'm actually sitting down and thinking about things and before I do things now, and the people I hang out with. If I was still on the streets, or if I didn't ever come to this court, I

> wouldn't have ever got off the dole. I would have sat down and been a druggo for the rest of my life. But coming here, and realising, well, that's not the way to go, I'm doing my course, getting qualified, then going out into a decent paying job, so I can get somewhere in life instead of sitting around smoking bongs all day, smoking ice.'

Other defendant participants spoke of the impact the court had had on their sense of self – their self esteem, their confidence, and their capacity to cope.

> 'My confidence levels are a lot better than what they were. I'm actually looking towards the future and what I want to do. Coming out of a normal court system, you're likely just to go straight back into whatever you were mucking up with before, whereas this way, is finding answers and actually solving problems.'

> 'I am a person that's gone through so much, I just wouldn't have coped without this court… The main courts still would have been way too raw for somebody like me.'

> 'It gives people a sense of hope that people are willing to help – it doesn't matter your background or your circumstances, where you're from, what you've done – they can always change, you know?'

> 'I want to go back to school. I thought I was dumb as dog shit but now I think maybe I'm not, maybe I can do something more. I've begun to dream again.'

Some defendant participants commented that the renewed respect for the justice system that their participation in the court had brought about, as well as the personal confidence and pride the court had instilled within them personally, had the potential to reduce their chances of offending. For example, two defendant participants said:

> '[X]'s taught me to respect the judicial system. I didn't have a lot of respect for the judicial system before. And I'm ashamed of that now.'

> 'It's making such a difference, not only in the offenders' lives, but in the wider community's lives. Cos I'm not wanting to go back out there and reoffend. I'm not wanting to go and hurt anyone or steal from anyone or cause havoc for anyone. So it's like everyone wins.

Further to this, the defendant participants who had reached the end of their time within the court expressed an intention to assist others who had experienced the same difficulties as themselves. One defendant participant commented:

> 'Personally, I would like to thank the Special Circumstances Court for helping me, for changing my life. Like I'm not going to be a big success story, but I'm still one of the successes that came out of this court, fully with all knowledge that these guys helped me. I mean, I know exactly what it's all about. I can spread it, I can tell everyone else about it, and encourage people that this court does change your life around, for the better. And it'd be sad for me to leave the support and the whole – all these guys – but someone needs to take my spot hey? Could be you!'

What court staff say about the Brisbane Special Circumstances Court

Research methods and participant characteristics

Between December 2010 and June 2011, twelve (12) professional people who work at the Special Circumstances Court were interviewed about their views on the court and their role within it (hereafter 'professional participants').

Of the 12 professional participants, there were:

- Three magistrates;
- Three employees of the Department of Justice (who act in case management and related roles); and
- Six community service providers who work for non-government organisations that are external to the court, but provide services to it and its defendants. Such organisations include major charities, specialist community services (targeted at youth, women, etc.), and homelessness services.

A semi-structured questionnaire was used in each interview. The issues that were explored with participants included:

- What they thought the goals of the court were;
- Whether they thought the court met its goals;
- How they thought the court could be improved;
- Whether they thought the court could, or should, be rolled-out or 'mainstreamed' and how this might be done.

The duration of the interviews ranged from 35 minutes to two hours. All the interviews were tape recorded and subsequently transcribed. The qualitative data yielded was analysed thematically using pattern coding, as per Miles and Huberman's methods.[60] (Owing to the small sample size, the comments that are quoted here are not attributed to any professional role or group because this would make them potentially identifiable.)

General findings

The central message delivered by all professional participants was their strong support of the court. While most of the professional participants held their own views on ways in which the court could be improved, they all praised the court and its achievements, and were overwhelmingly in favour of the court continuing in close to its current form.

The strengths of the Special Circumstances Court were identified as being:

- The capacity of the court to contextualise defendants' offending behavior – to look at the defendant as an individual within a complex set of circumstances rather than looking at their offence in isolation;
- The ability of court staff to build supportive relationships with defendants to effectuate change in their lives;
- The court's role in service delivery, including services delivered by the court liaison officers and probation officers, as well as those delivered by external service providers that attend and support the court; and
- The court's capacity to use its authority to encourage and bring about change in defendants' lives.

Having said this, the professional participants identified potential limitations and risks associated with each of these features of the court. The key concerns regarding the current model of the court raised by the professional participants were:

- Concerns regarding defendants' privacy and confidentiality;
- A lack of resources, both for the community service providers that provide services to the court and defendants, but also within the sector as a whole;
- The limited scope of the court, and that not all individuals who would benefit from the court's services are able to access it; and
- The inadequacy or inappropriateness of existing sentencing alternatives to support the goals of the court.

The context of offending: Looking at the person not the offence

The professional participants overwhelmingly felt that the best feature of the Special Circumstances Court was the capacity to take the whole of the offender's circumstances into account when determining how they should be dealt with by the criminal justice system. All of the professional participants emphasised that the defendants coming before the Special Circumstances Court were disadvantaged in a variety of ways. For example, one professional participant said:

> 'I mean, you go back and you read the details of their lives and you couldn't script it. There are things that are so dreadful you think: well, why wouldn't you be like this?'

The professional participants considered the generalist court system to be inappropriate for the kinds of individuals coming before the Special Circumstances Court, and they all agreed that these individuals needed differential treatment within the justice system. The professional participants identified a number of reasons why this was the case.

First, the professional participants noted that often defendants have been charged with offences directly related to their poverty, homelessness, mental illness or intellectual impairment. The offences of public nuisance, begging, theft and minor

drug offences were all attributed to defendants' status, rather than any kind of 'evil' or dangerous nature. In the Special Circumstances Court, factors that contributed to offending behaviour, such as past trauma or events that provoked or otherwise led to the offence, could taken into account. This was considered its key strength. They said:

> 'There's often a whole heap of stuff like, you know, his girlfriend died yesterday, and you go "Christ, didn't that have some relationship to their offending behavior?"'

> 'It isn't just using the crime and punishment mentality. [The court is] actually trying to use the welfare model of – well, the legal issue exists but it exists within a major amount of other stuff that's going on in that person's life.'

By taking into account defendants' circumstances and life chances, the professional participants felt that they were able to treat defendants with more respect and 'humanity' than was possible in other court settings. They felt that this meant defendants were more comfortable, and more willing to work with them. One participant said:

> 'When someone comes into the room and the magistrate is actually like "how are you?" that, for starters, is a big thing.'

