ACCESS TO JUSTICE:

WHY DO LITIGANTS SELF-REPRESENT IN QUEENSLAND CHILD PROTECTION COURTS?

A Thesis Submitted by

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ABSTRACT

This thesis examines the question of 'Why do litigants self-represent in Queensland child protection courts?', using principles based on child protection history, an overview of participants, processes and procedures, legal service provision, barriers to accessing justice, litigant contributions, and federal and state funding.

CERTIFICATION OF THESIS

This Thesis is entirely the work of Kathy Sue Reeves except where otherwise acknowledged. The work is original and has not previously been submitted for any other award, except where acknowledged.

Principal Supervisor: Professor Caroline Hart

Associate Supervisor: Professor Reid Mortensen

Student and supervisors' signatures of endorsement are held at the University.

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ABBREVIATIONS

ATSI	Aboriginal and Torres Strait Islander
CAO	Court Assessment Order
CLC	Community Legal Centre
CLSP	Community Legal Service Program
CMC	Crime and Misconduct Commission
CSA	*Children's Services Act 1965* (Qld)
CSO	Child Safety Officer
DCPL	Director of Child Protection Litigation
DCSYW	Department of Child Safety, Youth and Women
GCIA	*Guardianship and custody of Infants Act 1891* (Qld)
ICCPR	International Covenant on Civil and Political Rights
IPA	Intervention with Parental Agreement
IRSA	*Industrial and Reformatory Schools Act 1865* (Qld)
LAQCEO	Legal Aid Queensland Chief Executive Officer
LTG	Long Term Guardianship
OCFOS	Office of Child and Family Solicitor
QCPCI	Queensland Child Protection Commission of Inquiry
QLS	Queensland Law Society
QPILCH	Queensland Public Interest Law Clearing House
SCA	*State Children's Act 1911* (Qld)
TAO	Temporary Assessment Order
TCO	Temporary Custody Order

CHAPTER 1 – INTRODUCTION

I BACKGROUND

Access to justice within the Queensland child protection courts depends on a properly functioning justice system that provides all parties with attainable and affordable justice. This system includes delivery of fair and equitable outcomes without risking considerable economic and social costs.[1] While there has been much information on self-represented litigants generally,[2] minimal information has been presented as to why they self-represent in Queensland child protection courts. Not surprisingly, many self-represent because they cannot afford legal representation or are ineligible for legal funding.[3] This possibly places many litigants at a significant disadvantage; a community legal centre has identified a lack of awareness or unfamiliarity with the legal system which compromises their ability to access justice.[4] Further, many litigants self-represent as they have a distrust of the legal system.[5]

This chapter outlines the problem, states the research question, provides justification for the research, describes the contribution of the research, defines key terms, outlines the limitations on the scope of the study and presents the structure of the study.

II THE PROBLEM

A *Research on Self-Represented Litigants in Queensland*

[1] Australian Productivity Commission, *Access to Justice – Inquiry Report* (2016) Vol. 2, v.
[2] Chapter 1, Part 2A – Research on Self Represented Litigants in Queensland.
[3] Attorney-General's Department, *Litigants in Person,* Family Law Council Litigants in Persons Committee, *Litigants in Person* (August 2000), 2.10.
[4] Chris Povey, Lucy McKernan, Gregor Husper, and Emily Webster, Emily, PILCH Submission to the Senate Legal and Constitutional Affairs Committee on the Inquiry into Access to Justice' (30 April 2009) 39, [20.1].
[5] Hon. Justice Pierre Slicer, 'Self Represented Litigants' (Paper presented to the Magistrates' Conference, Supreme Court of Tasmania, 14 June 2004). <http://www.supremecourt.tas.gov.au/publications/speeches/slicer/self_represented>.

In Australia, there is no constitutional right to civil state-funded legal representation, in proceedings such as eg child protection matters. To date, there is no authority requiring a stay of proceedings on the basis of inadequate legal representation in any civil matter (including child protection), regardless of the consequences.[6]

B *Research on Self-Represented Litigants in Canada and the United States*

There have been studies on the lack of access to justice for self-represented litigants in child protection courts in both Canada[7] and the United States.[8] The law in both Canada and the United States subscribes to the notion that there is a right to legal representation in child protection matters where it is necessary to ensure a fair hearing.[9] However, the issue is when access to this fundamental right is to be provided to them. In Canada, self-represented litigants must establish that the proceedings may have an impact on their life, liberty or personal security such that it would violate the tenets of justice.[10] The law in the United States holds that constitutional due process does not create a right to legal representation, even where parental rights are at stake.[11] However, some states have enacted legislation requiring legal representation by judicial appointment before children can be removed from parents or guardians or parental rights terminated.[12]

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[6] Tamara Walsh and Heather Douglas, 'Lawyers, Advocacy and Child Protection' (2011) 35(2) *Melbourne University Law Review* 19, 644.
[7] Chapter 5, Part B(5)(2) – Canada.
[8] Ibid, Part B(5)(3) – United States.
[9] *Canada Act 1982 (UK)* c 7, sch B pt I ('*Canadian Charter of Rights and Freedoms'*).
[10] K Kehoe and D Wiseman, 'Reclaiming a Contextualized Approach to the Right to State-Funded Counsel in Child Protection Cases', (2012) 63 *University of New Brunswick Law Journal* 180.
[11] Legal Information Institute, '*Lassiter v Department of Social Services*', *Cornell Law School* (Case Citation, 2019) <https://www.law.cornell.edu/supremecourt/text/452/18#ZD1-452_US_18ast>.
[12] New York State Senate, 'Expanding Gideon: The Right to Indigent Civil Representation', *The New York State Senate* (Government, 15 December 2009) <https://www.nysenate.gov/newsroom/articles/expanding-gideon-right-indigent-civil-representation>.

III THE RESEARCH QUESTION AND ISSUES

A *The Research Question*

The question examined in this thesis is: 'Why do litigants self-represent in Queensland child protection courts?' This thesis will explore the self-represented litigant's access to justice through critical analysis of the history of Queensland child protection, legislative changes (including government funding policies, systemic costs, and access to justice), children's court process and procedures, and structured interviews with relevant legal service personnel who are involved in child protection matters.

B *Research Issues*

Based on the literature review, a number of issues are identified (and detailed in Chapters 3 and 4). The following form the basis for the research question:

RQ1 Are self-represented litigants distrustful of the legal profession?

RQ2 Are the effects of limited access to funding a major contributing factor to self-representation?

RQ3 Do self-represented litigants hold emotional attachments to their case such that they prefer to self-represent (eg 'no one can know my family better than me').

IV SCOPE OF THE STUDY

The literature has steadily maintained that access to justice for parents in child protection matters has been at the core of self-representation, due to a lack of funding. For example, the Queensland Law Society surveys legal practitioners about how Queensland legislation is viewed by the public and whether access

to justice is being attained.[13] The information gleaned from this survey is used to produce statistical information on how access to justice assists those in need of legal assistance,[14] and to identify improvements in addressing access barriers.[15]

Since 2017, these surveys have provided that the questionable affordability of legal representation and inadequate funding for legal assistance have been consistent major themes.[16] The issues raised by the research question and access to justice, along with the lack of any data, will provide more context to the approaches being adopted in an attempt to remedy the problem.

A *Co-Production*

The research into co-production theory[17] will add to the literature by addressing issues stemming from the advantages and disadvantages in the lawyer-client collaboration. The research will involve an in-depth review of unbundling legal services and the lawyer-client 'peer' relationship. It will contribute to questions of power imbalance between the parties; the client's need for assistance (financial); their ability to provide integral participation (knowledge); and service delivery satisfaction (emotion).

B *Access to Justice*

The concept of 'access to justice' is explored in detail in Chapter 5.[18] It is built on the notion of fairness and equality for all individuals with respect to their right to obtain justice. In particular, the research will add to the literature review by providing an exploration of the obstacles faced by marginalised individuals in achieving access to justice. There will be an evaluation of the State government's role in the provision

[13] Queensland Law Society, 'Access to Justice Scorecard: evaluating access to justice in Queensland', *Access to Justice* (Queensland Law Society, 2016) 2.
[14] Ibid.
[15] Ibid.
[16] Ibid 4.
[17] Chapter 4, Part 2(C)(4) – Unbundling.
[18] Chapter 5, Part 2 – Access to Justice.

and administration (or lack thereof) in access to justice for self-represented litigants. Additional research will consist of a review of responses from legal service personnel, by way of legal service provision and representation, to assist litigants in need.

C *Right to Legal Representation*

Enshrined in the tenet of 'access to justice', eg fairness and equality in seeking justice, is the right to legal representation.[19] Despite this right, there is no recognition that legal services be freely given or readily available to any litigant.[20] While there are many legal service options available to assist litigants in accessing justice within Queensland, there is always a cost involved.[21] This cost is not always financial (although a weighty factor), it can be emotional or adversarial. Accordingly, a key aspect of this thesis is to review whether access to justice should be made freely and readily available to marginalised litigants. Further, it will add to the research by addressing whether the Queensland government is willing and able to provide for suitable legal assistance to self-represented litigants facing trial in Queensland child protection courts.

V METHODOLOGY OVERVIEW

The research methodology used for this thesis is a phenomenological approach,[22] in the form of open-ended, semi-structured interviews and surveys with 22 participants in Toowoomba, Ipswich, and Brisbane (Queensland). Phenomenological research, while based on rich, detailed information, also represents 'how' the participants' experience and how they understand reality as a projection of human

[19] Australian Government Productivity Commission, *Access to Justice Arrangements* (Productivity Commission Inquiry Report, September 2014) 74-75.
[20] Ibid.
[21] Chapter 4, Part 2 – Legal Service Options.
[22] Jill Hussey and Roger Hussey, *Business research: a practical guide for undergraduate and postgraduate students* (MacMillan Press, 1997) 174.

understanding, eg from the perspective of the participant.[23] This allows for the researcher and participants' to remain unbiased in their approach and responses to the research questions.[24] As interviews could not be obtained with self-represented litigants,[25] a transcendental phenomenological approach was used, whereby participants' 'lived experiences' could be captured.[26] Transcendental phenomenology allows the researcher to step away from any preconceived attitudes and biases ('bracketing') in order to access participants' experiences without influence.[27] This does not mean that participants' cannot hold a bias or self-serving motivation, but rather paves the way for clear, concise, and subjective responses based on their real-life experiences.[28]

The concept of 'intentionality' was then used whereby the participants' attention was directed toward both a noema (objective experience) and noesis (subjective experience) approach[29] in their experiences within the child protection courts, as well as self-represented litigants in these courts. For example, all participants had attended a child protection trial whereby a litigant was self-represented. Their noema would constitute the 'what' of the trial, whereas the noesis would relate to how each participant perceived and experienced the trial and the parties involved.[30]

This phenomenological approach, incorporating 'bracketing' and ''intentionality' provides consideration of both the noema and the noesis in understanding the participants' experiences and their application to the research questions.

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[23] Ibid.
[24] Katrina Eddles-Hirsch, 'Phenomenology and Educational Research' (2015) 3(8) *International Journal of Advanced Research* 251.
[25] See Chapter 6.
[26] Eddles-Hirsch (n 24) 251-252.
[27] Brian Neubauer, Catherine Witkop, and Lara Varpio, 'How phenomenology can help us learn from the experience of others' (2019) (8) *Perspectives on Medical Education* 90.
[28] Ibid.
[29] Ibid.
[30] Ibid.

The research, using this phenomenological approach, is exploratory and descriptive in its design as there is limited information in relation to the research area. Thus, a descriptive design is used to employ qualitative and quantitative methodologies to determine, describe or identify the research through surveys and in-depth interviews with participants.[31] Further, an 'emergent design' process is used so that, while organic in nature, it provides for participant responses that are carefully considered.[32]

Along with an in-depth literature review, these provide a thematic analysis and understanding of the thesis question – why litigants self-represent in Queensland child protection courts. Chapter 6 provides greater detail.

VI DELIMITATIONS

Delimitations of the thesis include that it is a study into why litigants self-represent in Queensland child protection courts only. The research is limited to three cities, Brisbane, Ipswich, and Toowoomba.

The study will not encompass race or ethnicity issues in relation to why litigants self-represent in Queensland child protection courts. It does not include an exploration of Aboriginal and Torres Strait Islander Legal Service (ATSILS) providers, as it widely acknowledged that they are the preferred and most culturally appropriate providers of legal services to indigenous Australians.[33] This aspect is not dealt with due to high volume of information available, thesis limitations, and being an area of study deemed worthy of its own research.

The thesis deals with Queensland child protection courts and attention will be focused solely on self-represented litigants, not children. The purpose of the thesis is to examine why litigants self-represent in Queensland child protection courts. However, due to the inability to obtain access to self-represented

[31] Hussey and Hussey (n 22) 109.
[32] Hazel Wright, 'Using an 'emergent design' to study adult education' (December 2009) Special Issue *Educate* 62.
[33] Senate Legal and Constitutional Affairs Committee, Law Council of Australia, *Inquiry into Access to Justice* (2009) 24.

litigants, the research will be coming directly from legal service personnel within the Queensland child protection court system, including include lawyers, Legal Aid officers, and magistrates. The data obtained comes from their experiences and background within the child protection system (as well as their perceptions of influence and motivation) of self-represented litigants in the Queensland child protection system.

VII DEFINITIONS

This thesis refers to a number of definitions relating to child protection legislation and the relevant participants.

A *Child Protection Legislation*

Queensland's child protection history is discussed in Chapter 2 and an outline provided in Appendix 1. Below is a list of synopsised definitions of the child protection legislation discussed in this thesis.

1 *Industrial and Reformatory Schools Act 1865 (Qld)*

This Act[34] was to provide for the custody of children under the age of 15 years by way of special schools to educate and care for neglected children and juvenile offenders.[35] This Act was repealed by the *State Children Act 1911* (Qld).

2 *Orphanages Act 1879 (Qld)*

[34] Full title of the Act is "An Act to provide for the establishment of Industrial and Reformatory Schools" (Act no 8/1865, 29 Vic No. 8).
[35] *Industrial and Reformatory Schools Act 1865* (Qld) Preamble.

This Act[36] was established, at the public's expense, for the governance of orphanages and asylums charged with the care, teaching and training of children who were neglected or deserted.[37] This Act was repealed by the *State Children Act 1911* (Qld).

3 *Guardianship and Custody of Infants Act 1891 (Qld)*

This Act[38] provided that, on the death of the father, the mother became the guardian of the child. It further provided that if a child was abandoned or allowed to be raised by another party for a substantial period of time, without financial assistance, the child would not be returned to the parent (unless they were found fit to resume parental responsibilities).[39] This Act was repealed by the *Children's Services Act 1965* (Qld).

4 *Children's Protection Act 1896 (Qld)*

This Act[40] provided that an offence occurred if a child was 'ill-treated, neglected, abandoned or exposed' in such a way that would cause unnecessary suffering or health issues.[41] This Act was repealed by the *Children's Services Act 1965* (Qld).

5 *Industrial and Reformatory Schools Act 1906 (Qld)*

This was an amendment to the original *Industrial and Reformatory Schools Act 1865* (Qld).[42] Its main purpose was to amend the age classification of a child to under the age of 17 years (from the previous 15 years of age).[43] Like its predecessor, this Act was repealed by the *State Children Act 1911* (Qld).

6 *State Children Act 1911 (Qld)*

[36] Full title of the Act is "An Act to make better provision for the Establishment and Management of Asylums for Orphans and Deserted and Neglected Children."
[37] *Orphanages Act 1879* (Qld) Preamble.
[38] Full title of the Act is "*An Act to Amend the Law as to the Guardianship and Custody of Infants*".
[39] *Guardianship and Custody of Infants Act 1891*(Qld) ss 12-15.
[40] Full title of the Act is "An Act to provide for the Protection of Children" (Act no. 60 Vic. No. 26).
[41] This applied to boys under the age of 14 years and girls under the age of 16 years.
[42] Also known as *Industrial Reformatory Schools Amendment Act of 1906* (Qld).
[43] *Industrial Reformatory Schools Act Amendment Act of 1906* (Qld) s 3.

This Act[44] provided for the establishment of private institutions and a State Children's Department[45] with a Director to replace the Inspector of Orphanages.[46] The Act also provided that children under the age of 13 years may, on application by the parent or guardian, be admitted into Departmental care.[47] This Act was repealed by the *Children's Services Act 1965* (Qld).

7 *State Children's Amendment Act 1917 (Qld)*

This Act[48] amended the age of children who received State government benefits from 13 to 14 years of age.[49] This Act, and its predecessor, was repealed by the *Children's Services Act 1911* (Qld).

8 *State Children Amendment Act 1924 (Qld)*

This Act[50] extended the provision of education and care for State supported children from primary school to high school at the discretion of the Director.[51] This Act, and its predecessor, was repealed by the *Children's Services Act 1965* (Qld).

9 *Children's Services Act 1965 (Qld)*

This Act[52] was designed to promote and protect State children through a co-ordinated child welfare program.[53] Most importantly, this Act shifted focus from 'state governance' to the protection of children from parental neglect and abuse, as well as unacceptable living conditions.[54] This Act was repealed by the *Child Protection Act 1999* (Qld).

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[44] Full title of the Act is "*An Act to Consolidate and Amend the Law relating to State Children*".
[45] *State Children's Act 1911* (Qld) ss 5, 11.
[46] Ibid s 15.
[47] Ibid s 19.
[48] Full title of the Act is "*An Act to Amend "The State Children Act of 1911" in certain particulars*".
[49] *State Children's Amendment Act 1917* (Qld) ss 2-3, 6-8.
[50] The full title of the Act is "*An Act to further Amend "the State Children Act of 1911" in a certain particular*".
[51] *State Children Amendment Act 1924* (Qld) s 2.
[52] The full title of the Act is "*An Act to Promote, Safeguard and Protect the well-being of Child and Family Welfare and to Amend "The Adoption of Children Act of 1964*". It was repealed by the *Child Protection Act 1999* (Qld).
[53] *Child Protection Act 1965* (Qld) Part 1.
[54] Ibid, Part 6.

10 *Child Protection Act 1999 (Qld)*

This Act[55] governs child protection in Queensland and provides detailed principles to be administered.[56] The Act's purpose is to 'administer for the safety, wellbeing and best interest of a child, both through childhood and for the rest of the child's life'.[57] To date, and for the purpose of this thesis, this Act remains in force.

11 *Child Protection Reform Amendment Act 2017 (Qld)*

This Act was passed to amend the *Child Protection Act 1999* (Qld) to ensure the safe care and connection of Aboriginal and Torres Strait Islander children with their culture and communities; providing permanency for children, including after they leave State care; focused information sharing frameworks; and support for Supporting Families Changing Futures reforms.[58]

B *Child Protection Commission of Inquiries*

There have been three child protection Inquiries in Queensland. These Inquiries will be discussed in greater detail in Chapter 2. Below is a short synopsis of each Inquiry.