Relationships between defendants and court staff

The treatment of defendants as 'people' rather than 'offenders' was described by the professional participants as something more than mere courtesy. All of the professional participants described the interactions between defendants and court staff as 'relationships', and all noted that a genuine rapport tends to develop between them. This is mainly facilitated by the particular methodology employed by the Special Circumstances Court which involves repeat appearances for all defendants. Defendants see the same staff members each time they come to court,

including the magistrate. As a result of the frequency of their interactions, as well as the personal commitment of the individual staff members, genuinely supportive and caring relationships develop between the staff and the defendants. Professional participants said:

> 'To me, that's what makes the difference. They come in every two to four weeks, report on how they're going, and get stabilised.'

> 'I think that's what's good about this court – consistency. It's probably the closes thing to consistency that they've ever had – to have the same people in their life for six months.'

> 'They're normally around for a few months. They grow in confidence and, you know, they get to know the [court staff] and the people who are always hanging around to the point where they feel comfortable to say "hey, I'm having a really bad day".'

> 'You've got people in these roles who obviously want to do this and have a particular interest and ability to do this type of work… They certainly operate from a social justice framework and a desire to do the best for the person coming before the court… It's a very balanced and very sensitive sort of approach.'

Some of the professional participants believed that the building of these relationships was critical to the helping process. They felt that because defendants felt comfortable at the court, they were willing – or even wanting – to attend court on a regular basis. This mutual engagement enabled intervention to occur. Three professional participants commented:

> 'I think unless they feel welcome they're not going to table their problem, and if they don't table their problem we're never going to be able to get to the bottom of it.'

> 'That relationship building underpins how it all works, so they come back because they know they're accepted as a person not as a – not just as a charge, you know? It's different.'

> 'A lot of the people like coming because they haven't previously been in a position where someone in authority gave them – recognised their good points and recognised their strengths as against their weaknesses, and perhaps had a positive view about what they might do, instead of constantly putting them down with low expectations… Most of them seem to be pleased to come in and people come back to show photographs of children or talk about some triumph they've had with housing.'

Many professional participants spoke about the importance of mutual trust to the 'helping process'. Some noted that, practically speaking, the more defendants trusted the court staff, the more information court staff were able to obtain about them and the better equipped the staff felt to decide on and implement strategies to address defendants' offending behavior. Other professional participants believed that by developing supportive relationships with defendants, and providing reassurance and positive regard, they could assist defendants to build up a positive self-image. This, they believed, empowered defendants to bring about change in their own lives. One professional participant said:

> 'It's about building a relationship based on trust, which is about how they feel about themselves and all, and then to build on that whole process so that they want to change, so that their reoffending is reduced and try to address those major issues.'

Some professional participants said that defendants were sometimes motivated by a desire for the approval of 'the court'. One participant explained it this way:

> 'Initially, people change because they're relieved to be there, and they're not in the other courts and they can hear that they're going to get cut a break. Then they change because they want to please us, because they develop a level of which there's some, I suppose, fondness for us, and that we're keen for a better outcome. And then the breakthrough moment comes when they're doing it for themselves.'

While most of the professional participants said that supportive, trusting relationships between court staff and defendants was central to the court's success, some questioned the appropriateness and helpfulness of this in some circumstances. For example, one professional participant noted the 'huge, huge power imbalance' between the magistrate and the defendant and felt that on this basis alone, it was inappropriate for a magistrate to build a supportive relationship with a defendant. Another professional participant felt that the relationship should be between the defendant and 'the court' as a whole, 'not the personality of the magistrate'.

Other professional participants doubted whether this kind of supportive role was one that a court, or a magistrate, should have with a defendant at all. Two professional participants felt that there was a danger that defendants would become too dependent on the court:

> 'I think a lot of people can become quite dependent on the court and I think rather than seeing the court as – well – law, or seeing it as a court, they start to see it as a support service, which is great but I don't think that's what our role is. I think our role is to support while they're on court, but then get them to services, refer them and then let them go.'

> 'We want to divert them away from the criminal justice system so to have them become too, I suppose, dependent on the actual court or the people within the court is really detrimental long-term for them.'

Some questioned whether magistrates were suitably qualified to undertake the role of supporter and encourager, and suggested that it would be better for the defendant to build those supportive relationships with other professionals, such as a psychologist or psychiatrist. Related to this, some professional participants felt that defendants coming back to court all the time 'might not always be necessary'. For example, two said:

> 'I do think it expects a lot of the client… There needs to be clearer boundaries around well how long are we going to keep a person on the program for and how many times are we going to make that person come back?'

> 'I think that the actual going to court, reporting, things like that should be kept to a minimum… I think the more we can keep people out of that system, the better.'

Others were ambivalent or uncertain about whether the court should undertake supportive and therapeutic roles. They concluded that while it was 'pretty sad that they have to have a magistrate praise them and make them feel good', it seemed that no one else was fulfilling that role for the person. For example, three of the participants said:

> 'It's not really a role a magistrate should have, theoretically, but I think it works quite well for some people, so-'

> 'Some people desperately need the supervision, don't they?... I think they need a lot of support and a lot of attention.'

> 'Absent the court, who else is going to do it?'

Responding to the failures of the service system

There was a general sense amongst the professional participants that the service system had failed the individuals who found themselves before the Special Circumstances Court. Three professional participants said:

> 'The older people weren't even aware of the services they could access to access housing. It's unfortunate that they had to be picked up by the justice system for that to happen but, if that hadn't have happened, they'd still be out there.'

> 'A lot of the people we're seeing at the court aren't people who are service savvy, so these aren't people who are accessing services regularly – well, certainly when they do, they're not good advocates for themselves.'

> 'Many of those people won't come into a mainstream office. They would rather actually not have a Centrelink benefit than have to deal with a mainstream office… They can't deal with the bureaucracy and the queries and the inevitable delays and being put on phones.'

None of the professional participants offered suggestions on why and how the service system had failed to meet the needs of these individuals, and no blame was laid. A defendant's appearance before the Special Circumstances Court was viewed as an opportunity to link them with the services they needed (mostly housing and drug and alcohol treatment), and to fast-track service delivery where possible, so that the causes of their offending behaviour could be addressed as quickly as possible. The professional participants also said that the court could often provide immediate assistance such as obtaining identification documents, particularly birth certificates; providing food vouchers and chattels; providing assistance with job readiness such as compiling a CV; and providing general assistance with documentation related to such things as housing, social security, education and training. As one professional participant said:

> 'I like them to come in every fortnight because if they've got a particular problem you can go to the Salvation Army, use the photocopier, get assistance with sorting out some problems they might not have got the proper grasp of… When they're here, they're actually seeing the service providers.'

The ability of the court to rapidly deliver services to defendants was noted by all professional participants as a key strength of the Special Circumstances Court model. They said:

> 'With this really small window of opportunity, we really need to put in and give that person as much opportunity as we can.'

> 'One of the things the court can deliver is an outcome on the spot… If you come to court and you get outcomes you start to go, "well, maybe all this change that he's rabbiting on about is possible, because I don't have to wait six weeks for the appointment, or I am meeting someone."'

Some of the professional participants said that the court had become a place that people came to for help even after they had been sentenced and released from the program. For individuals who would not otherwise have accessed services, this was seen as critical to their well-being.

Having said this, some of the professional participants questioned whether the court was the best place for defendants to receive these services, and many lamented that these services were not being delivered in a community-based (as opposed to a criminal justice) setting. In particular, many of the professional participants felt that the court was not equipped or qualified to effectively deal with and treat individuals with serious mental illness. One said:

> 'They shouldn't be coming anywhere near the court. They should be getting proper medical attention… He needs help – it's not appropriate. His behaviour is the result of his medical condition… We're not equipped or trained to deal with it.'

Another professional participant acknowledged this but said:

> 'I mean, if the health system says "we can't deal with this person with a personality disorder", how the hell are we going to do it?... But we don't have a methodology to deal with it so I don't want to turn her away.'

Privacy and confidentiality

Some of the professional participants had serious concerns related to defendants' privacy. Attending a therapeutic court, where one's personal circumstances are discussed at length, can be particularly 'unpleasant and embarrassing' for defendants. A number of professional participants said that the open nature of the court was both inappropriate and a source of extreme anxiety for some defendants. Comments to this effect included:

> 'There's this one particular man, an older fellow, he had this severe, severe abuse in his life, and trauma, it was just horrendous this story. And he sat in court and the court was full of people waiting in the back, and I removed myself from the court because I said "I don't need to hear this information."'

> 'I think it's a lot to ask for someone just to spill their guts in front of everyone.'

> 'There's been times when I've thought "oh my god, there's just far too much information being divulged that doesn't need to be."'

Others noted that the open nature of the court can actually pose safety risks for some defendants. They commented:

> 'I think magistrates don't fully understand, and I don't fully understand either, how the streeties work and how the street life is, and what that means if someone's spoken about their whole life in front of people who are also on the street and how that could then impact their life when they go back out.'

> 'I find very difficult that it's an open court at times. Especially when there's drug dealers discussed and things like that. It can be very threatening.'

The concern was also raised that eliciting such deeply personal and traumatic information from defendants in a court setting can have the effect of re-traumatising them. One professional participant said:

> 'I've seen people get up and speak their stories and I don't believe they want to – I think they feel they're obligated to – and that's really dangerous. When someone's talking through trauma, you're talking a lot of work to see that one through. I think that can be really, really dangerous. People get caught in the moment… We had one guy who had a massive panic attack after.'

Some of the professional participants questioned the court's practice of holding 'case review' or 'case planning' meetings. The professional participants explained that these meetings are held weekly, and are attended by lawyers, court liaison offers and external service providers that work with the defendants. At these meetings, defendants' progress is discussed and plans are made regarding their case management including the services they need, and where they might access them. While there was no doubt amongst the professional participants that the meetings were held with a view to assisting defendants and providing them with the best possible service, some related concerns regarding defendants' confidentiality:

> 'Sometimes the clients don't even know they're being spoken about, and sometimes there's other people there who don't need to know that information… I think good casework is involving the client in those conversations so they can see what the court wants them to do.'

> 'People are being discussed without their legal representation, which I don't like.'

Similarly, some of the professional participants who supported defendants felt that their own confidentiality obligations to their clients, at times, conflicted with their role in the court room:

> 'I think there is a bit of a challenge around magistrates asking workers what's going on in the client's life with the client sitting there, or even when the client's not there.'

The authority of the court

While some professional participants questioned the appropriateness of the court's role as confidant and 'service provider of last resort', many felt that the same outcomes could not be achieved in a community-based setting. Most of the professional participants agreed that it was the authority of the court that facilitated positive outcomes for defendants in many cases and that, without it, many defendants would not be motivated to change. As two of the professional participants said:

> 'If you're the man from Communities and you want to have a talkfest, or you're the woman from Drug Arm, all you are is an adviser. But [the magistrate] is able to say "do it and you will walk out that door – do you understand?"'

> 'Probably part of the reason this works is because there are the magistrates there that have got that authority and the people who come actually respond to that authority and respond to the recognition by authority that they're inherently good people who've got some problems.'

Indeed, some of the participants felt that the 'heavy hand' of the court was not used often enough. They felt that at times the defendants were dealt with too permissively, were 'manipulative', and that ultimately the court's authority could be diminished as a result. One participant said:

> 'Although you have to be understanding and sort of empathetic to their needs, I think you also need to have a sort of a realistic approach. A practical approach as well… Flexible – but to a point. You know, it's definitely boundaries. You definitely have to have boundaries.'

Three other participants recognised this danger, but said that they felt the court responded appropriately in situations where a defendant lacked motivation, for example, by speaking harshly to them, sending them back to the generalist court or forfeiting their bond. This was an issue on which the participants held divergent views. Overall, half of the participants emphasised the importance of sanctions in keeping defendants on track. They felt that if defendants failed to engage with the court and the programs offered, they should be dealt with harshly and swiftly. One participant said:

> 'If they're not turning up to court, things like that, then it's not a breach. It's a simple matter of, ok, well it's back to regular court. That's it. Send them a warning letter, get a warning message out to them. It's simple. I think those things need to happen a little bit more.'