1 *The Forde Inquiry 1999*

The Forde Inquiry was the first Inquiry into Queensland child protection.[59] Stemming from allegations during the 1990s about past abuse of children in State care, there was a call for the Queensland government

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[55] The full title of the Act is "*An Act about the protection of children, and for other purposes*".
[56] *Child Protection Act 1999* (Qld) ss 5, 5A, 5B.
[57] *Child Protection Act 1999* (Qld) s 5A.
[58] Queensland Law Society, 'Amendments to the Child Protection Act 1999', *Queensland Law Society* (government webpage, 27 June 2018) <https://www.qls.com.au/About_QLS/News_media/News/Amendments_to_the_Child_Protection_Act_1999#:~:text=In%20October%202017%2C%20the%20Child,their%20families%2C%20communities%20and%20cultures>.
[59] PeakCare, 'The 20th anniversary of the Forde Inquiry Report, *PeakCare Queensland* (Webpage, 2019) https://peakcare.com.au/the-20th-anniversary-of-the-forde-inquiry-report/#:~:text=The%20Forde%20Inquiry%20was%20the,into%20child%20protection%20in%20Queensland.&text=The%20Forde%20Inquiry%20scanned%20the,provided%20information%20to%20the%20Commission.

to investigate these concerns. [60] The final report was provided to the Queensland government in May 1999 and provided 42 recommendations for change in legislation, policy and practice for children in care,[61] including the establishment of the Forde Foundation.[62]

2 *The Crime and Misconduct Commission Inquiry ('CMC Inquiry') 2004*

In 2003, the second Inquiry into Queensland child protection was formed. The CMC Inquiry was established to conduct an investigation into the abuse of children in the Queensland foster care system.[63] In January 2004, the '*Crime and Misconduct Commission Inquiry into Abuse of Children in Foster Care*' report was released.[64] This report contained 110 recommendations for further reform, including the formation of a dedicated department for the exclusive protection of children's rights.[65]

3 *The Carmody Inquiry 2013*

The Carmody Inquiry was the third Inquiry into Queensland child protection. It was established in 2012 with the aim of reviewing Queensland's child protection system.[66] The final report, '*Taking Responsibility: A Roadmap for Queensland Child Protection*' was released in 2013.[67] The findings of this Report were that the child protection system was under 'stress' and that families should take responsibility for the care and welfare of their children (where appropriate) with the assistance of non-government support services.[68] The report provided 121 recommendations for change to the child

[60] Ibid.
[61] Ibid.
[62] The Forde Foundation is an independent charitable trust for the improvement of the quality of life for people who were in State care and suffered abuse or neglect. The Forde Foundation, 'Our Vision' *The Forde Foundation* (Internet resource, 2019) <https://fordefoundation.org.au/about/>.
[63] Queensland Government, 'Protection children: an inquiry into abuse of children in foster care, *Department of Child Safety, Youth and Women* (Webpage, 25 October 2020) < https://www.csyw.qld.gov.au/child-family/child-family-resources/protecting-children-inquiry-abuse-children-foster-care#:~:text=The%20Crime%20and%20Misconduct%20Commission,commenced%20on%208%20October%202003>.
[64] Ibid.
[65] Ibid.
[66] Queensland Government, 'The Findings of the Inquiry' (Webpage, 25 October 2020) <https://www.csyw.qld.gov.au/campaign/supporting-families/background/findings-inquiry>.
[67] Ibid.
[68] Ibid.

protection system and highlighted the need for the State government to work with these non-government sectors to ensure successful collaboration.[69]

C *Child Protection Participants*

Chapter three outlines in detail the participants, processes and procedures involved in Queensland child protection matters. Below is a short synopsis of each participant.[70]

1 *Self-Represented Litigant*[71]

For the purpose of this thesis, a self-represented litigant is defined as a person who is responsible for conducting their own legal proceedings[72] in Queensland child protection matters (including trial), regardless of their ability to access any legal services or advices.

2 *Department of Child Safety Youth and Women*

This Queensland government department was established as the principal agency for governmental responses to child protection.[73] The focus is on child safety, support and building of families' capacity to care for their children. Through its legislative power, derived from the *Child Protection Act 1999* (Qld), the Department may investigate concerns about children; arrange for family support services as a pre-

[69] Ibid.
[70] It is noted that there are more participants that may be involved in Queensland Child Protection Court proceedings, eg court staff, support persons. However, for the purpose of this thesis, only the main participants will be discussed.
[71] As provided in Delimitations, self-represented litigants could not be interviewed for this thesis. Full context is provided in Chapter 4.
[72] The Queensland Law Handbook, 'What is Self-Representation', *Caxton Legal Centre Inc* (Webpage, 1 March 2019) <https://queenslandlawhandbook.org.au/the-queensland-law-handbook/the-australian-legal-system/self-representation/what-is-self-representation/#:~:text=A%20self%2Drepresented%20litigant%20is,for%20themselves%20during%20any%20hearings>.
[73] Queensland and Family Child Commission, 'Child Protection Information Kit for Parents', *Helping Families and Communities* (Information Kit, 29 October 2018) 42 <http://childprotection.org.au/key-concepts-of-child-protection/>.

emptive measure; apply to the court for applicable orders; place children in out-of-home care; and approve foster and kinship carers.[74]

3 *Office of the Child and Family Official Solicitor*

Established in 2016, the Office of Child and Family Solicitor ('OCFOS') was established to provide in-house legal support to the Department of Child Safety Youth and Women, as well as legal advice in relation to the state's administration and representation under the *Child Protection Act 1999* (Qld).[75]

4 *Director of Child Protection Litigation*

In 2016, the Director of Child Protection Litigation ('DCPL'), an independent statutory agency was established.[76] This agency is considered the applicant responsible for deciding whether a child protection application should be made, the type of order sought, as well as, where appropriate, litigating the child protection proceedings.

5 *Lawyers*

In Queensland, lawyers are those persons who are admitted to the legal profession under the *Legal Profession Act 2007* (Qld) or a corresponding law in another state or territory. Legal practitioners are those lawyers who hold practising certificates as either solicitors or barristers. Adopting the colloquial parlance, when 'lawyers' are referred to in this thesis, I mean a legal practitioner and, in all cases mentioned, a solicitor.

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[74] Ibid.
[75] Director of Child Protection Litigation, 'Director's Guidelines' *Director of Child Protection Litigation* (Webpage, 1 July 2018) 29 <https://www.dcpl.qld.gov.au/__data/assets/pdf_file/0012/576984/directors-guidelines-issued-under-the-director-of-child-protection-litigation-act-1-july-2018.pdf> 6-7.
[76] Queensland Government, 'The Director of Child Protection Litigation', *Department of Child Safety, Youth and Women* (Webpage, 25 October 2020) <https://www.csyw.qld.gov.au/about-us/partners/child-family/our-government-partners/director-child-protection-litigation>.

6 *Separate Representative*

In Queensland child protection proceedings, the Children's Court may consider it necessary, and in their best interest, for the child to be separately represented by a lawyer.[77] This lawyer is not a party to the proceedings, nor are they required to act on instructions from the child.[78] Their role is to do anything required to act in the best interests of the child.[79]

7 *Magistrate*

A magistrate is a judicial officer appointed to the Magistrates Court of Queensland, the lowest court in the State hierarchy.[80]

VIII THESIS OUTLINE

This thesis comprises 10 chapters. Chapter 1 introduces the research undertaken, any gaps found, contributions made, as well as justifications for the research. There is a methodological overview and detailed definitions of key terms used in the thesis.

Chapter 2 provides an historical background of Queensland child protection legislation from 1865 to 1999.[81] This includes the development of methods and processes giving context to significant child protection legislative reforms in 2016. A number of themes are addressed, including the role of the state government in child protection matters; governmental policies that minimise systemic costs in child protection; and the slow emergence of litigation as a means of levelling the playing field between the executive government power and self-represented litigants in child protection proceedings.

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[77] *Child Protection Act 1999* (Qld) s 110(1)(a).
[78] Ibid, s 110(5).
[79] Chapter 3, Part 2F – The Separate Representative.
[80] *Magistrates Act 1991* (Qld) s 5(1).
[81] The most recent child protection legislation is the *Child Protection Act 1999* (Qld).

Chapter 3 discusses legislative changes that provided a more comprehensive picture of the substantial power imbalance between the government and parents and guardians, which is a major contributing factor to self-representation, as well as a potential distrust of both the legal and judicial profession.

Chapter 4 continues the literature review by providing a deeper account of the legal services options currently available for litigants in Queensland child protection matters. It includes an analysis of legal service funding and service delivery structures in Queensland, as well as other Australian jurisdictions.

Chapter 5 provides an account of the approaches underpinning the research, drawing primarily on co-production theory, access to justice and the right to legal representation. This incorporates a continuation of the literature review to assist in identifying problems arising in the child protection process. This also includes a review of the approaches used in not only Australia, but also the United States and Canada. This chapter will also examine the relationship between the thesis questions (RQ1-RQ3) and the reasons why litigants self-represent in Queensland child protection courts.

Chapter 6 provides a review of the approaches used in capturing legal service personnel information and perspectives in relation to situations where families are forced to make decisions about child protection litigation. It looks at how access to justice (or compromised access to justice), has an impact on these decisions regarding self-representation. The research design and methodology are detailed, including the sample size, method of data collection, and the development of semi-structured interviews, protocols and processes used to maximise content validity. The qualitative methodology used for the research and the methodological approaches is outlined, including the benefits of using comprehensive and valued data collection and analysis.

Chapters 7 and 8 present the data and provide insight into the complexity of issues surrounding why litigants self-represent in Queensland child protection trials. Interviews were conducted with members of the legal profession, including lawyers, magistrates, and Legal Aid officers. The responses provided not only thematic data, but also an opportunity to extract their views on the Queensland Children's Court, self-represented litigants, and access to justice issues. The interview results provide a narrative from the data received from legal service personnel interviews and associated commentary.

Chapter 9 brings together the discussion of the interview results and the literature review with respect to the research question, underlined by the three research issues: self-represented litigants and the distrust of the legal profession; effects of limited access to funding as a major contributing factor to self-representation; and emotional attachments held by self-represented litigants toward their child protection matter.

Chapter 10 provides an overview of the research presented, incorporating these issues, their potential for future research, and conclusions drawn.

CHAPTER 2 – THE DEVELOPMENT OF THE QUEENSLAND CHILD PROTECTION SYSTEM

I INTRODUCTION

The purpose of this chapter is to give background on the history of child protection legislation in Queensland. Child protection law has seen substantial change since its foundation in the late 1800s when the first Queensland legislation was enacted (*Industrial and Reformatory Schools Act 1865* (Qld) and *Orphanages Act 1879* (Qld)) and put practices in place that subsequently provided the colony or State with power to effectively control 'problem' children (those deemed in need of care and protection). While not particularly pioneering by today's standards, these two Acts formed the basis for the current child and family-based child protection legislation, the *Child Protection Act 1999* (Qld).

As is demonstrated in this chapter, and despite historical regulatory and legal shifts in child protection, the State remains omnipresent. Historically, this progression began with the State identifying children as 'neglected' and in need of 'control'.[1] Since colonial times, children have been arrested and brought before the Queensland child protection courts, through which they have been either gaoled or institutionalised.[2] The legislative changes that occurred (boarding-out, foster care, family supports), while ostensibly in the 'best interests of the children', continue to promote the State's interest. For example, the *Children's Court Rules 2016* (Qld) are meant to be drafted in such a manner that self-represented litigants can understand. However, these rules are based on policies and procedures that reflect the systemic exercise of the court's discretion in child protection matters. This is not something that an average individual, without a legal background, would comprehend, much less a self-represented litigant in child protection matters.

[1] *Industrial and Reformatory Schools Act 1865* (Qld) s 2; *Orphanages Act 1879* (Qld) s 5.
[2] Ibid.

In this chapter, I provide an historical account of child protection since 1865, including the development of methods and processes giving context to significant child protection legislative reforms in 2016. Several themes will be addressed, the first being the consistent and pervasive role the State government plays in child protection matters. Secondly, despite its centralised position within child protection, the government continues with policies to minimise system expenses such that, while economically efficient, provides poor outcomes for the welfare of children. As is demonstrated in this chapter, the practical availability of litigation as the critical means of controlling executive government action in child protection was slow to emerge. The *Children's Services Act 1965* (Qld) was a significant point in this development and, as recommended by the Carmody Inquiry, the *Child Protection Act 1999* (Qld) introduced a significant range of orders[3] to secure the interest of the child, but also made litigation more available to parents and guardians. In some respects, it demonstrates the gradual ordering of child protection under the rule of law.

II HISTORY OF QUEENSLAND CHILD PROTECTION

Queensland child protection changed significantly between the late 19th century, when abandoned and neglected children were legislatively treated as criminals,[4] and the 21st century where the focus of legislative protection is on children's wellbeing and safety.[5] The impact of legislative developments represents a paradigm shift from the colony and State initially having "complete 'control' over the process, including financial responsibilities of maintaining children in care",[6] to taking a more therapeutic

[3] Chapter 4D – Child Protection Intervention Process.
[4] Shurlee Swain, 'History of Child Protection Legislation' *Royal Commission into Institutional response to Child Sexual Abuse* (March 2014) 6.
[5] *Child Protection Act 1999* (Qld).
[6] Swain (n 4).

approach in providing assistance through non-governmental agencies for support in keeping families together.[7]

The majority of Australian colonies had set up children's courts by the 1890s,[8] although children dealt with in these courts remained subject to adult sanctions.[9] After Federation in 1901, child protection services continued to be a State responsibility, albeit with unique legislation and practices. Towards the end of the 19th century, Queensland, as well as other Australian colonies, established children's courts and developed child protection legislation.[10] These courts had exclusive authority over child welfare matters,[11] including the discretion to determine if a child was neglected under the terms of relevant child protection legislation, and being able to order the child to be detained by police and placed in institutionalised government care.[12] Children could be placed into institutional or other forms of care, depending on how they came into the system. For example, children could be placed into care by their own parents (voluntarily), or by the colony or State acting under legislative provisions (eg being deemed neglected).[13] In the case of involuntary placement, legal guardianship was transferred to the government.[14] However, for those who were voluntarily transferred, guardianship remained with the parents,[15] but could be voluntarily transferred to the government by parental application or consent.[16] Once this occurred, and a court order made, government guardianship could not be easily revoked.[17]

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[7] Australian Institute of Family Studies, *History of child protection services* (January 2015) Australian Government <https://aifs.gov.au/cfca/publications/history-child-protection-services>.
[8] A Tomison, 'A history of child protection: back to the future' (2001) 60 *Family Matters*, Australian Institute of Family Studies 49 cited in Community Affairs References Committee, The Senate, *Forgotten Australians* (August 2004) 30 [2.61].
[9] John Boersig, 'Delinquency, Neglect and the Emergency of Children's Rights Legislation in NSW', (2003) 5(2) *The Newcastle Law Review* 140.
[10] Tomison (n 8).
[11] Ibid.
[12] E Mellor, *Stepping stones: the development of early childhood services in Australia* (Harcourt Brace Jovanovich, London, 1990) 92-94 cited in Commission of Inquiry into Abuse of Children in Queensland Institutions (Forde Report), 1999, 18 cited in Community Affairs References Committee, The Senate, *Forgotten Australians* (August 2004) 31 [2.61].
[13] Community Affairs References Committee, The Senate, *Forgotten Australians* (August 2004) 29 [7.4].
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Ibid.

As early as 1895, Queensland children were placed into care for a number of reasons, including neglect, being orphaned, family violence, parental divorce or separation, and economic hardship.[18] Their circumstances saw them made wards of the colony or State, rather than being held responsible for any criminal wrongdoing.[19] They were subsequently placed into a variety of institutions, including orphanages, reformatories, and industrial training schools that were administered through the government and other charitable or welfare groups.[20]

The government's involvement in placing children into institutions has been far from static throughout Queensland's child protection history.[21] Its involvement in developing child protection policies regarding the fate of these children may, in fact, have been biased toward political and economic outcomes (eg cost cutting measures, institutional overcrowding, poorly-trained staff)[22] rather than the best interests of children.[23] This serves as an historical reminder of the perceived continued power imbalance between the government and families.[24]

A *Neglected Children*

In the 1800s, children were considered to be neglected if they were found begging or wandering, were homeless with no means of support, were living amongst thieves or prostitutes, had criminal matters before the court, were government dependent,[25] or had been born to Aboriginal or 'half-caste mothers' (eg mixed race or ethnicity).[26] This definition of neglect saw children as needing control, rather than care.[27] These

[18] Community Affairs References Committee, The Senate, *Forgotten Australians* (August 2004) xv, 31 [2.62].
[19] Ibid.
[20] Ibid.
[21] Ibid 19 [2.9].
[22] Ibid 22 [2.94].
[23] Ibid 16 [2.67].
[24] Ibid [2.10].
[25] Swain (n 4) 6-7.
[26] *Industrial and Reformatory Schools Act 1865* (Qld) s 6(7).
[27] Swain (n 4).

children were taken before magistrates and charged, through no fault of their own, with being neglected.[28] They were then institutionalised for a period of seven years, with the colony becoming their legal guardian.[29] Children who could not be housed in orphanages were placed in asylums, along with destitute adults, or in prison under vagrancy laws.[30]

The *Children's Protection Act 1896* (Qld) ('*Children's Protection Act'*) provided more definition and scope to the provision of child protection.[31] It expanded the term 'neglect', which was defined as to 'ill-treat, neglect, abandon or expose a child' in a way that would cause unnecessary suffering or health issues, and amounted to an offence.[32] Further, there was more specificity to the definition of children, being classified as boys under 14 years and girls under 16 years of age.[33] It was deemed that, at this age, girls were more likely to leave the home with the ability to care for themselves, while boys would be able to earn a suitable living.[34]

From the late nineteenth to the early twentieth century, there was a period of distinct change involving a systemic and administrative expansion of child welfare agencies.[35] The establishment of Children's Courts and probations systems altered the nature of the work being undertaken as well as increasing the form of state supervision and interaction.[36]

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[28] *Industrial and Reformatory Schools Act 1865* (Qld) s 8.
[29] Swain (n 4).
[30] *Industrial and Reformatory Schools Act 1865* (Qld) s 6(3).
[31] *Children's Protection Act 1896* (Qld), s 1.
[32] Ibid.
[33] Ibid s 3.
[34] Brisbane Courier Mail, 'Children's Protection Bill 1896', *National Library of Australia* (Newspaper Article, 28 August 1896) 2 <https://trove.nla.gov.au/newspaper/rendition/nla.news-article3633471.3.pdf?followup=ad25e1a8f0a889648b9881ee159282ad>.
[35] Robert van Krieken, *Children and the State: Social control and the formation of Australian child welfare* (Allen & Unwin, 1992) 84.
[36] Ibid.