The other half of the participants emphasised the importance of nurturing and empathising, even in situations where the defendant was being 'non-compliant'. They felt that, rather than exiting a defendant who was not 'participating', some

effort should be made to determine why they were not engaging with the program. They interpreted 'non-compliance' as an indicator that additional assistance was needed, rather than a marker that they were 'not willing to change.' Two participants made the following comments:

> 'There's one woman at the moment that just doesn't want to engage. She doesn't want to engage with any of the services and we were saying "well, why doesn't she want to engage?" And then we talked about it a little bit more and I said "you know, she obviously isn't motivated to change, so what have we done about helping her to get motivated to make changes in her life?"'

> 'We just keep trying, and we don't kind of throw people aside. We don't throw people off our books. Whereas others, I think, have a set period of time.'

Equitable and efficient use of resources

Another concern raised by some participants was that defendants who failed to engage with the program were being allocated resources that could have been allocated to a person who did want to engage. Some believed that this was unfair, particularly since resources are so limited.

Issues related to equitable resource allocation were mentioned by all of the professional participants, but each of the participants held different perspectives. There was a general concern amongst participants that the Special Circumstances Court was not adequately resourced. However, views on the nature of the resource shortage differed widely between participants. Most participants advocated for a general expansion of the program. Participants believed that the court's catchment should be expanded to include defendants in additional locations, as well as a broader range of offence types. Most of the participants stated that the funding provided to external community service providers should be increased to enable

them to provide existing and additional services at the court. Some advocated for more resources for programs for defendants, including life skills training, general education classes, and anger management.

However, other professional participants raised the plight of other disadvantaged people in the community. They said there were many others who would benefit from the kinds of services being provided at the court, but did not have access to them. According to some of the professional participants, this included not only other offenders (such as those whose offences did not qualify for inclusion), but also individuals attending other courts (such as the Children's Court), and individuals in the general community who had not found themselves before any court.

> 'The help should be to all homeless people; all mentally ill people. They shouldn't have to only get this immense assistance by offending. But by the same token, people who do offend are really – they're not necessarily evil or bad. It's their only way of coping… They're really, truly tragic people in a lot of pain who somehow get drawn into the system, and there should be a place for them. But I suppose, I don't know how many of their numbers are in the Special Circumstances Court – but a lot of them aren't.'

> 'I don't think it's right that people have to come to a court to get that sort of support. I would rather see all of these referrals and agency assistance being made available through an appropriate community – appropriately funded and proper community organisation, so that people had the support they needed to not be committing the offences.'

> 'To me, it's all about a lot of money to help a few people.'

While most felt strongly that the reach of the court should extend beyond the Brisbane CBD, there was no consensus on how this might best be done. Some of the participants believed that aspects of the Special Circumstances Court were generalisable to other courts. They believed that with an understanding magistrate,

a reduced list, a skilled court liaison officer, and the presence of non-government organisations to provide services, similar outcomes could be achieved for defendants in general arrest courts.

Yet, other participants said it would be very difficult for the methodology of the Special Circumstances Court could be 'mainstreamed'. Two professional participants said:

> 'I don't think the results would be anywhere near as good because it's the relationship that you develop with the person that really matters as well… For somebody with – a lot of the defendants we work with have such complex needs that it's not just a matter of ticking boxes and going "ok, well let's refer you to get some support."'

> 'You have to be made aware of the particular factors that affect that person, and that might be – it could be anything – it could be upbringing, it could be the situation they found themselves in, it could be their response to a particular situation… you get an opportunity to take into account the person more than you are able to in a very busy court.'

Most of the concerns about mainstreaming expressed by professional participants had to do with resourcing. When prompted, most agreed that if the mainstream courts were resourced sufficiently, with time, personnel, brokerage money and the support of external service providers, similar outcomes for defendants in general arrest courts were (potentially) achievable. One professional participant, however, had a different view:

> 'I take a slightly dim view of that and think, well, perhaps the regional and the local and the district and the remote communities could sit down and go "how do we address the needs in *our* community?" And this model may not be that model. It may be about a local mediation model. It could be about a

> local who knows what model… I think local communities need to have a look and see what local communities need to do to support their needs.'

Sentencing

One barrier that exists both for magistrates within the Special Circumstances Court and magistrates in the general arrest courts who wish to impose therapeutic sentences is the lack of available sentencing alternatives. The professional participants with legal training noted that only a limited range of penalties are available to magistrates under the *Penalties and Sentences Act 1992* (Qld) and they said this can pose a problem for magistrates who wish to impose a 'creative' sentence.

There was clear consensus amongst participants that existing sentencing alternatives were not appropriate for the cohort of defendants that the Special Circumstances Court deals with. Comments to this effect included:

> 'I don't think counseling solves everything, but being sent away with a five hundred dollar fine is ridiculous.'

> 'You'd give probation, but sometimes they just don't report in.'

> 'If they're placed on a bond they have to comply with its terms and therefore if they didn't come in, the bond should be forfeited.'

The participants noted that the magistrates within the Special Circumstances Court have needed to stretch existing alternatives to their limits. They said that while most often magistrates impose a combination of good behaviour bonds with conditions attached and adjournments, there is actually no sentencing alternative within the Act that neatly allows the magistrates to impose the kind of sentences they do. One professional participant gave the following example:

> 'We would like to put certain conditions on bail which we think would be beneficial for them. That would be helpful. It's one of those things when you give them certain bail conditions, at the present time, if they don't comply with those bail conditions, it's not an offence. In another court it can be but it's not necessarily an offence. It's just one of those things where you think, well, if there could be more harsh conditions on – or the consequences of not doing it were a little bit harsher, it might be sometimes a bit more incentive for them to follow through.'

While most professional participants agreed that the penalties and sentences being imposed by the Special Circumstances Court were effective, some participants said that they felt that, for some defendants, the sentences that were being imposed were disproportionate to the offence committed. One professional participant said that 'fronting up at court' was punishment enough for many of these defendants because actually attending court itself was 'very stressful and unpleasant and embarrassing and horrible.' Another said:

> 'It's really counter-productive to make someone come back to the court six times for what someone else can pay a quick fine for.'

Having said this, the professional participants were aware that 'the perception at large basically is we are not being harsh enough on people'. Some of the professional participants noted the need to strike the right balance between deterrence on one hand, and supportive rehabilitation on the other. But most of the professional participants felt that the court reconciled these competing concerns effectively. As one professional participant remarked:

> 'I think what works best is the fact that they are supported, number one, and they know they are supported. I think it empowers them to try to take control of their lives with a view to stop the recidivism. That's what society wants anyhow, isn't it? They feel as though these people are out there on the streets and committing all these crimes and no one is really doing anything

about it… but if we can get them into housing, which we really work hard at, then the chances of them continuing on [offending] is certainly reduced.'