A major political turning point during this period was that state officials were under pressure to make fundamental changes as the current system was not achieving its goals.[37] What was envisioned was a transformation from boarding out to reforming wayward children and youth – a system designed as to reconstruct families that they deemed unconventional by mainstream societal standards.[38]

Unfortunately, there is little information available by way of Children's Court records for this period.[39] However, it is clear that the main issue was that everything revolved around crime prevention[40] with concerns that parents were avoiding their parental responsibilities.[41] The State's position appeared more punitive than rehabilitative as there was no assistance provided to parents (or children), including legal or family support. The underlying position was the institutional principle that family life should be conventionally idealistic.[42] These 'unconventional' families raised problems not only of parental neglect and incapacity to care for their children, but also financial and intellectual inability to challenge the institutional administration's definition of 'ideal'.[43] Further, if this definition was targeted contextually as a basis of moral development, it would be more preferable to keep children with their families.[44]

As is evident from the reported cases, not all parent/child relationships are ones of natural love and affection.[45] While many lower socio-economic status families resisted government legal interventions, others relegated their children as mere objects of control.[46]

[37] Ibid 86.
[38] Ibid.
[39] Ibid 91.
[40] Ibid 86.
[41] Ibid 87.
[42] Ibid.
[43] Ibid 88.
[44] Ibid.
[45] Ibid 28.
[46] Ibid.

3 *R v Macdonald and Macdonald*[47]

As early as 1904, Queensland's State powers allowed for family intervention - not to regulate parental duties - but to protect children from actual harm. In *R v Macdonald and Macdonald*,[48] the father and step-mother of the child, Grace (aged 14 years), were convicted of her wilful murder.[49] This was based on a series of acts consisting of violence; failure to furnish appropriate clothing; starvation; and failure to obtain easily available medical advice.[50] Interestingly, there was no dispute as to Grace's injuries, which consisted of emaciation, body sores, two broken ribs and a severely broken wrist, with exposed bone.[51] The issues were whether the father and stepmother owed Grace a duty of care, and whether the neglect caused her death.[52] The step-mother's position was that the father, even in his absence, held the duty of care.[53] The court and jury, based on evidence provided, held that it was a joint duty, and if one neglected to provide such care, then the other should have sought help.[54] The evidence provided that joint control was exercised, and in the father's absence, the step-mother held control.[55] They were held liable for each other's actions in causing the child's death, through neglect, and subsequently sentenced to death.[56]

4 *Woodcraft v McKenzie; ex parte McKenzie*[57]

In contrast to *R v Macdonald and Macdonald,*[58] the earlier case of *Woodcraft v McKenzie; ex parte McKenzie*[59] rested on a more inherent meaning of 'neglect'. The focus was not solely on protecting children from neglectful behaviour, nor any comprehensive supports for the family unit as a whole.[60] The father (sole parent) of an illegitimate child was charged with being responsible for, yet neglecting and

[47] [1904] St R Qd 151.
[48] Ibid.
[49] Ibid 152.
[50] Ibid.
[51] Ibid.
[52] Ibid 159.
[53] Ibid.
[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] [1902] QWN 94.
[58] [1904] St R Qd 151.
[59] [1902] QWN 94.
[60] Ibid.

abandoning, the child in a manner that constituted unnecessary suffering.[61] Shortly after birth, the father gave care of the child to a nurse, with regular maintenance payments being met.[62] After five years, the payments stopped and the nurse advised the father that she could no longer care for the child.[63] The father immediately left, giving the nurse no choice but to continue to care for the child.[64] The father was convicted and fined on the basis of neglect, but successfully appealed on the basis that there was no evidence that he had control of, or wilfully neglected, the child in a manner that would cause suffering.[65] It was held that the father of an illegitimate child is not presumed to have legal control and therefore cannot be guilty of neglect or abandonment.[66]

These cases suggest that there is a need for child welfare involvement as the court must have a proactive role in the safety of children. In these instances, the rule of law only becomes available after the child has been injured or killed. It risked recklessness to have no role for government child welfare agencies. However, there was a need for clarity as to their role regarding administration and active involvement in decision making regarding the child. There was also a need for transparency as to what parental support would be provided to promote and maintain the State's definition of the 'ideal' family. Thus, there was continued expansion of the state's political, economic, and social developments in child welfare and state intervention over the period from the late 19th century to 1999.[67]

B *Mass Institutionalisation*

Where a neglected child fell within the court's jurisdiction, parental responsibilities and rights became secondary.[68] The court took over the parental role, manifested in its sentencing process, including placing

[61] Ibid.
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] Ibid.
[67] van Krieken (n 35) 107.
[68] Boersig (n 9) 142.

children into institutions.[69] Vagrant or neglected children could be arrested and brought before a court of summary jurisdiction for hearing[70] to determine whether the child was living in appropriate conditions, and could be removed to an institution or industrial school.[71]

From 1850-1890, institutions such as orphanages, group homes, foster care, and juvenile detention centres[72] were the central location for housing neglected children.[73] This occurred alongside the development of the *Industrial and Reformatory Schools Act 1865* (Qld) ('*IRSA*'), which was an early attempt at child welfare legislation.[74] This saw an increase in the colony having greater responsibility for child welfare.[75] For example, government institutions or government-subsidised institutions, such as hospitals, orphanages and industrial reformatory schools, were established by the Governor in Council,[76] which also retained school supervision and management, as well as the disciplinary needs of the detained children.[77] However, this was no more than a romanticised notion, designed to remove children across class barriers when, realistically, an era of mass institutionalisation had just begun.[78] The *IRSA* was meant to provide for the care and custody of neglected (and convicted) children,[79] but it was also meant to protect Queenslanders from the perceived dangers[80] brought by these children.[81]

Poorer families saw institutionalisation as a way of finding places for children they could not support.[82] This created a perceived threat that, if conditions were better in the institutions than with the average

[69] Ibid.
[70] Ibid.
[71] Ibid.
[72] Community Affairs References Committee, (n 18) 1 [2.3].
[73] MJ Liddell, *Child welfare and care in Australia: understanding the past to influence the* future cited in CR Goddard and R Carew, *Responding to children: child welfare practice* (Longman Cheshire, Melbourne, 1993) 30 cited in Community Affairs References Committee, The Senate, *Forgotten Australians* (August 2004) 20 [2.14].
[74] Swain (n 4).
[75] Liddell (n 73).
[76] *Constitution of Queensland 2001*, s 27.
[77] *Industrial and Reformatory Schools Act 1865* (Qld) s 2.
[78] Swain (n 4)
[79] *Industrial and Reformatory Schools Act 1865* (Qld) s 1.
[80] Ibid s 6.
[81] Swain (n 4).
[82] Ibid 6-7.

working class family, many children would be placed into care at the government's expense.[83] Parents were expected to pay maintenance and support during their children's institutionalisation.[84] An order for maintenance could be sought,[85] but would be varied with the parents' capacity to pay,[86] if at all. Non-payment meant that parents could be arrested,[87] and recovery proceedings brought against them.[88] However, this would be deemed fruitless considering the nature of the charges and inability to pay maintenance and support. While this legislation was designed to protect children,[89] the hidden agenda was to protect government from the financial dangers believed to be posed by these 'neglected' children,[90] and to prevent this from becoming a generational problem.[91]

From 1890-1935, state institutionalisation continued to serve as a cost saving measure.[92] It allowed neglected children to work, with certain conditions, including that the term was no more than three years, and that their maintenance and residence continued.[93] Any money earned was collected on the children's behalf and paid into the Government's Savings Bank,[94] with deductions made for maintenance expenses.[95] At the end of their tenure, children were expected to resume their education, unless they were discharged.[96] If they simply did not return, they were considered to have absconded.[97] In these cases, consequences were extreme. Males convicted of escape could be privately whipped and returned to school until reaching 15 years of age (maximum).[98]

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[83] Ibid.
[84] *Industrial and Reformatory Schools Act 1865* (Qld) s 16.
[85] Ibid s 17.
[86] *Industrial and Reformatory Schools Act 1865* (Qld) s 18.
[87] Ibid s 19.
[88] Ibid s 20.
[89] Australian Institute of Family Studies (n 7).
[90] Commonwealth, The Royal Commission into Institutional Responses to Child Sexual Abuse, *History of Child Protection Legislation* (2014) 6.
[91] Swain (n 4) 13.
[92] Liddell (n 73) 21 [2.16].
[93] *Industrial and Reformatory Schools Act 1865* (Qld) s 15.
[94] Ibid s 25.
[95] Ibid s 26.
[96] Ibid s 15.
[97] Ibid.
[98] Ibid s 31.

The legislation continues to recall the model of child protection that rested on delinquency, orphanage and pauperage.[99] It was nevertheless giving equal prominence to others' neglect of the child. The two models were nevertheless conflated. The same penalties were applied whether the child was regarded as delinquent or neglected. The courts were expected to exercise a paternalistic approach, yet attach the same penalties for a neglected child as that of a delinquent.[100] Concern grew for the health and wellbeing of institutionalised children with the environment being described as 'dwarfing children and causing them to degenerate into mere machines' and 'breeding contagious moral diseases such as vice and crime'.[101] The consensus was that the system needed to be organic and adaptive, with significant legislative changes to reflect societal values.[102]

While the boundaries between State intervention and the community were drawn quite rigidly, the fact remains that the State was necessarily an entity without feeling or relationship. Added to this, child welfare agencies were designed to impose a set of 'ideal' family morals suited to conventional families and the general principle was that this would improve the lives of working class children and working class interests.[103] Thus, it is not surprising that the administration of child welfare during this time was largely based on economic and labour conditions with the aim of producing disciplined workers (boys) and dutiful housewives or maids (girls).[104] Child welfare was being operated on the basis of social hierarchy with working class children under its control.[105] The State's 'ideal' family and work structure was based on a sense of overlapping values and attitudes which continued to form the political rather than familial progress of the period.[106]

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[99] Boersig (n 9) 142.
[100] Ibid.
[101] Queensland Parliament, *Record of proceedings* [Hansard], (Queensland Government Printer, 1875) cited in Elizabeth Bowerman (n 102) 2.
[102] Elizabeth Bowerman, 'The History of Foster Care in Queensland' (Research Paper, Foster Care Queensland, 2016) 2.
[103] van Krieken (n 35) 25.
[104] Ibid 6.
[105] Ibid 29.
[106] Ibid.

C *Organic and Evolutionary Legislative Changes*

A number of factors influenced the shift away from institutionalisation. However, maintenance and support funding continued to be the catalyst for the government to find alternatives to the placement of children in institutional care.[107]

While the colony continued to 'maintain' children under the *IRSA*, legislative changes were needed to reflect societal needs. In particular, there was a continued need to seek care for neglected children, but also improve the management of those providing care.[108] *The Orphanages Act 1879* (Qld) ('*Orphanages Act'*) enshrined these ideals, as well as the concept of foster care,[109] and provided that 'any trustworthy and respectable person' would be considered an appropriate foster carer.[110]

Orphanages were charged with the care, teaching and training of children in State care.[111] The colony established designated public orphanages (overseen by management committees),[112] and also granted licenses for private benevolent societies to establish orphanages.[113] The Minister[114] retained responsibility for the appointment of teachers and staff, however, supervision was undertaken by a Superintendent and Matron.[115] These appointments were made by the Governor in Council,[116] and a management committee

[107] Australian Institute of Health and Welfare, 'Deinstitutionalisation: the move towards community-based care', *Australia's Welfare 2001*, 98 citing Goffmann E, *Asylums: essays on the social situation of mental patients and other inmates*, 1961 & 1968 cited in Parliament of Australia, 'Chapter 2: Institutional Care in Australia', *Parliament of Australia* (Government webpage, 2004-2007) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2004-07/inst_care/report/c02> [2.19].
[108] Ibid s 4.
[109] Bowerman (n 102) 3.
[110] Ibid.
[111] *Orphanages Act 1879* (Qld) s 6.
[112] Swain (n 4) 26.
[113] *Orphanages Act 1879* (Qld) s 6. In Queensland, these subsidised orphanages were maintained in Brisbane, Townsville and Rockhampton.
[114] The Secretary for Public Instruction charged with orphanage administration. *Orphanages Act 1879* (Qld) s 1.
[115] *Orphanages Act 1879* (Qld) s 4.
[116] Ibid s 3.

consisting of no fewer than three people, under the Minister's direction.[117] Despite this internal management, orphanages (and later foster care families)[118] were inspected through routine visits from untrained members of philanthropic ladies' committees,[119] formed by female institutional executive members, with the goal being to serve the needs of women and children in asylums and institutions.[120] They oversaw the provision of moral advice to those they deemed fortunate enough to be the objects of their charity.[121] Foster carers would be advised and reprimanded on 'proper' ways to run households to avoid any maltreatment or cruelty to children in their care.[122] These 'lady' visitors would then provide the appropriate department with detailed reports about the children's maintenance and school attendance.[123]

Children under 12 years were sent to orphanages unless they were boarded out to a 'trustworthy and respectable person' or given an apprenticeship.[124] This was the average school leaver age and initially considered to be a permanent arrangement as children were deemed to be independent and could enter into their own apprenticeships.[125] They were not permitted to remain in care, at the public's expense, past the age of 13 years without Ministerial approval.[126] Regardless, children 'aged out' of care at 16 years.[127] The Minister, having no parental opposition, was able to contract children[128] to employment or apprenticeships. This included allowing the child to board for accommodation,[129] as long as it was not

[117] Ibid s 5.
[118] Department of Children's Services, *Centenary of care for children* (Queensland Government, Brisbane, 1979); Stephen Garton, *Out of Luck: Poor Australians and social welfare* (Allen & Unwin, April 1990); Robert van Krieken, *Children and the State: Social control and the formation of Australian child welfare* (Allen & Unwin, 1992) 78.
[119] *Diamantina Orphanage* (1865-1910) (20 November 2018) Queensland Government <https://www.findandconnect.gov.au/ref/qld/biogs/QE00192b.htm>.
[120] Elaine Thompson, 'Women in Medicine in late Nineteenth and Early Twentieth-Century Edinburg: A Case Study' (PhD Thesis, University of Edinburgh, 1998) 21.
[121] Ibid.
[122] Department of Children's Services (n 118).
[123] Ibid.
[124] *Orphanages Act 1879* (Qld) s 7. In some instances, the child could be hired out or apprenticed as young as 10 years.
[125] Office of Economic and Statistical Research, *Queensland past and present: 100 years of statistics, 1986-1996* (Queensland Government, 1998) cited in Bowerman (n 102) 4.
[126] *Orphanages Act 1879* (Qld) s 8.
[127] Ibid.
[128] Ibid s 26.
[129] Ibid.

with a publican licensee, keeper of common lodging, or boarding house.[130] Accordingly, the State continued to wield power and social control over the welfare of these families. Parents were still powerless and seen as objects of administration, management, and intervention, with their actions and behaviours policed by what is now collectively known as 'mandatory reporters', eg teachers, social workers, and doctors.[131]

In the 1890s, the colony suffered economic depression, which applied further pressure on families. They were forced to put their children into care, which placed increased pressure on foster care and boarding out.[132] Compounding these issues was the lack of formal assessment, training or support received by foster carers.[133] The only licensing requirement was that the woman (as men were not allowed to be foster carers)[134] was of 'good health and moral character, not over 55 years of age, married, have a humble lifestyle, live harmoniously with her husband and children (or if a widow with her own children)'.[135]

By 1901, the practice of boarding out had diminished, owing partly to the small pool of available carers, the economic status of foster families (placing children with families of similar economic and social class), and insufficient financial support offered by the government.[136] Parents and relatives were still expected to contribute maintenance,[137] however the problems relating to an ability to make these payments remained and no real contribution could be made.[138] Regardless, foster care was favoured by the government over large institutions as its financial responsibility was reduced[139] to nothing more than the

[130] Ibid s 23.
[131] van Krieken (n 35) 33.
[132] Office of Economic and Statistical Research (n 125).
[133] Bowerman (n 102) 3.
[134] Department of Children's Services, *Centenary of care for children* (Queensland Government, Brisbane, 1979) cited in Bowerman (n 102) 3.
[135] Ibid.
[136] van Krieken (n 35) 131.
[137] *Orphanages Act 1879* (Qld), s 21.
[138] Swain (n 4) 14.
[139] Office of Economic and Statistical Research (n 125) 4.

provision of one outfit of clothing and a school uniform for each foster child. [140] The balance of care and support was expected to be borne by the foster carers, based on a standard, yet deficient, allowance. [141]

Families were actively discouraged from trying to contact children placed in foster homes and, in an effort to promote security and continuity of care, children were not provided information about their biological families. [142] Family reunification was not a consideration until the enactment of the *Guardianship and Custody of Infants Act 1891* (Qld) ('*GCIA'*).

To date, no information on Queensland's first child protection case has been found. [143] However, it was the introduction of the *GCIA* which provided the first mention of parental rights to make application to the Supreme Court to challenge a custody decision of the Department. [144] The *GCIA* gave the Supreme Court the power to refuse to return children to parents who had 'abandoned or deserted' them over a substantial period of time, until they could prove their suitability to assume responsibility for the child's best interests. [145] The Supreme Court, exercising its power of *parens patriae*, was provided a more explicit role in child protection - the power to regulate Ministerial decisions. Previously, the State and child welfare agencies held the primary, if not sole, control over these families. To some degree, there are a number of ways in which the union between State and society continues to be formed through social control paradigms of poverty and welfare, despite continued theoretical debates around who actually wields the power. [146] Regardless of this skepticism, a significant change was made to provide parents with a legislative choice to be heard regarding the welfare of their children.

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[140] Department of Children's Services, *Centenary of care for children* (Queensland Government, Brisbane, 1979) cited in Bowerman (n 102) 4.
[141] Ibid.
[142] Queensland Department of Families, Youth and Community Care, and Leneen Forde, *Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions* (The Inquiry, 1999) Brisbane; Robert Holman, 'The place of fostering in social work' (1975) 5(1) *British Journal of Social Work*, 3-27.
[143] In researching the Queensland Reports, no information could be found. This may be due to privacy issues and the sensitive nature of the cases. Current Queensland child protection court matters are closed court sessions.
[144] Swain (n 4) 37.
[145] *Guardianship and Custody of Infants Act 1891* (Qld) s 12.
[146] van Krieken (n 35) 32.