The Way Forward: Promoting Access to Problem-Solving Techniques

Overview

Defendant participants and professional participants in this study generally reported high levels of satisfaction with the procedures, practices and outcomes of the Special Circumstances Court. Most of the defendant participants were full of praise for the court. Key terms they used to describe the court and their experiences within it included 'help', 'listen', 'human', 'parent', 'cope', 'respect' and 'hope'. This, in itself, is telling. Clearly, defendants feel welcome at the court. It is a place where they expect to find help, understanding and support. The professional participants agreed. They reported that the relationships formed within the court were generally caring and supportive ones, and that this was critical to defendants' 'success' within the program.

Relationships

It is the defendants' need for relationship that featured most prominently across the 32 interviews. Many defendants expressed a sense of aloneness and alienation when speaking about their lives, and their previous experiences within the criminal justice system. Defendants indicated that, at the Special Circumstances Court, they felt connected, heard and cared about.

The analogies made with family and parenting are particularly interesting. They indicate the existence of a number of possible dynamics. First, it is telling that defendants characterised themselves as the 'children' in this scenario. Does this imply that they feel that the other court players chastise them, provide for them,

nurture them, or all of the above? Does it indicate that they experience a lack of agency in the process – do they feel that they are being directed, disciplined, perhaps even coerced?[61] At least one professional felt that this might be the case:

> 'There have been a couple of clients over the time that suddenly I become aware of the fact that really the court is making decisions about this person, not the person making decisions. The cool thing about Specials is that it is a good team and we can raise that and sort of say, "I'm just concerned about what's happening with person B or person C… because this person is an adult and is able to make decisions and has capacity to make decisions and we've taken that capacity.'

Based on the responses of defendants it seems most likely that the references to the court as family or parent are indicative of the caring nature of the relationships they form within the court. The positive effects of being afforded dignity and respect cannot be underestimated. This sense that they are a 'person rather than a number' at the Special Circumstances Court is powerful, according to defendants' own reports. If people believe someone cares for them, and they are accountable to that person, it seems they may be more likely to bring about positive changes in their life.

Of course, as one of the professional participants said, the fact that defendants generally like the court and have positive relationships with court staff is not, itself, an indicator of the court's success. This participant said:

> 'Obviously there'd be very few who didn't say they think it's wonderful because when they come here they're treated kindly, they don't get in trouble for being late, they're given food vouchers, sometimes given a new telephone if they've lost the old one, people help them fill in forms, they get careful treatment from Centrelink that mightn't be available elsewhere, and they get other benefits.'

Success can only be measured against the goals aimed to be achieved. The Magistrates' Court Practice Direction for the Special Circumstances Court states that the purpose of the Court is to 'direct participants to available treatment, rehabilitation and support services with the focus on the reduction of their criminal offending behaviour.' It cannot be denied that the court does do this. But the goals that the professionals within the court set for themselves in their own work with defendants go beyond this more general purpose. The professional participants in this study revealed that they desire to see defendants housed, in treatment, materially provided for, and emotionally stabilised. They justified this through their belief that if these needs of defendants are met, their offending behaviour is likely to be reduced. The extent to which one does in fact lead to the other is difficult to measure, and longitudinal studies are needed to determine whether this is, in fact, the case. Most of the participants in this study were convinced that appropriate support could result in a reduction in offending. But as long as punitive laws exist that criminalise behaviour associated with poverty and drug use, and as long as structural barriers to employment and social inclusion remain, it may be illusory to think that defendants' offending behaviour can be eliminated entirely. As one professional participant said:

> 'Theoretically the goals are to address those issues and see the people commit less and less crime… In practice, I'm not sure that we're actually getting there because it seems that many of the people who were participating in Special Circumstances Court five years ago still have current clients… That's not being critical of Special Circumstances. Maybe this cohort is always going to – every community, every city, every bunch of – this sort of thing sits everywhere… I really don't believe Specials is looking for easy solutions, which is good because they're probably not finding them either [laughs].'

Information

It was generally agreed amongst the participants in this study that information must be collected from defendants about their lifestyle, their background and their personal struggles if the court is to develop an appropriate case plan. The caring relationships that are developed between defendants and professionals at the court serve an additional purpose of building trust, which is necessary if defendants are to share such personal information.

Yet, some of the participants of this study stated that trusting, caring relationships with defendants should be built by professionals other than magistrates, such as counsellors, social workers or psychologists outside the courtroom. They said that the magistrates could concentrate on sentencing and monitoring while other professionals provide support and assistance. There would be a number of advantages of such an approach. First, the Special Circumstances Court is an open court, and both defendant participants and professional participants raised concerns regarding the privacy and safety implications for defendants who share very personal stories in that setting. Second, the defendant may need to access their support person on occasions other than court appearances. One professional participant in this study said that, for some defendants, a 24 hour a day, seven day a week commitment is required of the worker. Obviously a court cannot provide this level of support. Third, this could facilitate the mainstreaming of problem-solving approaches. If magistrates did not need to spend time building relationships with defendants, and they could rely on another professional to do this, they could simply be made aware of the defendants' circumstances and devise an appropriate plan in response. As one participant said:

> 'What [the magistrate] needs is information. If you've got the information, you can act on it.'

Presumably, such information would include both information about the defendant's circumstances and information about what services are appropriate and available to

support and assistant the defendant. Some of the professional participants believed that, if this information was readily available, all magistrates would be capable of devising an appropriate sentence to address the problems identified.