D *State Children's Departments*

The *State Children Act 1911* (Qld) ('*SCA'*) consolidated the *IRSA* and the *Orphanages Act 1879* (Qld)[147] to establish a State Children's Department providing for the care, management and control of State children (and their property) under the direction of a Departmental 'Director'.[148] The Director's role was to organise accommodation in institutions; arrange apprenticeships; and place-out[149] children to suitable persons willing to be responsible for their care and maintenance.[150] This was undertaken without reference to parents, relatives or other guardians until such time as the Minister sought to intervene, or until the child was discharged from State care.[151] Despite the establishment of the *SCA* and the Children's Department, there was still no provision for prospective carers to be formally trained or assessed.[152] Further, societal norms continued to reflect women as being the dominant carers,[153] with 'accreditation' simply based on a medical examination and a character reference to confirm suitability.[154]

By the 1930s, there appeared to be a decline in placing-out children in family homes,[155] owing, again, to a range of socio economic factors including: economic depression; decrease in female volunteers; women in the workforce; inadequate financial compensation for carers; a preference for carers to be based in urban areas; and an increase in adoptions.[156] By the 1940s, however, disadvantaged parents were able to claim

[147] *State Children Act 1911* (Qld) s 6.
[148] Ibid s 7.
[149] The practice of placing State children in private family homes began to gain momentum and governmental support, even prompting a change in terminology whereby children were no longer 'boarded out' but now 'placed out': *State Children Act 1911* (Qld) s 11.
[150] *State Children Act 1911* (Qld) s 11.
[151] Ibid s 10(2).
[152] Hazel Smith, 'The need for revaluation and assessment of Australian foster care programmes' (1963) 16(2) *Australian Journal of Social Work* 25-29 cited in Elizabeth Bowerman (n 102) 5.
[153] Bowerman (n 102) 5.
[154] Smith (n 152).
[155] Queensland Department of Families, Youth and Community Care, and Leneen Forde, *Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions* (The Inquiry, 1999) Brisbane; Robert Holman, 'The place of fostering in social work' (1975) 5(1) *British Journal of Social Work*, 3-27.
[156] Ibid.

allowances for their children, a widow's and deserted mother's pension, unemployment benefits, sickness and special dependency benefits, and free hospital treatment.[157]

While there were no major changes in Australian child protection law in the early 20th century,[158] awareness of the impacts of continual abuse and harm on children's behaviours, as well as their social and emotional development, continued to grow.[159] Institutionalised care re-emerged as preferential to boarding out.[160] However, concerns were still held about the standard of living in these institutions, placing the shift toward smaller group care.[161] Despite these concerns, there appeared to be minimal public or government interest in child protection during the first half of the century.[162]

In contrast, by the 1960s the child protection landscape had seen significant changes. Medical professionals 'professionalised' child protection issues and brought it to the forefront of public awareness.[163] Overwhelming media and public scrutiny on child abuse issues placed increased pressure on State governments to engage and take greater responsibility, leading to the establishment of welfare departments being established and movement to government-based child protection approaches.[164]

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[157] Stephen Garton, *Out of Luck: Poor Australians and social welfare* (Allen & Unwin, April 1990); Robert van Krieken, *Children and the State: Social control and the formation of Australian child welfare* (Allen & Unwin, 1992) 11-117; Susan Keen, 'The Burnside homes for children: an overview of their social history, 1911-1980' (1995) 48(1) *Australian Social Work* 30-36.
[158] Australian Institute of Family Studies (n 7).
[159] Mary Lewis, 'Foster-family care: Has it fulfilled its promise?' (1964) 355(1) *The Annals of the American Academy of Political and Social Science* 31-41; Alison Mathew, 'The establishment of a foster care programme by a voluntary organisation' (1963) 16(2) *Australian Journal of Social Work* 30-32.
[160] Ibid.
[161] M Liddell 'Child welfare and care in Australia: Understanding the past to influence the future.' In C.R. Goddard & R. Carew (Eds) 'Responding to children: Child welfare practice' (Melbourne: Longman Cheshire, 1993) 28-62 cited in Australian Institute of Family Studies (n 7).
[162] J Fogarty, 'Some aspects of the early history of child protection in Australia' (2008) 78 *Family Matters* 52-59.
[163] B Lonne, N Parton, J. Thompson & M Harries, *Reforming child protection* (London & New York: Routledge, 2009) cited in Australian Institute of Family Studies (n 7).
[164] Australian Institute of Family Studies (n 7).

Foster care continued to gain acceptance, although in Queensland it was still common for children to be placed in orphanages until suitable placements were found.[165] The State Children's Department expanded its fostering program and established a pool of available licensed[166] foster carers, in an effort to avoid institutionalising children.[167] This was a large commitment and the Department undertook a recruitment drive by providing potential foster carers with information regarding their rights and responsibilities; assistance and guidance; the effect on children of separation from family, routine, and belongings; the significance of familiarity and routine; and contact with natural parents and reunification.[168] Departmental social workers conducted non-mandatory assessments designed to determine the motivation behind potential foster families' applications to undertake the care of the children.[169] Only a minority of prospective carers were formally assessed (interviews, medical examinations and character references),[170] with monitoring and support provided[171] through quarterly visits by social workers.[172]

Despite a heavy reliance on accommodation for State children, the Queensland government, while recognising its responsibility to safeguard these needs, was still unwilling to provide adequate resources for supervision.[173] Placement stability and thorough assessments were still needed to avoid foster placement breakdowns.[174]

Child welfare continued to become absorbed and integrated into administrative state bureaucracy.[175] Despite this, perhaps one of the most striking features was that there was a fundamental shift from the

[165] Smith (n 152).
[166] Swain (n 4) 54.
[167] Ethel Nock, 'A consideration of foster family care in Queensland' (1963) 16(2) *Australian Journal of Social Work* 35-37.
[168] Ibid.
[169] Esther Phillips, 'The role of the social worker in foster care' (1963) 16(2) *Australian Journal of Social Work* 41-42.
[170] Ibid.
[171] Queensland Department of Families, Youth and Community Care and Forde (n 155) 7.
[172] Swain (n 4) 54.
[173] Ibid 8.
[174] Alison Mathew, 'The establishment of a foster care programme by a voluntary organisation' (1963) 16(2) *Australian Journal of Social Work* 30-32 cited in Elizabeth Bowerman (n 102) 7.
[175] van Krieken (n 35) 110.

moral concerns of the 19th century to a focus on emotional development, family dynamics and social pressures.[176] Regardless, every generation of child welfare reformers believe they are the first to criticise the framework, but the alternatives did not match their expectations, resulting in some form of institutional care.[177] This indicates the need to look past societal conventions (the 'ideal' family life) and move toward a holistic family focussed approach.

E *Child and Family Welfare*

In the 1960s, child protection practices began to reflect a paradigm shift aimed at understanding children's needs and the harmful effects of abuse and neglect. The aim was to work alongside carers and parents[178] and to provide support toward family reunification.[179]

The *Children's Services Act 1965* (Qld) ('CSA') replaced the *Guardianship and Custody of Infants Act 1891* (Qld), the *Children's Protection Act 1896* (Qld), and the *State Children Act 1911* (Qld).[180] It was designed to 'promote, safeguard and protect the wellbeing of children[181] through a comprehensive and coordinated program of child and family welfare'.[182] The focus was to protect children from neglectful parents and unacceptable living conditions.[183]

[176] Ibid 127.
[177] Ibid 131.
[178] Robert Holman, 'The place of fostering in social work' (1975) 5(1) *British Journal of Social Work*, 3-27.
[179] Commission of Inquiry into Abuse of Children in Queensland Institutions, *Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions* (Queensland Government, Brisbane, 1999) cited in Crime and Misconduct Commission and Brendan John Butler (n 182).
[180] Crime and Misconduct Commission and Brendan John Butler, *Protecting Children: An Inquiry into Abuse of Children in Foster Care* (The Commission, Brisbane, 2004) 7.
[181] A child was considered to be a person under the age of 17 years. *Children's Services Act 1965* (Qld) s 8.
[182] Crime and Misconduct Commission and Butler (n 180).
[183] *Children's Services Act 1965* (Qld) s 4(1).

Children deemed to be in need of care and protection[184] included[185] those who were neglected; exposed to physical or moral danger; falling, or likely to fall into a life of crime or drug addiction; uncontrollable; or had no parent or guardian providing proper care.[186] However, there were no legislative provisions providing the basis for initiating investigations into suspected allegations of child abuse or neglect.[187]

In the 1990 case of *R v Watts,*[188] a 14-year-old boy was convicted on a guilty plea of raping (and stealing from) a 16-year-old girl. Despite his young age, he had a number of convictions, but none relating to serious criminal offences against persons.[189] He had been placed on a two-year care and control order prior to the offence, and three times afterwards. On his conviction for rape, he was ordered to be detained for an unspecified term,[190] while the stealing charge saw him committed to the care and control of the Department for a period of two years.[191] The issue raised on appeal was that the judge did not take into account the indeterminate nature of the sentence for the rape charge, and the possibility of rehabilitation.[192] There were only two sentencing options available to the trial judge: Watts could be imprisoned for two years, which would involve a finding as to his character; or the indeterminate period of imprisonment should stand.[193] A further alternative was that the Department could retain control of him for two years, and before the order expired, a further order would be sought for a period not exceeding another two years.[194] This would allow for rehabilitation as well as certainty of time. The appeal was dismissed, and the original sentence was deemed not to be manifestly excessive.[195]

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[184] The term 'neglected child' was replaced with 'child in need of care and protection'. Swain (n 4) 74.
[185] *Children's Services Act 1965* (Qld) s 46(1)(a).
[186] Ibid s 46(1)(b).
[187] Queensland Department of Family Services and Aboriginal and Islander Affairs, 'Child Protection Legislation: Issues Paper' (Brisbane, 1993) 12.
[188] [1990] 2 Qd R 387.
[189] Ibid.
[190] *Children's Services Act 1965* (Qld) s 63.
[191] Ibid s 62.
[192] [1990] 2 Qd R 387.
[193] Ibid.
[194] Ibid.
[195] Ibid.

On examination of *Watts'* case, the indeterminate sentence, while perhaps appropriate for serious adult offenders, appeared in its context to be Draconian for imposition on a 14-year-old child. The Department Director's duty was to use his powers and resources to further Watts' best interest while in care.[196] However, because of his habitual criminal offending, the court, in its discretion, detained him for an indeterminate period.[197] Rather than acting in the child's best interest, the court opted to detain him in a facility designed for adult offenders. While habitual criminals' provisions are designed to protect society from physical harm, the *Children's Services Act* was designed to facilitate rehabilitation and yet, at the same time, offer punishment.[198] The outcome in *Watts* was not consistent with these principles.

During this period, knowledge and expertise about physical, sexual, and emotional abuse changed focus. Child protection shifted from a medical approach to a more holistic family approach, taking into account the children's needs within the family environment.[199] The State was given a dual responsibility to assist families in welfare provision and to protect children from harm when there was no parent willing or able.[200] This allowed for the provision of assistance to families who had inadequate income or resources to properly care for children[201] and, where necessary, assistance in obtaining full-time education or vocational training.[202]

Parents, carers, relatives and anyone of good standing could apply for voluntary placement of a child into Departmental care.[203] The only assessment required was that 'assistance' would benefit the child.[204] If successful, orders could be made to transfer the child's guardianship from their biological parents[205] or

[196] *Children's Services Act* 1965 s 65.
[197] Ibid s 63.
[198] [1990] 2 Qd R 387.
[199] Queensland Department of Family Services and Aboriginal and Islander Affairs (n 187) 4.
[200] Ibid 3.
[201] *Children's Services Act 1965* (Qld) s 41(1).
[202] Swain (n 4) 75.
[203] *Children's Services Act 1965* (Qld) s 47.
[204] Ibid s 47(1).
[205] Parents were still expected to make a contribution to their child's care and maintenance. *Children's Services Act 1965* (Qld) s 120.

guardian to the Director until the child attained 18 years.[206] Legislative provisions also provided the Director with the power to revoke and discharge the child from care,[207] as well as placing them with approved foster carers,[208] relatives, a licensed institution, boarding school or other place considered to be in their best interests.[209]

According to Goddard and Carew, foster care 'required careful selection of parents and careful placement of children to ensure there would be compatibility between foster carers and the child'.[210] The expectation was, and continues to be, that carers would treat these children as their own, including coping with behavioural and emotional issues.[211] They were further expected to work alongside the Department[212] to engage with biological parents – all with a minimum level of training and support.[213]

Conducting formal assessments on prospective carers was still not formalised,[214] with approvals continuing to be made on the basis of the prospective carer's health and character.[215] Potential carers had to lodge applications of interest in becoming approved carers,[216] as opposed to the old regime whereby the Department directly approached families seeking accommodation for children.[217] Foster parents' roles and responsibilities remained relatively unchanged from that of the *State Children Act 1911* (Qld).[218] No further suitability checks were required.[219] There was no legislative provision requiring review or renewal

[206] *Children's Services Act 1965* (Qld) ss 53 and 61.
[207] Ibid s 47.
[208] Foster parents were compensated for caring for the child. Crime and Misconduct Commission and Brendan John Butler (n 182).
[209] *Children's Services Act 1965* (Qld) ss 58 and 65.
[210] Christopher Goddard and Robert Carew, *Responding to children: child welfare practice* (South Melbourne, Longman Cheshire, 1993) cited in Bowerman (n 102) 10.
[211] State Children Department was renamed the Department of Children's Services. Swain (n 4) 74.
[212] Ibid.
[213] Goddard and Carew (n 210).
[214] Bowerman (n 102) 9.
[215] Ibid.
[216] Ibid.
[217] Ibid.
[218] Ibid.
[219] *Children's Services Act 1965* (Qld) s 105.

of approvals on a regular basis, although the Director had power to 'revoke an approval at any time'.[220] Men continued to be restricted from being carers and could only be considered if they lived with and were married to an approved carer.[221]

The intent was that carers, parents and Departmental workers would form close working relationships allowing for a more streamlined approach to matching children with appropriate placements.[222] With the best interests of the child now seen as paramount, the Department's primary focus was no longer on the carers.[223] Carers could no longer access independent support services, despite the growing need due to the increasing complexity of foster care.[224] While this could be perceived as a 'backward step', it indirectly resulted in formalised training and recruitment of approved foster carers.[225]

In 1993, independent, non-government agencies were introduced.[226] These government funded 'Shared Family Care' agencies were responsible for improving training and support of foster carers.[227] In 1996, the Department decided to transfer the overall responsibility for training, assessments and support to the non-government sector, while retaining their responsibility to carers.[228] This twofold system of foster care continues today.[229] The imposition of additional checks and balances underpinned the belief that improving carer conditions would ultimately improve conditions for children.[230] These legislative

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[220] Ibid s 104(4).
[221] Bowerman (n 102) 9.
[222] M Oswald, 'An analysis of some factors associated with success and failure in foster home placements' (1964) 17(2) *Australian Journal of Social Work* 17-21 cited in Bowerman (n 102) 10.
[223] P Spall and R Clark, *Evaluation of four shared family care pilot care provider transfer services final report* (Department of Families, Youth and Community Care, 1998) cited in Bowerman (n 102) 10.
[224] Ibid.
[225] P Spall and R Clark, *Evaluation of four shared family care pilot care provider transfer services final report* (Department of Families, Youth and Community Care, 1998) 9 [1.5].
[226] Spall and Clark (n 223).
[227] G Murray, 'Final report on phase one of the audit of foster carers subject to child protection notifications: Toward child-focussed safe foster care', *Family Inclusion Network (FIN) Queensland (Townsville) Inc.* (Report, 2003) 9 <http://www.fin-qldtsv.org.au/foster_carer_audit.pdf>; PeakCare, 'Future Directions for Family Based Care: A Discussion Paper', *PeakCare Queensland* (Discussion Paper #2, 2003) 13 <http://www.efac.com.au/pdf/Future_Directions_2003.pdf>; Spall and Clark (n 224).
[228] Ibid. The Director's power in respect of assistance falls within s44 of the *Children's Services Act* 1965.
[229] Murray (n 227) cited in Bowerman (n 102) 10.
[230] Spall and Clark (n 224) 10-11.

attitudes and best interest principles towards children, rather than State-based policy making, has motivated continued shifts in child protection reform[231] as social understandings of precisely what is in the children's best interest evolve or are refined.

F *Lack of Legal Processes*

The legislative history relating to how neglected children were dealt with has a long history inherited from English court systems.[232] Legislative practices with respect to sentencing of these children were adopted on colonial settlement in Australia,[233] as there was no special court for sentencing children and no legislative guidance as to how children should be dealt with.[234] The judicial system (at least prior to 1850) had a one size fits all approach with respect to both adults and children,[235] centred on crime and punishment, with retribution and deterrence considerations.[236] After more than two centuries, both judicial and child protection systems began to see a substantial paradigm shift, from punishment and individual accountability, to protection and welfare – the 'justice model'.[237]

During the colonial period, neglected and orphaned children were considered a threat to society's social hierarchy, with no legislative processes or government protections afforded to them.[238] The judicial process during this period saw them taken before courts, charged with neglect, and placed into government administered institutions.[239] It was an expensive exercise and the government, as part of cost efficiency measures, sought alternatives to institutionalisation.[240] This included placing institutionalised children out to work, with any earnings received paid directly to the government.

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[231] Swain (n 4) 9.
[232] Boersig (n 9) 121.
[233] Ibid.
[234] Ibid 122.
[235] Ibid 130.
[236] Ibid.
[237] Ibid 122.
[238] Ibid 129.
[239] Bowerman (n 102) 3.
[240] Ibid.

The *Orphanages Act 1879* was the first Queensland statute to provide for the concept of foster care through government administration of public and licensed charitable orphanages. The *Guardianship and Custody of Infants Act 1891* provided the government with the power to refuse to return children to their families until their parents could prove suitability to care for them. The *State Children Act 1911* introduced the provision of care, management and control of children through the State Children's Department. Regardless of any well-meaning provisions from these Acts, these legislative endeavours were set to fail as the government still did not provide foster carers, administrators or parents with appropriate guidance or training.

During these periods of legislative development, parents were still expected to subsidise or reimburse their children's institutional care. This posed an obvious challenge as if the parents had funds readily available, there was less likelihood that their children would be institutionalised for neglect. Parents were ultimately set up to fail as they were being placed in the same financial position as before the children were institutionalised.

Perhaps the first, most advantageous piece of child protection legislation (for families) was the *Children's Services Act 1965* (Qld). Its main legislative focus was not only to protect children from neglectful parents and unacceptable living conditions, but to utilise a reunification approach to keep families together. There was a legislative shift for a 'family focused' approach with the government assisting families with income and resources to care for children, as well as education and vocational training. Despite these fundamental changes, there were still no formal assessments or suitability checks for prospective carers, nor any legislative provisions requiring foster care review.

Historically, the discretionary power and management held by the State with regard to children was pervasive.[241] The discretion was skewed towards those in power, punitive towards children, and with minimal accountability for those charged with their care and protection.[242] Accordingly, many legal processes were not always followed (eg neglect of children in State care did not often hold accountability towards those responsible).[243] Societal changes saw the need for legislative rejuvenation to incorporate a holistic family approach to child protection.[244] The new family support approach, along with the findings of the Forde Inquiry, prompted the development of the current *Child Protection Act 1999* (Qld).[245]

G *Forde Inquiry*

In August 1998, the Queensland Minister for Families, Youth and Community Care (now the Department of Child Safety, Youth and Women) established[246] a Commission of Inquiry to determine whether there had been any abuse, mistreatment or neglect of children in Queensland institutions.[247] The Chairperson was solicitor, Ms Leneen Forde, later Governor of Queensland.

This Inquiry, covering 159 institutions from 1911 to 1999, and over 300 participants, was established to make full and considered inquiries into any government or non-government institutions or detention centres legislated under the *State Children Act 1911*, *Children's Services Act 1965* or the *Juvenile Justice Act 1992*.[248] Overall, the aim was to determine whether any unsafe, improper or unlawful care or treatment of children had occurred, and whether there had been any breaches of statutory obligations under these Acts with respect to the care, protection and detention of children.[249]

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[241] Community Affairs References Committee (n 18) 28 [2.65].
[242] Ibid.
[243] Ibid.
[244] Ibid.
[245] Bowerman (n 102) 12.
[246] The Commission was established under the *Commissions of Inquiry Act 1950*.
[247] *Commissions of Inquiry Order (No. 1)* (Report, August 1998) i.
[248] Ibid.
[249] Ibid.