This is the premise behind general court intervention programs, such as the Victorian Court Integrated Services Program. These programs use the authority of the court to address the underlying causes of defendants' offending behaviour, but they do not rely so heavily on the personality of the magistrate, and they do not require a defendant to plead guilty. They retain many of the features of problem-solving courts, for example, they rely on judicial monitoring to ensure compliance with the program; they take a team-based approach to case planning and the management of defendants; they encourage the direct involvement of the defendant in the case; and the emphasis is still on achieving positive outcomes for defendants.[62]

The evaluation of the Victorian Court Integrated Services Program found that defendants participating in that program were less likely to reoffend and had lower levels of alcohol use. Further, magistrates were generally supportive of the program, and felt that any increases in their workload were justified by better outcomes.[63] The economic evaluation of the program reported that this translated into cost savings due to the reduced levels of imprisonment the program brought about.[64] The Western Australian Law Reform Commission was supportive of court intervention programs in its 2009 report, and considered their advantages to include:[65]

- reduced crime;
- reduced overcrowding in prisons;
- appropriate placement of certain classes of offenders;
- 'offender' health and well-being;
- more efficient and effective service delivery to 'offenders'; and
- cost savings in other areas.

Yet, most of the defendant participants and professional participants interviewed in this study preferred the idea of a specialist court, with dedicated magistrates and support staff. One professional participant said:

> 'I think it needs the flexibility and the informal nature of that court. You certainly – it would be very hard to do that in a mainstream situation where the procedure is paramount. I think it would be really difficult to do.'

Service provider of last resort

A central feature of court intervention programs and problem-solving courts is the access to services they facilitate. The benefits to the defendants, the community and the public purse that they provide are the direct result of the provision of necessary services to defendants with the aim of supporting them to stop re-offending. The court, therefore, acts effectively as a 'proxy gateway' into social service programs.[66] But Thomson advances that if these services were packaged as comprehensively outside the courts, individuals might be able to access them on their own.[67] And, as McCoy has said, 'there is not much evidence that courts are better at providing such services than are adequately funded social services.'[68] Certainly it is not an ideal situation if a person has to commit a criminal offence to obtain speedy access to services; this has the potential to result in unfair and inequitable distribution of scarce resources, and it may not be the most effective or ethical way to intervene in the lives of individuals with complex needs.

But what is the alternative? If problem-solving courts are exposing the 'inadequacies, flaws and weaknesses of inter-agency work',[69] then what is the best response? It could be argued that funding should instead be injected into the community sector to fill the gaps in service delivery. Some of the professional participants in this study said they believed at least some of the funding allocated to the court would be better spent within the community organisations that deliver the services to the defendants. Yet, if disadvantaged individuals continue to be arrested for low-level crimes which their homelessness or impaired decision-making capacity

has contributed to, then the courts will still have to respond. There is no doubt that a problem-solving approach is a fairer and more appropriate response to this kind of offending than occurs within the generalist criminal courts, and service delivery alone will do nothing to alter the police practices that result in the arrests in the first place.

The same, of course, could be said of problem-solving courts themselves – they do not address the policing practices that lead to discrimination against, and the criminalisation of, disadvantaged individuals. Nor do they address the structural causes of poverty, unemployment or poor mental health. It is too much to expect the courts to solve society's most intractable social problems, but could they address the problems faced by disadvantaged individuals in other ways?

One suggestion that has been made in the literature is that, instead of engaging defendants in lengthy, judicially monitored programs, judicial officers could simply discharge defendants where there is no punitive value in sentencing them.[70] If magistrates began discharging defendants for low level offences where the charge arose in circumstances connected to the defendant's homelessness or impaired decision-making capacity, it is likely that, in time, less people would be charged by police in these circumstances. Such an approach could be legislated, as it has been in South Australia. Section 15 of the *Criminal Law (Sentencing) Act 1988* (SA) states that despite any minimum penalty set by an Act, a court may dismiss a charge where the court finds the person guilty of an offence, but 'finds the offence so trifling that it is inappropriate to impose any penalty.' It has been argued that this, coupled with an active referral to an appropriate community service, might serve defendants better, and could ultimately bring about the same outcomes in terms of reduced arrests.[71]

Of course, as was identified by many of the professional participants in this study, community service providers on their own lack the 'heavy hand of the law'; they cannot compel defendants to attend their programs under threat of imprisonment or some other kind of sanction. For some defendants, this may be critical to their initial decision to commit to change. Yet, the relationships between homelessness,

impaired capacity and substance use are complex. Again, if it is agreed that most of the individuals coming before the Special Circumstances Court have committed only low-level criminal offences, and have done so in a context of past trauma and abuse, which has crystallised into drug or alcohol use, and has ultimately resulted in homelessness or impaired decision-making capacity, then the agency of the individual in their 'offending' is questionable. Perhaps they should not have been arrested in the first place.

The fact that laws are applied differently based on class and other characteristics is well-documented.[72] In the United States, a common concern regarding problem-solving courts is that they impair the dignity of 'the poor' by sanctioning the differential application of the criminal law to them as compared with the middle class.[73] As Malkin has said, we may reach a situation where 'the rich check into rehab, the poor into courts.'[74] It is true that while we are debating the nature and use of problem-solving courts, we are being distracted from broader questions regarding the adequate funding of social services, the appropriateness of policing practices, the discriminatory impact of public space offences, and the accessibility of drug and alcohol treatment particularly for those who are essentially self-medicating for mental illness.

But it is clear that the Special Circumstances Court contributes significantly to the well-being, recovery and rehabilitation of many of the individuals who come before it. The professionals that work within it are very supportive of it and its continued existence, regardless of their role within the system. Most of the defendants interviewed in this study felt that their lives were better because of it. The commentary of these participants is meaningful, and the court's achievements must be affirmed on this basis.

Concluding remarks

Ultimately, both the literature and the results of this research indicate that courts should be moving towards a different model of service delivery in respect of low-

level offenders with complex needs. Many of those coming before the courts experience multiple forms of disadvantage and it seems that they are, for whatever reason, slipping through the community service net. This seems to be associated with their offending behaviour. A court appearance provides an opportunity to provide intervention and support to individuals with complex needs. By making social or welfare workers available at the courthouse, individuals can receive case management services such as counseling, referrals to specialised treatment and other programs, and practical assistance where necessary (through the provision of food vouchers and phone cards). Trials of such 'one-stop shop' courthouses that house courtrooms as well as service providers have been considered successful. They offer a new and innovative model for courthouse design. The next step may be the formation of court-based non-government organisations that are accommodated within court buildings, and specialise in social work interventions in a legal context.

The praise of the Special Circumstances Court from defendants and the professionals that work within it provides a reminder of the results that a holistic approach to justice can achieve. The courthouse can provide individuals with a sense of safety – it can be a place where people feel welcome and cared for. The defendants in this study suggested that their positive experience of the Special Circumstances Court restored their faith in the justice system and their respect for the courts. The challenge is to generalise this to all vulnerable people who come to court, not just those within the Special Circumstances Court program.