The Forde Inquiry had two major purposes: an investigation into past institutional abuse and a review of the (then) current systems (legislation, policy and practice, and facilities).[250] Literature reviews were conducted to provide context and information about current developments in institutional child abuse.[251] These studies were supported by submissions from academic and professional experts, as well as a review of archival evidence.[252]

Stakeholder groups were consulted throughout this Inquiry. Individuals who had resided or worked in institutions were invited to come forward, and submissions from other interested individuals and organisations were sought.[253] Those who provided information disclosed details of their childhood experiences[254] including emotional, physical, sexual and systemic abuse, as well as trauma arising from family separation.[255] This impacted on a number of these children in their adult years, reported poor personal relationships, low self-esteem, insecurity, poverty, suicide attempts, and limited employment prospects.[256]

In making any recommendations for consideration, the Inquiry was held to Terms of Reference in relation to: (i) any systemic factors which contribute to any child abuse or neglect in institutions or detention centres; (ii) any failure to detect or prevent any child abuse or neglect in institutions or detention centres; and (iii) necessary changes to current policies, legislation and practices.[257] The Inquiry found that there had been 'unsafe, improper or unlawful treatment of children in many institutions licensed and established under the relevant Acts'.[258]

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[250] Ibid ii.
[251] Ibid iii.
[252] Ibid.
[253] Ibid ii.
[254] The Forde Foundation, 'The Forde Inquiry', *The Forde Foundation* (Internet resource, 2013) <http://fordefoundation.org.au/resources/the-forde-inquiry>.
[255] Ibid.
[256] Ibid.
[257] *Commissions of Inquiry Order (No. 1)* (n 247).
[258] Ibid iv.

On 8 June 1999, the Forde Inquiry Commission Report was tabled in the Queensland Parliament.[259] The findings were that there was significant evidence of unsafe, improper and illegal treatment of children in Queensland institutions in the past. Further, there was acknowledgement of ongoing concerns in relation to current child protection and youth detention practices.[260] The Report provided 42 recommendations[261] for implementing major changes in legislation, policy and practice regarding children currently in care or detention.[262] All but one was accepted by the Queensland Parliament.

Among the significant reforms to be implemented, the *Child Protection Act 1999* (Qld) was passed by Parliament in March 1999. This replaced the *Children's Services Act 1965* (Qld).[263] The purpose of this legislation was to address the issues raised by the Forde Inquiry including the provision of quality services to children and their families.[264] Among the recommendations made, the establishment of a 'one stop shop' was made for a range of services, including ongoing counselling, educational and literacy programs, advice regarding accessing information.[265] However, there were no discussions or recommendations for the establishment of an inquiry into legislative controls over government actions relating to children or the need to enhance the roles within child protection courts, specifically in relation to providing assistance for parents who could not afford legal representation.

III *CHILD PROTECTION ACT 1999* (QLD)

During the 1970s and 1980s, the focus was on the 'professionalisation' of child protection services, with

[259] The Forde Foundation (n 254)
[260] Ibid.
[261] Queensland Government, 'Queensland Government Response to recommendations of the Commission of Inquiry into Abuse of Children in Queensland Institutions' (*Forde Foundation)* (Government, 11 September 2001) 3 <http://fordefoundation.org.au/u/lib/cms/forde-govt-resp-progress.pdf>. Recommendation 14 was not endorsed as it called for the reconsideration of the Government's decision to construct a Youth Detention Centre at Wacol. This would have caused undue delay in closing the Sir Leslie Wilson Youth Detention Centre and thus, not feasible.
[262] The Forde Foundation (n 254).
[263] Commission of Inquiry into Abuse of Children in Queensland Institutions (Report, August 2019) 48.
[264] Ibid.
[265] The Forde Foundation (n 254) 288.

States moving to a juridification of child welfare. This legalistic approach saw child protection services more focused on legal responses to allegations of abuse and neglect and whether protective intervention was warranted.[266] This approach took a significant amount of time and resources with State funding being significantly reduced. The limited funding and support meant that vulnerable and disadvantaged families would continue to suffer.[267]

During the mid-1990s, changes to child protection legislation were motivated by a number of factors, including the area becoming too 'professionalised'; new research on effects of abuse on children; as well as the Forde Inquiry,[268] which exposed significant abuse and neglect of children in State institutions.[269]

When the *Children's Services Act 1965* (Qld) was enacted, there was little information in relation to child abuse.[270] It was the 'professionalisation' of child abuse which prompted interest by US researcher Dr Henry Kempe to undertake research into what is now known as 'battered-child syndrome'.[271] The term 'battered-child syndrome' describes the 'clinical condition in young children who have received serious physical abuse'.[272] Kempe's work has been recognised as generating an explosion of interest and research into the field of child protection.[273] It was not until the 1976/77 Department of Children's Services Annual Report that the topic of sexual abuse was first reported:

> There appears to be a trend overseas to broaden the definition of child abuse and in line with this the Child Protection Unit has had various other areas of need brought to its attention, ie sexual abuse and 'failure to thrive' cases (severe nutritional neglect of an intentional nature).[274]

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[266] Tomison (n 8).
[267] Ibid.
[268] The Forde Foundation (n 254).
[269] Bowerman (n 102) 12.
[270] Cassandra Rayment, 'Governing Through Risk: Exploring the Maltreated Child as a Potential Delinquent' (PhD Thesis, Queensland University of Technology, 2008) 132.
[271] Lonne et al (n 163).
[272] Rayment (n 270) 132.
[273] Ibid.
[274] Department of Children's Services, *Annual Report* (Annual Report, 1976) 6 cited in Rayment (n 270) 133.

Knowledge of child sexual abuse was supported by expert research[275] and, as a result, the definition of 'child abuse' was expanded in 1979 to include:

> A non-accidentally injured or maltreated child is one who is less than 18 years of age, whose parent or other person have care of the child has inflicted on the child physical injury or gross deprivation which has caused or created a substantial risk of death, disfigurement, or impairment to physical or emotional health, or has allowed or created a substantial risk of physical injury or gross deprivation to arise or exist. *This definition includes sexual abuse or sexual exploitation* (emphasis added).[276]

Legislation began to reflect this change in understandings of child abuse.[277] Child protection legislative reform began in 1993,[278] with the enactment of juvenile justice legislation.[279] This was the catalyst for the drafting of new child protection legislation, as the *Children's Services Act 1965* (Qld) previously covered over both child protection and juvenile justice matters.[280]

The Department released a paper on child protection, citing a need for change.[281] Families required substantially more support, with the child's removal being a measure of last resort.[282] The Department stated:[283]

> Since the enactment of the *Children's Services Act 1965* (Qld) knowledge and expertise about physical, sexual, and emotional abuse has changed and the strategies and services used to deal with these problems have expanded… The emphasis now is on a multi-disciplinary response to the

[275] Rayment (n 270) 133.
[276] Department of Children's Services (n 274).
[277] Rayment (n 270) 134.
[278] Ibid.
[279] *Juvenile Justice Act 1992* (Qld).
[280] Rayment (n 270) 134.
[281] Ibid 131.
[282] Department of Children's Services, *The History of Child Protection in Queensland* (2000) 2 cited in Rayment (n 270) 136.
[283] Ibid 131.

> investigation, assessment, and intervention processes. The inter-agency processes for co-ordinating responses to protect children which are now accepted as 'best practice' are not reflected in the current legislation.[284]

In late 1998,[285] in an attempt to effect policy change, a group of senior Departmental social workers were asked to formulate policy guidelines (eventually forming the *Child Protection Act 1999* (Qld) ('*Child Protection Act*').[286] This provided two mainstays for Queensland child protection: a standard of care specific to a child's needs, and a charter of rights for children in care.[287] Rights provided in the *United Nations Convention of the Rights of the Child 1989* were incorporated, including the child's right to be protected from neglect and abuse, to live in a safe environment, and to have cultural and religious rights recognised and respected.[288] Standards of Care were introduced as it was becoming evident that children who were deemed at risk in their homes were also suffering further abuse due to inadequate levels of protection in care.[289] Provision was made for a variety of community services that ensure that minimum standards of care are met when children are in State or foster care.[290]

The *Child Protection Act* brought about the implementation of numerous changes based on various key agency consultations. These agencies included the Department of Children's Services, Queensland Police, Department of Justice and Attorney-General, Queensland Health, Brisbane Children's Court Magistrates, Legal Aid Queensland, the Children's Commissioner, and Education Queensland.[291] There was also extensive community involvement with approximately 250 people attending Ministerial forums, and approximately 400 people attending at least one of 36 consultation meetings held throughout

[284] Department of Family Services and Aboriginal and Islander Affairs, 'Child Protection Legislation: Issues Paper' (1993) Brisbane 1 cited in Rayment (n 270) 132.
[285] Explanatory Memorandum, *Child Protection Bill 1998* (Qld), 3.
[286] Bowerman (n 102) 12.
[287] Ibid.
[288] Ibid.
[289] Ibid.
[290] Explanatory Notes, *Child Protection Bill 1998* (Qld), 2.
[291] Ibid 3.

Queensland.[292] These individuals represented key fields such as child and family welfare, care providers, non-government education, health, law, tertiary institutions, and the Aboriginal and Torres Strait Islander ('ATSI') community.[293]

Despite the numerous consultations with State based agencies regarding the implementation of change, no discussions were held about the adequacy (or limitations) of support for self-represented litigants in the child protection system.

The overall aim of the Act, according to the government's Explanatory Notes, was to provide legislative reform for improving service delivery and changing community values, including holding the government accountable where necessary[294] and further defining their role in protecting children and supporting families.[295] Families were to be given more decision making authority and to play a productive role in ensuring the children's needs were met.[296] This included allowing for ATSI agencies to be consulted in relation to ATSI children in care.[297] This was the first piece of child protection legislation that provided ATSI families and communities to receive services from the Department to meet their unique needs in culture and identity.

Historically, the executive government in Queensland appeared to be subject to minimal judicial scrutiny as there was no practical ability to litigate or challenge child protection orders.[298] As provided in Chapter 1, various Acts of the Queensland Parliament gave the colony or State the power to direct the provision of care for marginalised children.[299] It was not until the *Children's Services Act 1965* (Qld) that steps to

[292] Rayment (n 270) 134.
[293] Explanatory Notes (n 290) 3-4.
[294] Ibid 2.
[295] Ibid.
[296] Ibid.
[297] Swain (n 4) 82.
[298] Queensland Child Protection Commission of Inquiry, *Taking Responsibility: A Roadmap for Queensland Child Protection* (June 2013) 246-247.
[299] Chapter 1, Part 7A – Child Protection Legislation.

promote and protect the best interests of these children were made by judicial officers in the Children's Court.[300] This Act provided for orders based primarily on issues of 'care and control' in youth justice offences, as well as the guardianship of children.[301] This was the first time where a person who felt aggrieved by an order could appeal against the Children's Court decision.[302] It was approximately 34 years later, with the enactment of the *Child Protection Act 1999* (Qld) that a more holistic approach to promoting the best interests of the child would arise. This included the making of more comprehensive, yet protective orders,[303] as well as support frameworks to assist the reunification of families.

A *Crime and Misconduct Commission Inquiry 2004*

The catalyst for the Crime and Misconduct Commission Inquiry was information provided to the Department of Children's Services in late May 2003 by a woman who alleged that she (and other foster children within the same placement) were being physically and sexually abused while in foster care.[304] Her allegations included sexual abuse (over a 13 year period) by her approved foster carer as well as visitors and family friends.[305] Eventually, documents relating to abuse of the other children placed within this family became public and suggested departmental failures.[306] It was this intense media scrutiny that saw action taken by the Minister[307] and, in 2004, the Crime and Misconduct Commission ('CMC') undertook a public inquiry into abuse of children in foster care.[308]

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[300] *Children's Services Act 1965* (Qld) s 49.
[301] Ibid s 62.
[302] Ibid s 21 (b).
[303] Chapter 3, Parts 4(D)(1-5)
[304] Crime and Misconduct Commission, 'Protecting Children: An Inquiry into Abuse of Children in Foster Care', *Queensland Child Protection Commission of Inquiry* (Government, January 2004) xvii <http://www.childprotectioninquiry.qld.gov.au/__data/assets/pdf_file/0008/160856/QCPCI_Exhibit_3_Protecting_Children_CMC_report.pdf>.
[305] Ibid.
[306] Ibid.
[307] Ibid.
[308] Ibid.

This CMC Inquiry was held to Terms of Reference in relation to: (1) examining systemic factors contributing to child abuse in foster care; (2) examining suitability of measures to protect children from abuse in foster care, in particular, suitable systems and procedures for detection and prevention; (3) adequacy of response of suspected abuse reported by foster carers; and (4) making recommendations appropriate for (1) and (2) including changes to policies, practice and legislation.[309]

Within six months, the Inquiry concluded their findings and published their report, *Protection Children: An Inquiry into Abuse of Children in Foster Care*.[310] According to Tim Carmody, the CMC Report findings were similar to those of the Forde Inquiry in that it concluded that the child protection and foster care system continued to fail children. [311] These failings did not simply develop from a few 'atypical' cases where poor departmental judgment had been made.[312] It was representative of systemic failings in the State's ability to effectively respond to relevant child protection issues.[313] Evidence pointed to inadequate and inconsistent departmental processes and procedures including lack of appropriate case planning, supervision, and investigations.[314] This led to many children receiving multiple placements, but no medical, psychiatric or educational services.[315] These issues were compounded by a lack of accountability or ownership of casework decisions, seemingly compounding case management difficulties.[316]

[309] Crime and Misconduct Commission (n 304) xii-xiii.
[310] Crime and Corruption Commission, 'Year 3: 2003-2004 – CMC Inquiry recommends creation of Department of Child Safety (CMC)', *Crime and Misconduct Commission* (Government, n.d.) <https://www.ccc.qld.gov.au/about-us/our-history/crime-and-misconduct-commission/year-3-2003-2004-cmc-inquiry-recommends>.
[311] Timothy Carmody, 'Submission to the Inquiry into the Queensland's Child Protection System', *Commission for Children and Young People and the Child Guardian* (Submission, 21 September 2012) 14 <http://www.childprotectioninquiry.qld.gov.au/__data/assets/pdf_file/0018/163242/Commission_for_Children_and_Young_People_and_Child_Gaurdian_Elizabeth_Fraser_Submission.PDF>
[312] Ibid.
[313] Ibid.
[314] Carmody (n 311) 15.
[315] Ibid.
[316] Ibid.

The CMC Report found that between 2002-2003, in Queensland there were 31,068 cases notified of child abuse and neglect, and 3,966 children were under child protection orders. Of these children, 3,642 were under orders granting custody and/or guardianship to the Department.[317] The vast majority of these children were placed in alternative care, which was predominantly family-based care, either in foster or relative care settings.[318] Those matters requiring immediate action included indications of sexual abuse or patterns of excessive or inappropriate physical discipline.[319] Foster carers were identified as being responsible for 57 per cent of harm, with the balance attributed as 18 per cent to foster carers' relatives; 11 per cent to foster carers' children; seven per cent to other foster children; and the final seven per cent involving non-relatives.[320]

The CMC Report concluded that children were lost within the child protection system.[321] It was not suggested that this was due to any lack of care by service providers, but a realistic view that when resources were stretched or there were limitations in the level of professional experience, significant problems would occur that eventually might reach crisis level.[322]

B *Carmody Inquiry 2013*

In 2013, recommendations were made for improvements to the child protection system based on the Queensland Child Protection Commission of Inquiry ('QCPCI').[323] These recommendations were based on findings of lengthy delays in finalising orders (interim and final); poorly drafted affidavit materials and

[317] Queensland Government (n 308).
[318] Ibid.
[319] Crime and Misconduct Commission (n 310).
[320] Ibid.
[321] Carmody (n 311) 16.
[322] Ibid.
[323] The purpose of this Inquiry was to review Queensland's overall performance in relation to the child protection system and incorporate positive social change where necessary. Queensland Child Protection Commission of Inquiry, *Discussion Paper* (February 2013) 252 <http://www.childprotectioninquiry.qld.gov.au/__data/assets/pdf_file/0008/175391/Overview-and-chapter-1.pdf>.

statements; families not being legally represented; and not enough legal advice provided to families throughout the process (especially in the early stages).[324]

The Carmody Inquiry, led by the Honourable Tim Carmody QC,[325] published its report, *Taking Responsibility: A Roadmap for Queensland Child Protection*, in 2013.[326] The Inquiry concluded that the child protection system was not ensuring the safety, wellbeing and best interests of children.[327] The current system was not only unsustainable, but also contrary to policy and community expectations.[328] It was found that the Queensland child protection budget had more than tripled in a decade, but that there were other signs that the system was failing including:

> Child protection intakes tripling, the rate of Aboriginal and Torres Strait Islander children in out-of-home care also tripling, the number of children in out-of-home care more than doubling and children in care staying there for longer periods.[329]

Compounding these perceived failures was the Carmody Inquiry's point that child protection law, by its nature, is invasive - involving tension between the State, and parent or carer, who may have social disadvantages or vulnerabilities, leaving them powerless in a perplexing court system.[330]

The rationale behind policy reforms, supported by the Queensland Law Society and Legal Aid,[331] was to establish greater accountability with respect to applications brought to the court by the Department where

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[324] Department of Communities, Child Safety and Disability Services, *What is the Office of Child and Family Official Solicitor?* (5 June 2018) Queensland Government, Department of Communities, Child Safety and Disability Services (https://www.communities.qld.gov.au/resources/campaign/supporting-families/what-is-ocfos-information-sheet.pdf).
[325] Queensland Parliament, *Record of proceedings* [Hansard], 11 May 2016, 1682 (Mr Walker, Mansfield - LNP).
[326] Queensland Parliament, *Record of proceedings* [Hansard], 11 May 2016, 1691 (Mr Dickson, Buderim - LNP).
[327] Ibid.
[328] Ibid.
[329] Queensland Parliament, *Record of proceedings* [Hansard], 11 May 2016, 1685 (Ms Davis, Aspley - LNP).
[330] Queensland Parliament, *Record of proceedings* [Hansard], 11 May 2016, 1680 (Ms Linard, Nudgee - ALP).
[331] Tim Carmody, 'Queensland Child Protection Commission of Inquiry, *Queensland Child Protection Commission of Inquiry* (Webpage, June 2013) 458 <https://www.cabinet.qld.gov.au/documents/2013/dec/response%20cpcoi/Attachments/report%202.pdf>.

appropriate and necessary.[332] It was believed that the Department would benefit from early and independent legal advice in producing quality applications and supporting affidavit material which would be consistent with model principles of litigation and early conflict resolution.[333]

Concerns were held that even though there were provisions for parents and carers to be represented in child protection proceedings, realistically, they relied on limited resources of Legal Aid and volunteers in community based organisations.[334] In some instances, Department officers told parents and carers they did not need legal representation, thus disadvantaging them in the course of proceedings.[335] This left many unrepresented parents and carers ill-informed of their rights and evidence, and confused about orders being sought.[336] The Inquiry agreed that appropriate legal representation for parents and carers is crucial for the child protection system to produce just outcomes, safeguarding rights and improving decision-making.[337]

In making recommendations, the Carmody Inquiry was held to Terms of Reference in relation to reviewing: (i) the progress of Forde Inquiry recommendations; (ii) Queensland legislation about child protection (including the *Child Protection Act* 1999); (iii) resource adequacy and effectiveness, appropriateness of support for child protection staff; (iv) child protection processes and procedures, and the transition of children through the child protection system; (v) effectiveness of investigations, monitoring and complaint mechanisms; and (vi) the adequacy of government responses and actions regarding allegations of criminal conduct, and child sexual abuse in youth detention centres.[338]

[332] Queensland Parliament, *Record of proceedings* [Hansard], 11 May 2016, 1685 (Ms Davis, Aspley - LNP).
[333] Queensland Parliament, *Record of proceedings* [Hansard], 11 May 2016, 1690 (Mr Dickson, Buderim - LNP).
[334] Carmody (n 331) 475.
[335] Ibid.
[336] Ibid 476.
[337] Ibid.
[338] Ibid 1-2.

The Carmody Inquiry made 121 recommendations, all of which were accepted, with two Acts[339] being introduced on the basis of these recommendations.[340] One of the broader reforms was to enable children and families to have a stronger voice in child protection proceedings by providing role clarity for children's representatives.[341] It was also recommended that parents be supported at the earliest possible point in proceedings with Legal Aid Queensland providing legal representation where directed by the court.[342] These objectives were met with the introduction of the *Director of Child Protection Litigation Act 2016* (Qld), the paramount principle of which is the safety, wellbeing and best interest of the child.[343]

These reforms moved away from investigating narrowly defined incidents of danger, to a more conceptual idea of 'harm',[344] being 'any detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing'.[345] This definition removed the need for specific situations to occur before the child was deemed to be 'at risk'[346] and enabled intervention to occur in a wider range of circumstances.[347] The overall aim in using this broader approach was to assess the child's protective needs.[348] Assessments were categorised by physical, sexual, and emotional abuse and neglect and aid the Department in recording specific information about children who are at potential or actual risk.[349]

A further change incorporated in the Act was that any adult could be approved as a carer if they met eligibility criteria.[350] These criteria included suitability checks comprising criminal, domestic violence and traffic history checks.[351] Applicants with histories were not necessarily denied the ability to be carers,

[339] The *Child Protection Reform Amendment Act* 2017 (Qld) and *Director of Child Protection Litigation Act 2016* (Qld).
[340] Minister Shannon Fentiman, 'Queensland marks another step in child safety reform journey' (Media Release, The Queensland Cabinet and Ministerial Directory, 12 May 2016).
[341] Explanatory Memorandum, *Director of Child Protection Litigation Bill 2016* (Qld), 1.
[342] Carmody (n 331) 476.
[343] *Director of Child Protection Litigation Act 2016* (Qld), s 5.
[344] *Children's Services Act 1965* (Qld) s 46.
[345] *Child Protection Act 1999* (Qld) s 9.
[346] Rayment (n 270) 141.
[347] Ibid.
[348] Ibid.
[349] Ibid.
[350] *Child Protection Act 1999* (Qld) s 135.
[351] Ibid s133.

but they had to be able to obtain a Blue Card.[352] Incorporating these criteria provided a higher security level to protect children from experiencing further harm while in care.[353] Carers were also to demonstrate their ability to care for children and meet the prescribed standards of care legislated in the Act.[354] The mere provision of food, clothing and a clean home is no longer an acceptable standard.[355] Children were no longer to be easily removed from their biological parents.[356]

IV CONCLUSION

The 2016 legislative reform brought Queensland child protection law to the point where litigation became the most prominent way of managing child protection law. At present, DCSYW statistics show that they continue to enter into the child protection system at an increasing rate.[357] As at 30 June 2019, the number of children living away from home had increased by 6.4 per cent (9,629 to 10,248) from the previous year (Figure 2.A). Over the five years beforehand, the number increased by 16.3 per cent from 8,812 (2015).[358]

[352] Ibid Division 3. The Blue Card is a Queensland based system used as a prevention and monitoring mechanism for people wanting to work with children and young people. Queensland Government, 'About the Blue Card System', *Blue Card Services* (Webpage, 12 February 2019) < https://www.bluecard.qld.gov.au/>.
[353] Bowerman (n 102) 13.
[354] *Child Protection Act 1999* (Qld) s 122.
[355] Bowerman (n 102) 13.
[356] Ibid.
[357] Department of Communities, Child Safety and Disability Services, 'Living away from home', *Queensland Government Department of Communities, Child Safety and Disability Services* (Government website, 9 October 2020) <www.communities.qld.gov.au/childsafety/about-us/our-performance/ongoing-intervention-phase/living-away-from-home> cited in Bowerman (n 102) 13.
[358] Department of Child Safety, Youth and Women, 'Living away from home', *Child and Family* (Queensland Government site, 9 October 2020) < https://www.csyw.qld.gov.au/child-family/our-performance/ongoing-intervention-phase/living-away-home>.

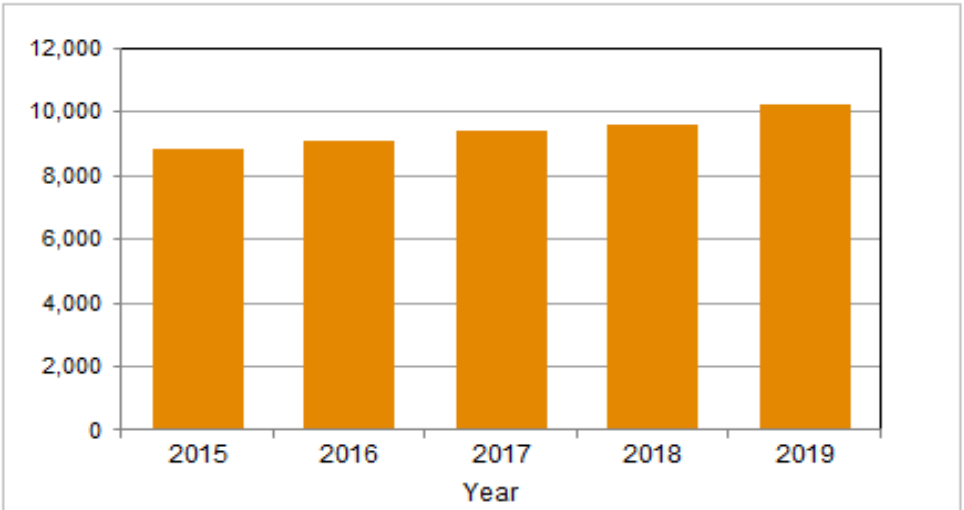

Figure 2.A: Number of children living away from home in Queensland home-based care as at 30 June 2015 to 2019[359]

Of the children living away from home, 84.9 per cent (8,696) were in home-based care, with 51.1 per cent (4,443) being placed with other family-based carers (Figure 2.B).[360]

[359] Ibid.
[360] Ibid.

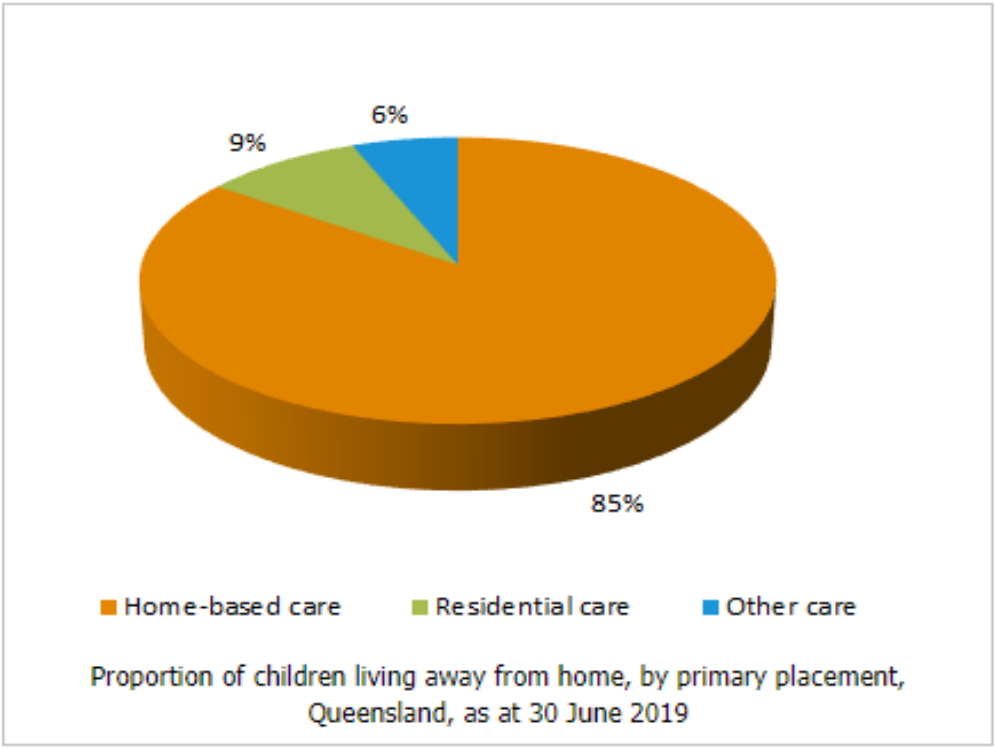

Figure 2.B: Proportion of children living away from home as at 30 June 2019[361]

The Carmody Report suggested that the reasons for a continuing increase in the removal of children from home included communities becoming more aware of child abuse, mandatory reporting, an increase in family pressures, and workforce changes that facilitate risk adverse responses.[362]

If a child's removal is warranted, the ultimate goal of the *Child Protection Act 1999* (Qld) is familial reunification.[363] Action taken to protect a child must not be unwarranted[364] and departmental intervention is supposed to be minimal.[365] The removal of children from their families is supposed to be a remedy of last resort.[366]

[361] Ibid.
[362] Carmody, *Queensland child protection commission of inquiry* (Queensland Child Protection Commission of Inquiry, June 2013) 429; Institute of Health and Welfare, 'Child protection Australia 2012-2013 Report' *Australian* Government (Report, 2014) <www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129548164>.
[363] Rayment (n 270) 139.
[364] *Child Protection Act 1999* (Qld) s 5.
[365] Rayment (n 270) 140.
[366] Ibid.

A key theme from early child protection reformation was that the State, in its legislative approach, took a paternalistic view with the premise of children being placed into institutionalised care based on neglect and legislative 'control'. This paternalistic role was reinforced by the general absence of any effective external supervision or the executive government, by the courts. Legislative awareness of parental self-representation was not expressed until the establishment of the *Guardianship and Custody of Infants Act 1891*. However, there was still a considerable lack of judicial supervision until the incorporation of the *State Children Act 1911* (Qld). Standing historically static in child protection legislation (and its varied forms of care) was the State maintaining funding contributions as a significant factor in child protection administration. Despite legislative developments, the desire to maintain care and 'control' remained. It was not until 2013 and the Carmody Inquiry that it was recognised that there was a significant power imbalance between the State and socially disadvantaged and vulnerable parents/guardians within the child protection court system.

CHAPTER 3 – PARTICIPANTS, PROCESSES AND PROCEDURES

I INTRODUCTION

In this chapter, I identify the relevant participants, processes, and procedures of Queensland child protection proceedings. I include a review of the impact of regulations and legislative changes on self-represented litigants, the DCSYW and judicial officers. Further, I discuss how legislative changes provide a more comprehensive picture of how litigants are continually faced with a substantial power imbalance between the State and parents or guardians, effectively leading to a major contributing factor to self-representation, and perhaps a distrust of both the legal profession and judiciary.

Australia's approach to child protection and welfare has largely been through a system combining State based institutionalised care, boarding out, fostering, and organisational financial support of children.[1] Each element of the child protection system appeared as a separate response to varying issues. However, the one constant continues to be the perceived power imbalance and legislative control between the State and parents or guardians.

Developments in child protection and welfare have seen substantial changes throughout the nineteenth to early twenty-first centuries.[2] One of the key themes developed throughout this time was the State's role as a patriarch, reinforcing supervision of children through its executive discretion, and without parental contribution.[3]

[1] Robert van Krieken, *Children and the State: Social control and the formation of Australian child welfare* (Allen & Unwin, 1992) 3.
[2] Chapter 2, Part 2 – History of Queensland Child Protection.
[3] Ibid.

From Queensland's first legislative consciousness to parental self-representation in the *Guardianship and Custody of Infants Act 1891* (Qld) to the current *Child Protection Act 1999* (Qld) there is still a considerable lack of fusion between the State and parents/guardians. Despite the developments of the Carmody and Forde Inquiries, there continue to be theoretical debates around the State's power and the lack of legal representation afforded to parents and guardians in ensuring fairness despite the formidable power imbalance.

Legal disputes in Queensland about the care and protection of children are triggered by notifications to the Department of Child Safety, Youth and Women ('DCSYW') and account for the greatest number of applications to the Queensland Children's Court. During the 2018-2019 year, there has been an increase in the number of child protection applications in both Australia and Queensland.[4] However, the only decrease was in the number of Intervention with Parental Agreement orders (or 'least intrusive orders'). The significance of this to the well-being of children and families, and the work of the Queensland Children's Court is important. However, it must take into account evidence concerning the impact of the power imbalance between the State and the self-represented litigant.

II RELEVANT PARTICIPANTS

As outlined in Chapter 2, child protection in Queensland is currently regulated by the *Child Protection Act 1999* (Qld), which formally aims to provide for the protection of children[5] with a primary focus on ensuring their safety, wellbeing and best interests.[6] Regulation in this area has seen significant reform from the early days of Queensland's colonial history, where children were viewed as 'parental property'[7]

[4] Queensland Government, 'Magistrate Courts of Queensland Annual Report 2017-2018' *Queensland Courts* (Annual Report, 30 June 2019) 20 < https://www.courts.qld.gov.au/__data/assets/pdf_file/0005/636197/mc-ar-2018-2019.pdf>.
[5] *Child Protection Act 1999* (Qld) s 4.
[6] Ibid s 5A.
[7] Australian Institute of Family Studies, *History of child protection services* (January 2015) Australian Government <https://aifs.gov.au/cfca/publications/history-child-protection-services>.

and 'problems'[8] to its current legislative approach which brings together a collaboration between the executive government and family support services (both government and non-government agencies) in meeting (and tailoring) family needs, rather than the historical across the board approach.[9] The shift away from the early moral concerns of the nineteenth century to an emphasis on family dynamics and social development provided an explanation to the fundamental change in legislative approaches to child protection.[10] However, by the twentieth century, this shift in child protection and welfare appeared to be defined by a system of control, which van Krieken argued was intentionally orchestrated to eliminate the familial culture.[11] This historical and persistent control culture continues into the twenty-first century with the State wielding substantial power while parents or guardians continue to struggle with obtaining affordable legal representation or financial access to justice in child protection proceedings.

A *Self-Represented Litigants*

In 2017, Richardson, Sourdin and Wallace were commissioned to conduct research on self-represented litigants in the civil and administrative justice system.[12] Their research found that, despite the numerous terms used to describe self-represented litigants, including litigants in person and *pro se* litigants, no standard definition could be provided.[13] For the purposes of this research, which does not distinguish between those who are unrepresented by choice or by circumstance,[14] the definition adopted by Richardson, Sourdin and Wallace in their research is also used.[15]

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[8] Shurlee Swain, 'History of Child Protection Legislation' *Royal Commission into Institutional response to Child Sexual Abuse* (March 2014) 5 and Chapter 2, Part 2A – Neglected Children; Part 2B – Mass Institutionalisation.
[9] A Tomison, *A history of child protection. Back to the future?* (2001) Family Matters, Vol. 60, 46-57 cited in Australian Institute of Family Studies (n 7).
[10] van Krieken, (n 1) 127.
[11] Ibid 131.
[12] This research was undertaken by the Australasian Institute of Judicial Administration commissioned by the Australian Centre for Justice Innovation at Monash University. Liz Richardson, Genevieve Grant and Janina Boughey, 'The Impacts of self-Represented Litigants on Civil and Administrative Justice: Environmental Scan of Research, Policy and Practice' (Research Paper, The Australasian Institute of Judicial Administration Incorporated, Monash University, October 2018) 7.
[13] Richardson, Grant and Boughey (n 12) 13-14.
[14] Ibid 14.
[15] Ibid.

> [A]nyone who is attempting to resolve any component of a legal problem for which they do not have legal counsel, whether or not the matter actually goes before a court or tribunal.[16]

The right to self-representation in Australian courts is preserved under both Australian domestic[17] legislation and international human rights legislation.[18] While Australian federal legislation provides that litigants may self-represent, the International Covenant on Civil and Political Rights ('ICCPR') goes a step further in providing that litigants are not only entitled to a fair hearing[19] but, should they self-represent, they must be provided the same fundamental entitlements and guarantees of equality, including being properly informed of these rights in a language which they could understand.[20]

By 2014, the Productivity Commission's *Access to Justice Arrangements* project published a draft report which found that the majority of self-represented litigants were likely to be male, unemployed or have low income.[21] Further, the fundamental issues provided by the ICCPR remain an issue as older males with lower incomes continued to rely on non-profit, community based legal services as they were experiencing issues in accessing justice owing to physical disabilities, language barriers, and limited legal knowledge.[22]

In 2012, a report prepared for the Australian Law Reform Commission review of the *Federal Civil Justice System* found courts collected limited information regarding self-represented litigants and only the Federal

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[16] Ibid.
[17] *Federal Court Rules 2011* (Cth) Rule 4.01(1) and *High Court Rules 2004* (Cth) Rule 41.10.
[18] *International Covenant on Civil and Political Rights*, art 14.
[19] Ibid, art 14(3)(d).
[20] Ibid, art 14(3)(a).
[21] Australian Government Productivity Commission, *Access to Justice Arrangements*, Productivity Commission Draft Report Overview (April 2014) 489 citing Rosemary Hunter, Jeff Giddings and April Chrzanowski, *Legal Aid and Self-Representation in the Family Court of Australia* (Griffith University, May 2003; Rosemary Hunter, Ann Genovese, April Chrzanowski, and Carolyn Morris, *The changing face of litigation: unrepresented litigants in the Family Court of Australia* (Research Report) (Law and Justice Foundation August 2002); John Dewar, Barry Smith and Cate Banks, *Litigants in Person in the Family Court of Australia – Research Report No 20* (Family Court of Australia, 2000) 11-12.
[22] Ibid.