Education, particularly of lawyers and magistrates, is crucial. As Berman and Feinblatt have said, if problem-solving techniques are to proliferate, the uncoverted must be preached to.[75] One of the participants in this study recommended that more magistrates be rostered on to the Special Circumstances Court for this reason. If the court increased in size, more magistrates would necessarily be rostered onto the court. It must be borne in mind that defendants value seeing the same magistrate each time they appear, so some effort should be made to ensure that re-appearances are scheduled with the same magistrate where possible. But there

would likely be some value in exposing a larger number of magistrates to the Special Circumstances Court, particularly since Farole et al have found that judicial officers that have presided over problem-solving courts are more likely to apply problem-solving techniques in their generalist court work.[76]

There are a number of contributions that the Special Circumstances Court makes to our understanding of problem-solving techniques and how they could reach a wider audience. However, it is important that the debates about the structural causes of crime, and the criminalisation of poverty, continue. They, after all, cannot be solved by the courts, no matter how responsive they attempt to be.

Recommendations

Recommendation 1:

That magistrates in all courts began discharging defendants in circumstances where:

- The offence is a summary offence; and
- The charge was connected to the defendant's homelessness and/or impaired decision-making capacity; and
- The magistrate is of the view that there is no punitive value in imposing a sentence.

This should be legislated in a manner similar to section 15 of the *Criminal Law (Sentencing) Act 1988* (SA).

Recommendation 2:

That magistrates in all courts receive some support from a dedicated court liaison officer, or 'court case coordinator', who is able to undertake assessments, provide some case management services, and refer individuals to appropriate services, to support their use of problem-solving techniques.

Recommendation 3:

That the Department of Justice provide targeted funding to key non-government organisations to enable them to continue, or recommence, providing services to the Special Circumstances Court and its defendants.

Recommendation 4:

That consultation take place with magistrates, court case coordinators and other Department of Justice and Department of Corrective Services staff that have involvement with the Special Circumstances Court to draft appropriate sentencing alternatives and add them to the *Penalties and Sentences Act 1992* (Qld). Such sentencing alternatives should include the power to require a defendant to:

- participate in a specified treatment or rehabilitation program; and
- attend, or report to, the court after a specified period of time.

One model is the power of the courts in New South Wales to adjourn proceedings so that the accused person can participate in an intervention program. (See *Criminal Procedure Act 1986* (NSW) sections 345-352 and *Crimes (Sentencing Procedure) Act 1999* (NSW) section 11). Another model is the *Sentencing Act 1991* (Vic) section 83A where the court may adjourn proceedings for a period of time if the magistrate is of the opinion that sentencing should, in the interests of the offender, be deferred. (See also *Magistrates Court Act 1989* (Vic) s 4Q(3), in relation to Neighbourhood Justice Centres).

Recommendation 5:

That special legislation be created in respect of the Special Circumstances Court, similar to the *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic), that outlines the Court's practices, procedures, sentencing options and commitment to therapeutic jurisprudence.

Recommendation 6:

That magistrates consider exercising their discretion to close the Special Circumstances Court more frequently, in the interests of protecting defendants' privacy and safety.

Endnotes

[1] For a detailed description of the workings of the court, see Magistrates Court, *Practice Direction No. 25 of 2010: Special Circumstances Court Diversion Program*, 2010. See also Creative Sparks, *Homeless Persons Court Diversion Program Pilot Evaluation*, 2007.

[2] C. Chamberlain and D. MacKenzie, 'Understanding contemporary homelessness: Issues of definition and meaning' (1992) 27 *Australian Journal of Social Issues* 274.

[3] See generally G. Berman and J. Feinblatt, 'Problem-solving courts: A brief primer' (2001) 23(2) *Law and Policy* 125; V. Malkin, 'The end of welfare as we know it: What happens when the judge is in charge' (2005) 25(4) *Critique of Anthropology* 361.

[4] See for example H. Blagg, *Problem-Oriented Courts: A Research Paper Prepared for the Law Reform Commission of Western Australia*, 2008 at 3.

[5] A. Freiberg, 'Problem-oriented courts: Innovative solutions to intractable problems?' (2001) 11 *Journal of Judicial Administration* 8 at 20.

[6] M.C. Dorf and J.A. Fagan, 'Problem-solving courts: From innovation to institutionalisation' (2003) 40 *American Criminal Law Review* 1501 at 1508.

[7] Malkin, above n 3 at 362.

[8] Malkin, above n 3 at 362, 368; T.M. Meekins, 'Specialised justice? The over-emergence of specialty courts and the threat of a new criminal defence paradigm' (2006) 40 *Suffolk University Law Review* 1 at 17.

[9] C. McCoy, 'The politics of problem solving: An overview of the origins and development of therapeutic courts' (2003) 40 *American Criminal Law Review* 1513 at 1533.

[10] See J.L. Nolan Jr, 'Redefining criminal courts: Problem-solving and the meaning of justice' (2003) 20 *American Criminal Law Review* 1541; Freiberg, above n 5.

[11] B. Winick, 'Applying the law therapeutically in domestic violence cases' (2000) 69(1) *University of Missouri-Kansas City Law Review* 33 at 33.

[12] As (at least) one judge famously said 'I feel like I work for McJustice': G. Berman 'What is a traditional judge anyway? Problem solving in the state courts' (2000) 84 *Judicature* 79 at 80. See also Berman and Feinblatt above n 3 at 128-129.

[13] S. Kundu, 'Privately funded courts and the homeless: A critical look at community courts' (2004/05) 14 *Journal of Affordable Housing and Community Development* 170 at 172.

[14] See for example J.Matt, 'Jurisprudence and judicial roles in Massachusetts Drug Courts' (2004) 30 *New England Journal on Criminal and Civil Confinement* 151; E.L. Jensen and C. Mosher, 'Adult Drug Courts: Emergence, growth, outcome evaluations, and the need for a Continuum of Care' (2006) 42 *Idaho Law Review* 443; V. Baumbach, 'The operational procedure of Drug Court: Netting positive results' (2007) 14 *Trinity Law Review* 97; G.F. Vito and R.A. Tewsbury, 'The impact of treatment: The Jefferson County (Kentucky) Drug Court Program' (1998) 62 December *Federal Probation* 46.