Court of Australia (which holds no role in child protection) had specific data collection in this regard.[23] The lack of data-mapping in courts is an obstacle to evaluating implications for the administration of justice and any successful measures being implemented.[24] Despite these limitations, qualitative data and observations reported by the judiciary indicated that self-representation had, in fact, increased.[25]

The perception of self-represented litigants increasing in the court system, can be validated.[26] In 2000, the Family Court of Australia commissioned research into self-representation in the family law jurisdiction.[27] The purpose of this research was to develop a national approach in establishing clear and consistent services that would be easily understood by the self-represented litigant.[28] The findings were outlined in the 'Dewar Report,' and provided that, despite the high concentration of children's matters,[29] litigants were unable to obtain legal representation. Others stated that they did not require or want legal assistance.[30]

Self-represented litigants were also found to have a wide range of needs in relation to information and support services, including court procedures, document preparation and formulating legal arguments.[31] There was also an identifiable correlation between a litigant's inability to obtain legal aid assistance and self-representation.[32] This research divided self-represented litigants into two classes - those who could afford legal representation, but opted to self-represent and those who could not afford legal representation

[23] Raquel Dos Santos, 'Self represented litigants in the Australian civil justice system 10 years of the Self Representation Service in Australia' (Conference Paper, National Access to Justice and Pro Bono Conference, 23 March 2017) 2.
[24] Ibid 11-12.
[25] Deputy Chief Justice Faulks, Family Court of Australia, 'Self-represented litigants: tackling the challenge' (Paper presented at the Managing People in Court Conference, National Judicial College of Australia and the Australian National University, February 2013) cited in Raquel Dos Santos (n 24) 2.
[26] Richardson, Grant and Boughey (n 12) 8.
[27] Family Court of Australia, *Self-Represented Litigants – A challenge: Project Report* (Report, December 2000-2002) 1-2.
[28] Ibid 3.
[29] Ibid 1-2.
[30] Ibid.
[31] Ibid.
[32] Ibid.

and were left with no alternatives for legal support.[33] Australian Law Reform Commission data provides that more than one-half of self-represented litigants fell into the second category, with the remaining litigants either refusing legal representation; not believing it was necessary; or having legal representation refused.[34]

Toy-Cronin found similar results in New Zealand in 2016. She, however, identified four categories of justifications: namely inability to access legal services owing to cost; ineligibility for legal aid; costs of representation after having self-represented; and service quality (second rate services, lack of expertise by lawyers who did legal aid work, and negative experiences with lawyers).[35] Other justifications included a lack of understanding about how cases were determined and their lawyer's role; ability to manage their own cases; belief that the magistrate, court staff and opposing lawyer were obliged to assist them; and that the truth would prevail and justice would be served.[36]

According to the Family Law Council, the number of self-represented litigants seeking justice continued to increase.[37] This was based, in part, on a litigant's inability to afford legal representation or obtain government funded legal services.[38] The trend continues. Appendix 2 of this thesis provides the most recent breakdown of the four government funded legal services and their target demographic as provided by the Productivity Commission Report.[39] An increase was noted in the number of self-represented litigants but that there was not sufficient data to draw any conclusions directly linking these changes to legal aid funding.[40] In contrast, Dewar, Smith and Banks' 2000 report linked legal aid changes and the

[33] Family Law Council Litigants in Persons Committee, Commonwealth Attorney-General's Department, *Litigants in Person* (August 2000) 2.8.
[34] Ibid.
[35] Bridgette Toy-Cronin, 'I Ain't No Fool: Deciding to Litigate in Person in the Civil Courts' [2016] 4 *New Zealand Law Review* 723, 742 cited in Liz Richardson, Genevieve Grant and Janina Boughey (n 14) 20-21.
[36] Family Law Council Litigants in Persons Committee (n 33) 2.8.
[37] Richardson, Grant and Boughey (n 12) 8.
[38] Family Law Council Litigants in Persons Committee (n 33) 1.26.
[39] Australian Government Productivity Commission, *Access to Justice Arrangements*, Productivity Commission Draft Report Overview (April 2014) 25.
[40] Family Law Council Litigants in Persons Committee (n 33) 1.26.

increase in self-represented litigants, finding that, of the 49 self-represented litigants interviewed, changes to legal aid were responsible for just under half of legal aid refusals.[41] They concluded that there was an indirect effect causing hardship to the community,[42] compromising access to justice and draining an already overburdened system.[43]

As a result, despite the perceptions that the number of self-represented litigants in Australian civil jurisdictions is increasing,[44] there is limited evidence to prove it. There are barriers in collecting adequate and accurate information and issues regarding quality and reliability of data.[45] Analysis of available data suggests that the perceived growth in self-representation may relate to law reforms and practice changes, but there tend to be a higher number of self-represented litigants in child protection courts than in the superior and appellate court jurisdictions.[46]

B *Department of Child Safety, Youth and Women*

The Department of Child Safety, Youth and Women ('DCSYW') is a Queensland government department established under the *Public Service Act 2008* (Qld).[47] It is the principal agency for any governmental response to child protection.[48] It was established when its predecessor, the Department of Communities, Child Safety and Disability Services' responsibilities were split across two departments covering three areas - Child and Family Services; Women, Violence and Prevention and Youth Services; and Youth Justice Services.[49] The new structural and leadership arrangements, made effective on 3 April 2018, were

[41] Ibid 1.28.
[42] Ibid 1.31.
[43] Chris Povey, Lucy McKernan, Gregor Husper, and Emily Webster, *Senate Legal and Constitutional Affairs Committee on the Inquiry into Access to Justice*, 30 April 2009, 39 [20.1]
[44] Liz Richardson, Genevieve Grant and Janina Boughey (n 14) II.
[45] Ibid.
[46] Ibid.
[47] Queensland Government, 'Annual Report 2017-2018' *Department of Child Safety, Youth and Women* (Annual Report, September 2018) 63 <https://www.csyw.qld.gov.au/resources/dcsyw/about-us/publications/coporate/annual-report.pdf>.
[48] Queensland and Family Child Commission, 'Child Protection Information Kit for Parents', *Helping Families and Communities* (Information Kit, 29 October 2018) 42 <http://childprotection.org.au/key-concepts-of-child-protection/>.
[49] Department of Child Safety, Youth and Women, *Service Delivery Statements*, (Queensland Budget 2018-2019) 3.

aimed at strengthening capacity and flexibility while continuing to give effect to legislative responsibilities,[50] with the focus remaining on the safety, wellbeing and support of delivery services to assist families to protect and care for their children.[51]

The *Child Protection Act 1999* (Qld) provides not only the regulatory framework,[52] but also the legislative power for the DCSYW, the Children's Court or any part of the Queensland government that has power to intervene in relation to a child.[53] This legislation provides power to investigate concerns about children; arrange for family support services as a pre-emptive measure; apply to the court for applicable orders; place children in out-of-home care; and approve foster and kinship carers.[54]

Services provided by DCSYW include family support services (direct or by referral); receiving and responding to reports about children (investigations and assessments if mandated); working with families to address child protection concerns; initiating intervention, including applications for appropriate court orders or placing children in out-of-home care; working to reunite children with families; and securing permanent placement when family reunification is not possible.[55]

While the DCSYW is proffered as a conduit for support services for families as a pre-emptive measure, it is the inability of parents or guardians to obtain financial or legal assistance in their child protection matters. This effectively sets the legislation back to the late nineteenth century whereby parents or guardians, rather than children, are the problem and in need of control.[56]

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[50] Queensland Government (n 47) 7.
[51] Ibid 16.
[52] Australian Government Productivity Commission, 'Child Protection Services' *Report on Government Services 2018* (Report, 2019) 16.3 <https://www.pc.gov.au/research/ongoing/report-on-government-services/2019/community-services/child-protection/rogs-2019-partf-chapter16.pdf>.
[53] Queensland and Family Child Commission (n 48) 18.
[54] *Queensland Child Protection Act 1999* (Qld) s 7.
[55] Queensland and Family Child Commission 48) 18.
[56] Chapter 2, Part 1 - Introduction.

C *Queensland Child Protection Region and Research Focus*

The Queensland government view is that 'regional departments are considered the frontline of service delivery with a structured delivery of complex needs to child protection'.[57] Queensland has five regional areas: Northern Queensland, Central Queensland, Moreton Region, South West Queensland, and South East Region (Figure 3.A). This research will focus solely on Brisbane, and the two largest urban centres in the South West Region, Ipswich, and Toowoomba.

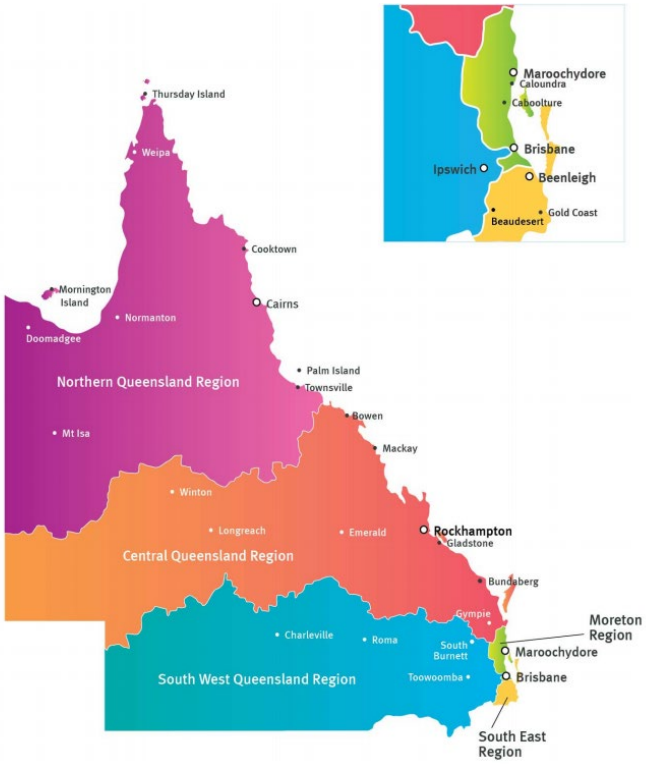

Figure 3.A: Queensland Regional Department Service Centres[58]

The Queensland government holds responsibility for funding child protection services.[59] The 2019-2020 Queensland State budget shows a total funding package of $517.5 million ($401.6 million new funding and $115.9 million funded internally) over a four year period and an additional $2.4 million per annum

[57] Queensland Government (n 47) 7.
[58] Ibid 15.
[59] Australian Government Productivity Commission (n 55).

ongoing[60] for continued implementation of critical reforms to child protection.[61] This funding package also includes additional frontline safety and support positions to ensure the system can respond quickly and effectively to emerging needs; quality improvement programs for staff; improving support and recruitment for foster and kinship carers.[62] Of this amount, $9.6 million will be used in continuing to provide early independent legal advices to child safety workers about child safety matters.[63] While funding is provided for families by way of support and community services, there is no provision for legal support services.[64]

In 2018-2019, the ongoing expenses for all child protection services per child was $1160 Australia-wide (Figure 3.B),[65] with Queensland's ongoing expenses being $1015.76.[66]

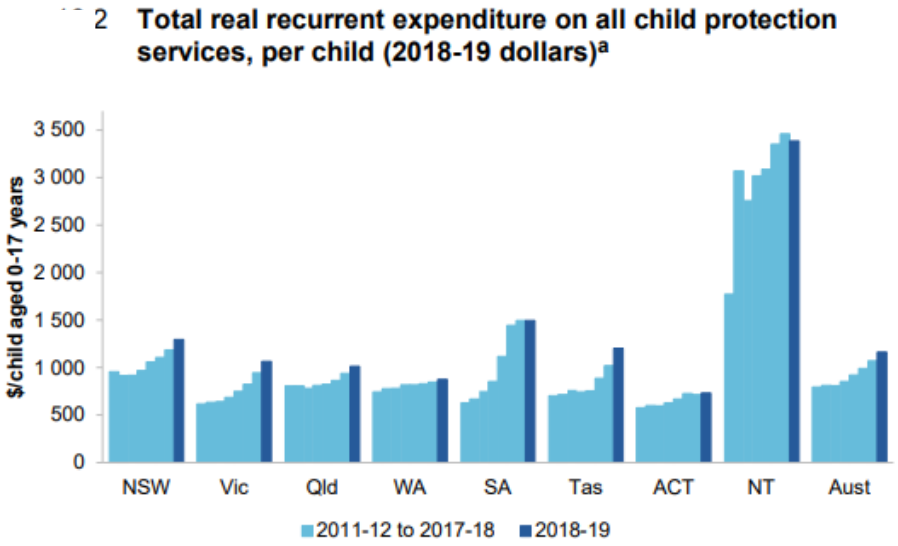

Figure 3.B: Total expenditure on all child protection services, per child (Australia)[67]

[60] Department of Child Safety, Youth and Women, 'Service Delivery Statements', *Queensland Budget 2019-2020* (Government Budget, 2019) <https://budget.qld.gov.au/files/2019-20%20DCSYW%20SDS.pdf> 4.
[61] Department of Child Safety, Youth and Women, 'Service Delivery Statements', *Queensland Budget 2018-2019* (Government Budget, 2018) < https://s3.treasury.qld.gov.au/files/SDS-Child-safety-Youth-and-Women-2018-19.pdf> 4.
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Australian Government, 'Child Protection Services, *Productivity Commission Report on Government Services 2020* (Report, 2020) 16.4 <https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/community-services/child-protection/rogs-2020-partf-section16.pdf >.
[66] Ibid 16A.7.
[67] Ibid 16.4.

During the 2018-2019 year, the number of child protection notifications in Australia was 269,193 (48.1 per cent); with 98,835 (17.7 per cent) subject to finalised investigations; and 47,516 (8.5 per cent) subject to substantiations (being in need of protection).[68] Further, 59,073 (10.6 per cent) were under care and protection orders; and there were 12,233 children admitted to care with 10,773 being discharged.[69] Queensland, during the same period, found the number of children who received child protection intervention as notifications was 22,746 (19.4 per cent); 19,108 (16.3 per cent) children were subjected to finalised investigations; and 5,884 (5.1 per cent) children were subject to substantiations.[70] Further, 6,047 (5.2 per cent) children were under care and protection orders; 8,125 (6.9 per cent) were in out-of-home care as at 30 June 2019; and 2,816 being discharged (Figure 3.C).[71]

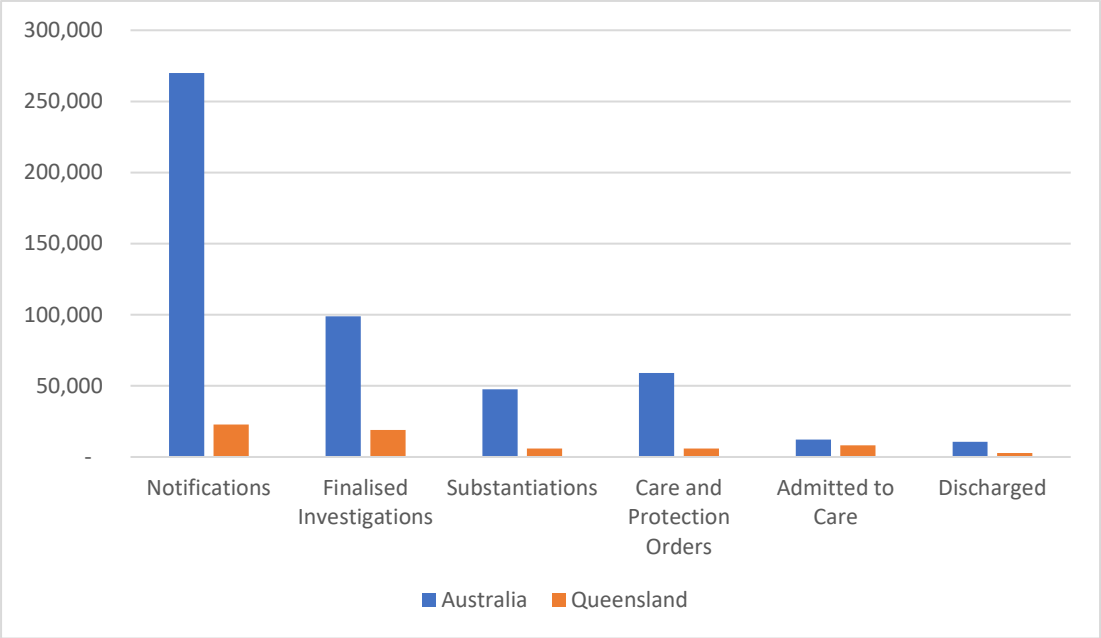

Figure 3.C: Australia and Queensland Child Protection Services for 2018-2019

[68] Reported as per 1000 children. For the 2017-2018-year, New South Wales had implemented a new client management system and the data was not fully comparable to previous publications. Therefore, they were excluded from these statistics. Australian Government (n 65) 16.3.
[69] Ibid.
[70] Ibid.
[71] Ibid 16A.4.

The total continuing amount spent on family support services, intensive family support services, protective intervention services and out-of-home care services was $6.5 billion Australia-wide in 2018-19 (increase of 9.5 per cent from the previous year), of which out-of-home care services accounted for the majority (59.3 per cent, or $3.8 billion).[72] In Queensland, the total continuous amount spent on family support services, intensive family support services, protective intervention services and out-of-home care services was $1.190 billion in 2018-19 (an increase of 9 per cent), of which out-of-home care services accounted for the majority (Figure 3.D).[73]

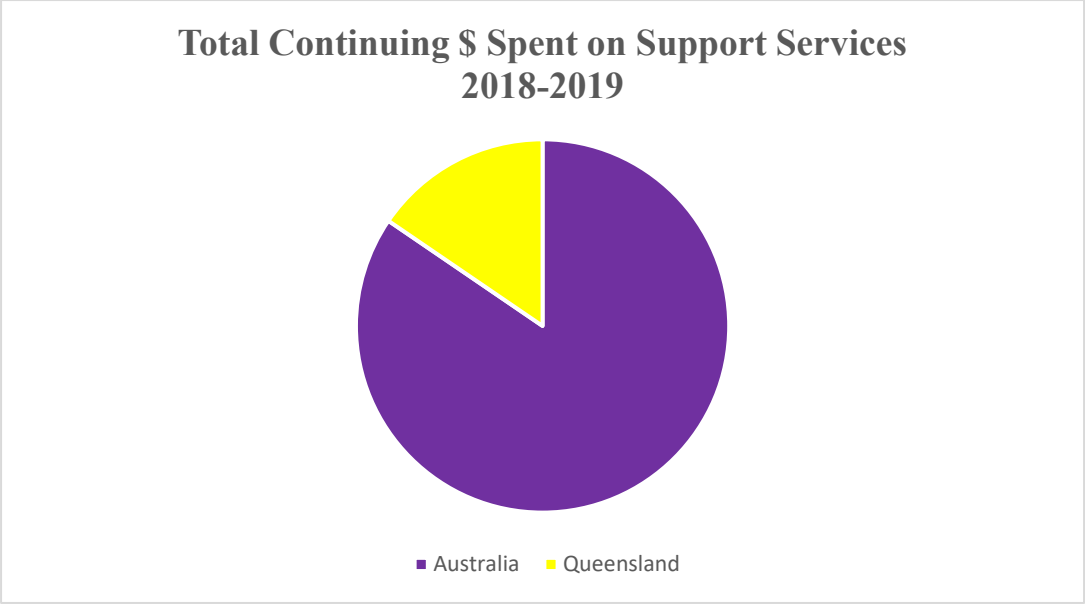

Figure 3.D: Total Continuing Funds Spent for Support Services 2018-2019

[72] Ibid 16.4.
[73] Ibid 16A.7.