[15] See for example McCoy, above n 9 at 1526; Dorf and Fagan, above n 6 at 1501-1502.
[16] Dorf and Fagan, above n 6 at 1504
[17] McCoy, above n 9 at 1526.
[18] Dorf and Fagan, above n 6 at 1505.
[19] R. Mirchandani, 'What's so special about specialized courts? The state and social change in Salt Lake City's domestic violence court' (2005) 39 *Law and Society Review* 379; M. Burton, 'Judicial monitoring of compliance: introducing "problem solving" approaches to domestic violence courts in England and Wales' (2006) 20 *International Journal of Law, Policy, and the Family* 366
[20] E. Lee, *Community Courts: An Evolving Model*, 2000; G. Toomey, 'Community Courts 101: A Quick Survey Course' (2006) 42 *Idaho Law Review* 383.
[21] See S.R. Binder, *Taking the Court to the Streets: Homeless Court*, 2001.
[22] J. Kendall, 'Can it please the court? An analysis of the teen court system as an alternative to the traditional juvenile justice system' (2003-2004) 24 *Journal of Juvenile Law* 154; A.H. Garrison, 'An evaluation of a Delaware Teen Court' (2001) 52(3) *Juvenile and Family Court Journal* 11.
[23] See further Freiberg, above n 5.
[24] P.M. Casey and D.B. Rottman, 'Problem solving courts: Models and trends' (2005) 26 *Justice System Journal* 35; J. Lippman, 'Achieving better outcomes for litigants in the New York state courts' (2007) 34(2) *Urban Law Journal* 813.
[25] J.J. Ammann, 'Addressing quality of life crimes in our cities: Criminalisation, community courts and community compassion' (2000) 44 *Saint Louis University Law Journal* 811 at 815-816.
[26] A.C. Thompson, 'Courting disorder: Some thoughts on community courts' (2002) 10 *Journal of Law and Policy* 63 at 65.
[27] Kundu, above n 13 at 177.
[28] See S. Murray, 'Keeping it in the neighbourhood? Neighbourhood courts in the Australian context' (2009) 35 *Monash University Law Review* 74 at 74-75.
[29] *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic).
[30] Binder, above n 21.
[31] *Infringements Act 2006* (Vic) s 3.
[32] See further Magistrates Court, *Practice Direction No. 25 of 2010: Special Circumstances Court Diversion Program*, 2010.
[33] That is, an order under section 19 of the *Penalties and Sentences Act 1992* (Qld).
[34] *Re AAM; Ex parte A-G (Qld)* [2010] QCA 305 at [9].
[35] 'Court intervention programs' are defined as 'programs that use the authority of the court in partnership with other agencies to address the underlying causes of offending behaviour and encourage rehabilitation': Western Australian Law Reform Commission, *Court Intervention Program: Final Report*, 2009 at 5.
[36] Western Australian Law Reform Comission, above n 35 at 8. See also S. Ross, *Evaluation of the Court Integrated Services Program*, 2009.
[37] Creative Sparks, above n 1 at 43.
[38] Malkin, above n 3 at 361.

[39] Thompson, above n 26 at 64.
[40] Malkin, above n 3 at 362, 367, 368.
[41] Thompson, above n 26 at 97
[42] Thompson, above n 26 at 81.
[43] Thompson, above n 26 at 78-79, 87.
[44] Thompson, above n 26 at 80-81; Dorf and Fagan, above n 6 at 1509.
[45] Nolan, above n 10 at 1543.
[46] Meekins, above n 8 at 19; M. Quinn, 'Whose team am I on anway? Musings of a public defender about drug treatment court practice' (2001) 26 *New York University Review of Law and Social Change* 37.
[47] Malkin, above n 3 at 371, 373. See also Thompson, above n 26 at 90.
[48] Thompson, above n 26 at 96.
[49] Ammann, above n 25 at 817; Meekins, above n 8 at 44 (termed 'the popcorn effect').
[50] Nolan, above n 10 at 1555-1556.
[51] Malkin, above n 3 at 369;
[52] A. Freiberg, 'Problem-oriented courts: An update' (2005) 14 *Journal of Judicial Administration* 196 at 214-5.
[53] P.F. Hora and W. Schma, 'Therapeutic jurisprudence' (1998) 82 *Judicature* 8; G. Berman and A. Gulick, 'Just the (unwieldy, hard to gather, but nonetheless essential) facts, ma'am: What we now and don't know about problem-solving courts' (2003) 30(3) *Fordham Urban Law Journal* 1027.
[54] See Freiberg, above n 5 at 21, 24.
[55] This was expressed by some of Farole et al's participants: D. J. Farole Jr, N. Puffett, M. Rempel and F. Byrne, 'Applying problem-solving principles in mainstream courts: Lessons for state courts' (2005) 26 *Justice System Journal* 57 at 68-69.
[56] Farole et al, above n 55.
[57] Defendants who were interviewed in this study identified concerns related to privacy, and these are discussed further at 31.
[58] Chamberlain and MacKenzie, above n 2.
[59] M. Miles and A. Hubermann, *Qualitative Data Analysis*, 2004.
[60] Miles and Hubermann, above n 59.
[61] Many critics of problem-solving courts raise concerns regarding coercion: see Nolan, above n 10 at 1554, 1557.
[62] Western Australian Law Reform Commission, above n 35 at 5-7. See also Ross, above n 36.
[63] Ross, above n 36.
[64] PricewaterhouseCoopers and Department of Justice, *Economic Evaluation of the Court Integrated Services Program*, 2009.
[65] Western Australian Law Reform Commission, above n 35 at 10-12.
[66] Malkin, above n 3 at 364.
[67] Thomson, above n 26 at 94
[68] McCoy, above n 9 at 1533.
[69] Blagg, above n 4 at 4.
[70] Ammann, above n 25 at 819-820; Kundu, above n 13 at 180.
[71] See Kundu, above n 13 at 179-181; McCoy, above n 9 at 1532-1534;

[72] See generally T. Walsh, *Homelessness and the Law*, 2011.
[73] See particularly Amman, above n 25.
[74] Malkin, above n 3 at 384
[75] Berman and Feinblatt, above n 3 at 138.
[76] Farole et al, above n 55 at 61.