D *Office of the Child and Family Official Solicitor*

The Office of Child and Family Official Solicitor ('OCFOS') was established in 2016 to provide Child Safety Service Centres with legal advice and support for matters that are, or are likely to be, in court.[74] It consists of an in-house legal division within DCSYW and provides legal advice in relation to the State's administration and representation under the *Child Protection Act 1999* (Qld).[75] OCFOS is considered to be the principal liaison for contact with the Director of Child Protection Litigation ('DCPL').[76] Its main function is to provide legal advice and assistance to DCSYW in child protection matters and make application for emergency orders (temporary assessment orders, court assessment orders, and temporary custody orders).[77] It also assists in preparing applications and submissions, attending court, preparing case material for referral to the DCPL; and is expected to work collaboratively on the on-going review and management of those cases.[78] The DCSYW has powers to review the requisite level of intervention needed and consult with OCFOS, who hold the delegation for making referrals to the DCPL for a child protection order. At this time, OCFOS then becomes the go-between for DCSYW and the DCPL until the matter is finalised.[79] Neither OCFOS nor DCSYW attend child protection proceedings (unless required).[80]

Although OCFOS holds authority to make these referrals, DCPL makes the final decision as to whether to apply for an order.[81] If there is disagreement between OCFOS and the DCPL in this regard, the matter is sent to senior officers within DCPL for review.[82] If no resolution can be made, DCPL's referral is to

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[74]Queensland Government, ''The Office of the Child and Family Official Solicitor', *Department of Child Safety, Youth and Women* (Webpage, 6 June 2018) <https://www.csyw.qld.gov.au/child-family/protecting-children/ongoing-intervention/court-processes>.
[75] Director of Child Protection Litigation, 'Director's Guidelines' *Direction of Child Protection Litigation* (Webpage, 1 July 2018) 29 < https://www.dcpl.qld.gov.au/__data/assets/pdf_file/0012/576984/directors-guidelines-issued-under-the-director-of-child-protection-litigation-act-1-july-2018.pdf> 6-7.
[76]Ibid 7.
[77] *Child Protection Act 1999* (Qld), Division 2. Queensland Government, 'Working with OCFOS and the DCPL' *Department of Child Safety, Youth and Women* (Practice Resource, January 2018) 1 <https://www.csyw.qld.gov.au/resources/childsafety/practice-manual/pr-working-with-ocfos-dcpl.pdf>.
[78] Ibid.
[79] Ibid 2.
[80] Ibid.
[81] Ibid 1.
[82] Ibid.

stand, with OCFOS's different position is noted.[83] The DCPL is to make its decision on the basis of all evidence provided.[84] If deficiencies are found in the material, it may negotiate with OCFOS to return the referral back to the DCSYW for clarity and consideration (Figure 3.E).[85]

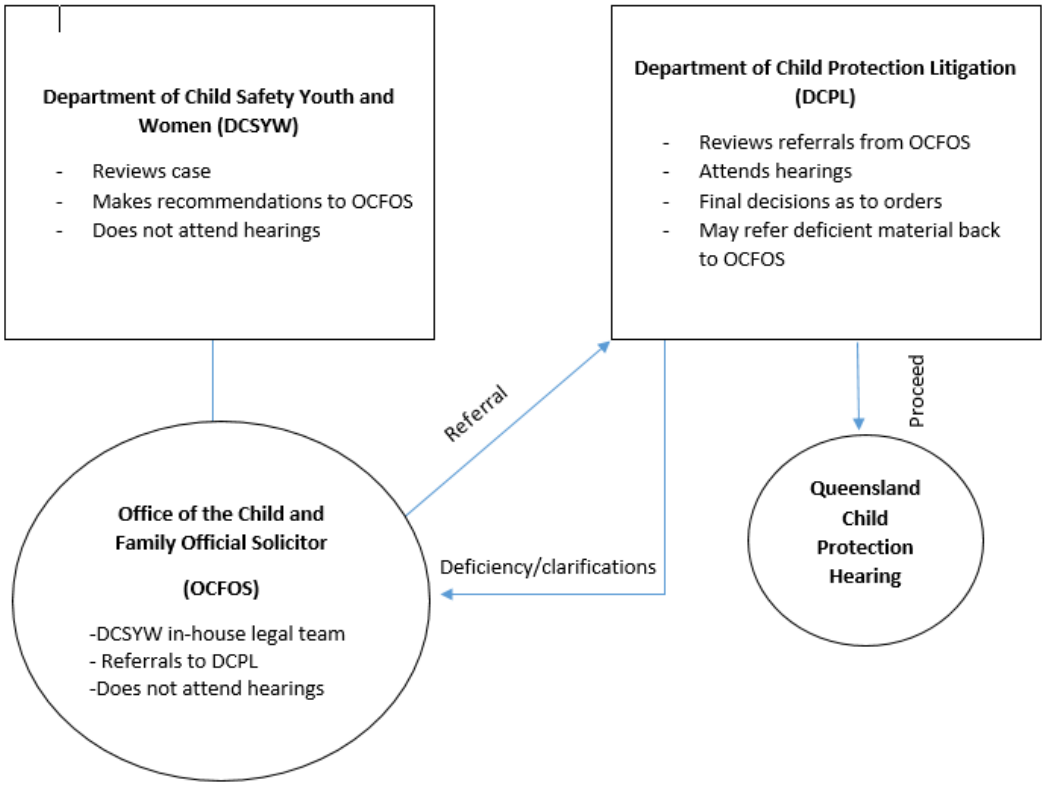

Figure 3.E: Office of the Child and Family Official Solicitor Referral Flow Chart Structure

E *The Director of Child Protection Litigation*

The Director of Child Protection Litigation ('DCPL') was established by the *Director of Child Protection Litigation Act 2016* (Qld) on 1 July 2016 with its role to be that of an independent statutory officer reporting directly to the Attorney-General and Minister for Justice.[86] The formation of this position was

[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] *Director of Child Protection Litigation Act* 2016 (Qld) s 4.

in response to recommendations in the Carmody Report.[87] In particular, the Queensland government established an agency independent of the DCSYW to make decisions relating to matters subject to child protection applications, including the type of orders sought, as well as litigation.[88] Accordingly, the DCPL would be responsible for bringing applications for child protection orders, with the exception of interim or urgent orders.[89] The DCSYW would retain this authority.[90]

The DCPL, as the State's representative, exercises its statutory functions in accordance with the Model Litigant Principles.[91] These principles reflect the State's power to be used for public benefit and not as a means of oppression.[92] The State must finely balance due process in a manner that is fair, through consistent, efficient and proportionate litigation, without taking advantage of another party's limited circumstances.[93] The DCPL is obliged to monitor and enforce these principles, however, they have the status of an ethical requirement rather than a legal standard.[94] The Attorney-General holds ultimate responsibility for non-compliance and can impose sanctions, including a specific direction[95] to remove or replace particular lawyers.[96]

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[87] Director of Child Protection Litigation, *Annual Report* 2017-2018 (Queensland Government Annual Report, 30 June 2018) 6.
[88] *Director of Child Protection Litigation Act* 2016 (Qld) s 4; Queensland Child Protection Commission of Inquiry, *Taking Responsibility: A Roadmap for Queensland Child Protection* (June 2013), Recommendation 13.17.
[89] Director of Child Protection Litigation (n 87) 11.
[90] Ibid.
[91] Director of Child Protection Litigation (n 76) 7.
[92] Queensland Government, 'Model Litigant Principles', *Department of Justice and Attorney-General* (Web page, 4 October 2010) < https://www.justice.qld.gov.au/__data/assets/pdf_file/0006/164679/model-litigant-principles.pdf>.
[93] Director of Child Protection Litigation (n 76) 7.
[94] Justice Tony Pagone, "Speech – the Model Litigant and Law Clarification" (VSC) [2008] VicJSchol 17 cited in Phillip Salem, 'The government's model litigant policy – ethical issues', *Sparke Helmore Lawyers* (Inhouse Journal, June 2015) 52 <https://www.sparke.com.au/custom/files/docs/model-litigant-policy.pdf>.
[95] *Judiciary Act 1903* (Qld) s 55ZF.
[96] Phillip Salem, 'The government's model litigant policy – ethical issues', *Sparke Helmore Lawyers* (Inhouse Journal, June 2015) 52 <https://www.sparke.com.au/custom/files/docs/model-litigant-policy.pdf>.

The Office of the DCPL has its base in Brisbane[97] and operates three chamber groups of lawyers, with each allocated to specific Queensland regions to ensure local service delivery, court appearances and working with the local Department, OCFOS, partner agencies and local lawyers (Figure 3.F).[98]

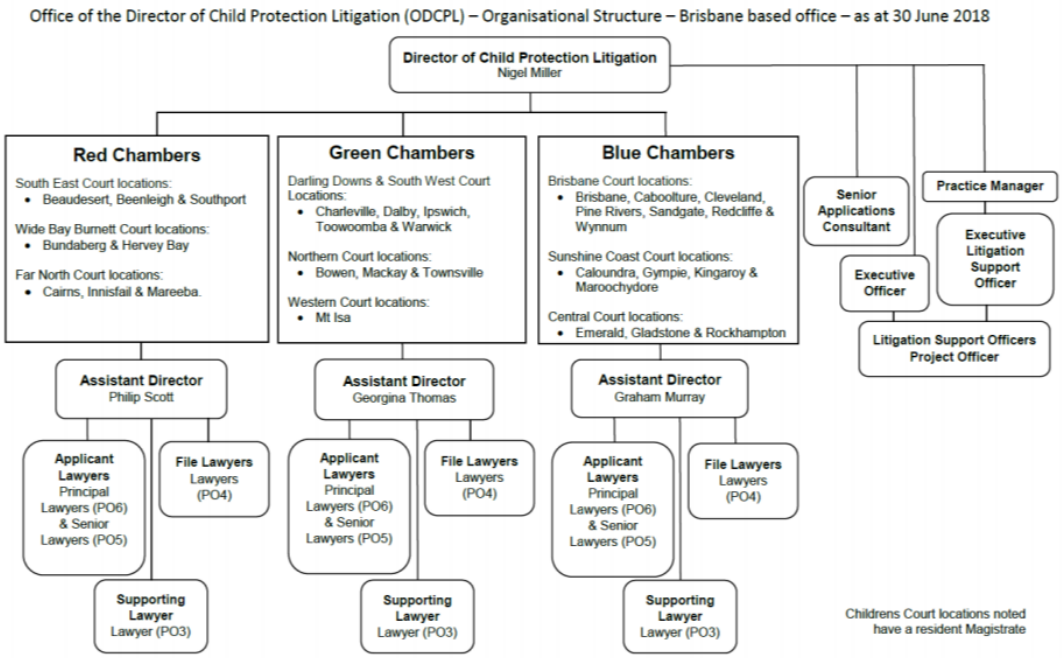

Figure 3.F: Director of Child Protection Litigation – Organisational Structure[99]

The DCPL's powers and functions include preparation and application of child protection orders and conduct in proceedings.[100] It is also responsible for the preparation and application of transfers and proceedings to a participating state;[101] and the preparation of appeals.[102] In administering these duties, the DCPL must[103] collaborate with the DCSYW.[104] Action should only being taken when warranted, and that

[97] Director of Child Protection Litigation (n 87) 13.
[98] Ibid.
[99] Ibid.
[100] *Director of Child Protection Litigation Act 2016* (Qld) s 9(1)(a).
[101] Ibid s 9(1)(b). This section provides the Director with the legislative power to transfer child protection orders or child protection proceedings to another participating state or territory within Australia. There is a national scheme for child protection that allows children to be relocated to another state or territory. All states and territories participate in this scheme.
[102] Ibid s 9(1)(c).
[103] Ibid s 6.
[104] Ibid s 6(a)

includes applying for only the least intrusive child protection order,[105] and considering whether evidence is sufficient and appropriate.[106]

In the 2018-19 year, 112 (3.9 per cent) of all referred child protection matters provided by the DCPL were referred back to the DCSYW.[107] Matters are referred back to the DCSYW for further investigation and evidence as to why the child is considered to be in need of protection and for further assessment as to what the DCSYW considered to be an appropriate child protection order.[108] This provides safeguards against applications being made without sufficient evidence.[109]

There is a clear distinction between the roles of the DCPL and the DCSYW. The DCSYW investigates, assesses, and makes referrals, whereby the DCPL reviews and considers the referrals and, if appropriate, makes application for child protection orders and conducts litigation.[110] Both agencies are required to seek the same outcome, protection and promotion of the safety, wellbeing and best interest of Queensland's children.[111] If the evidence no longer supports this position, or the order is no longer appropriate, the DCPL is to take active steps to withdraw the proceedings.[112] Where the order is no longer considered appropriate, the DCPL is supposed to take active steps to file amended applications seeking less intrusive orders, supported by current assessments and evidence provided by the DCSYW.[113] In 2018-19, 4.3 per cent of the total applications determined were withdrawn with the leave of the court.[114]

[105] Ibid s 6(b)
[106] Ibid (Qld), s 6(c).
[107] Director of Child Protection Litigation, *Annual Report* 2018-2019 (Queensland Government Annual Report, 30 June 2019) 38.
[108] Director of Child Protection Litigation (n 87).
[109] Ibid.
[110] *Director of Child Protection Litigation Act 2016* (Qld) Part 3.
[111] Director of Child Protection Litigation (n 76) 9.
[112] Ibid 8.
[113] Ibid.
[114] Director of Child Protection Litigation (n 107) 46.

In 2018-19, 2,296 applications were determined by the court, including its making 801 orders granting long-term guardianship of children.[115] According to the Director, this is a 25.2 per cent increase on 2017-18 statistics.[116]

Initially, this does suggest evidence of the benefits of the DCPL as an independent decision-making agency. However, the hard realisation is that the DCPL is merely one means, albeit an executive government check, that helps to bring the rule of law to the conduct of the DCSYW to ensure that they appropriately achieve their legislative mandate. While the best interest of the child remains, quite rightly, the main focus of child protection, there is a fundamental lapse in what is considered fair and equal entitlements to parents or guardians as provided under the ICCPR.[117] The funding attributed to this DCSYW 'handholding' exercise by the DCPL could be redirected to assist Legal Aid Queensland in funding more eligible[118] self-represented litigants in child protection trials.

F *The Separate Representative*

If the Children's Court considers it necessary, and in their best interests, the child will be separately represented by a lawyer[119] in a contested matter.[120] The lawyer is referred to as the 'Separate Representative'. This includes representing the children's best interests at family group meetings, court ordered conferences and court appearances where they may make submissions on what orders or interventions should be considered.[121]

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[115] Ibid 47.
[116] Ibid.
[117] *International Covenant on Civil and Political Rights* (n 18).
[118] This eligibility will be discussed in Chapter 4.
[119] *Child Protection Act 1999* (Qld) s 110(1)(a).
[120] Ibid s 110(2).
[121] The Queensland Law Handbook, 'Court Proceedings in Child Protection', *Caxton Legal Centre Inc* (Webpage, 25 January 2017) <https://queenslandlawhandbook.org.au/the-queensland-law-handbook/family-law/child-protection/court-proceedings-in-child-protection-matters/>.

While not a party to the matter,[122] the Separate Representative is bound by the *Children's Court Rules 2016* (Qld),[123] and must represent the child's views and wishes (if possible) to the court.[124] This role ends when the application has been decided or withdrawn, including by way of appeal. [125]

Regardless of any instructions given by the child, the Separate Representative will gather and assess independent evidence to assist and provide measured guidance and recommendations to the court about what is in his or her best interest.[126] This may include a social assessment report being undertaken by an independent report writer.[127] This report provides the court with information about the child and their protective needs.[128] The report writer will generally speak to all of the parties (including the DCSYW) and any other professionals involved (eg medical practitioner, school teacher, etc.).[129] Report writers include professionals such as social workers, psychologists or psychiatrists, as deemed appropriate by the Separate Representative and warranted under specific circumstances.[130]

Throughout the child protection process, the Separate Representative is perhaps the most important legal official for the self-represented litigant, regardless of the final outcome. That is not because they are an advisor or representative for the parent; they are not. It is because of the influence the Separate Representative will have on the outcome of the proceedings. In the absence of effective representation for the parents or guardians, the Separate Representative is the one legally qualified actor in the system who potentially counters the government's position. Despite being funded by the government (through Legal Aid Queensland), the Separate Representative serves the child, not the parents, guardians or governmental agencies. They are to remain neutral and form their own opinions based on independent evidence. Despite

[122] *Child Protection Act 1999* (Qld) s 110 (6).
[123] *Children's Court Rules 2016* (Qld) s 37.
[124] *Child Protection Act 1999* (Qld) s 110 (4)(b).
[125] Ibid ss 110(8)(a-b).
[126] Ibid s 110(5).
[127] Ibid s 98.
[128] Ibid.
[129] Ibid.
[130] Ibid.

the requirement of neutrality, the issue is that, should the Separate Representative form a position in favour of the parent or guardian, this does not automatically mean that the government department will not take the matter to trial. As discussed in Chapter 4, regardless of the merits of the case, eligibility for Legal Aid Queensland funding does not automatically apply, regardless of the Separate Representative's position on the question.

G *The Magistrate*

The Queensland Children's Court has jurisdiction over child protection matters and was established under the *Children's Court Act 1992* (Qld). It operates under the *Children's Court Rules 1997* (Qld) and comprises a Children's Court judge (or, if none available, a District Court judge) or a Children's Court magistrate (or, if none available, any magistrate, or two justices of the peace).[131] On recommendations of the Attorney-General, the Governor in Council may appoint one or more District Court judges as Children's Court Judges, having regard to their interest and expertise in child protection.[132] The Governor in Council may appoint one or more magistrates as Children's Court magistrates.[133]

At 2019, there were 32 Queensland magistrates' courts, with nine magistrates holding commissions as Children's Court magistrates;[134] and there are 29 District Court judges who hold commissions as Children's Court judges.[135] Any State magistrate may constitute a Children's Court where required[136] and, in practice, the significant majority of applications for child protection orders are heard and determined by a magistrate.[137] This includes applications for orders ranging from a supervision order, custody orders (1-2 years), guardianship orders in favour of the Department, as well as long-term

[131] Ibid s 5.
[132] *Children's Court Act 1992* (Qld) s 11.
[133] Ibid s 14.
[134] Queensland Government, 'Magistrate Courts of Queensland Annual Report 2017-2018' *Queensland Courts* (Annual Report, 30 June 2018) 6-7 <https://www.courts.qld.gov.au/__data/assets/pdf_file/0009/589545/mc-ar-2017-2018.pdf>.
[135] Queensland Government (n 4) 4.
[136] *Children's Court Act 1992* (Qld) s 5.
[137] Ibid s 102.

guardianship orders, which are the most intrusive orders available and places a child in Departmental care or another person until they reach 18 years.[138] Many applications are contested. However, a large portion are resolved in court ordered conferences. During the 2018-19 reporting year 6,069 child protection applications were lodged, an increase from the previous year of 1,542 (+34.06 per cent) (Figure 3.G).[139]

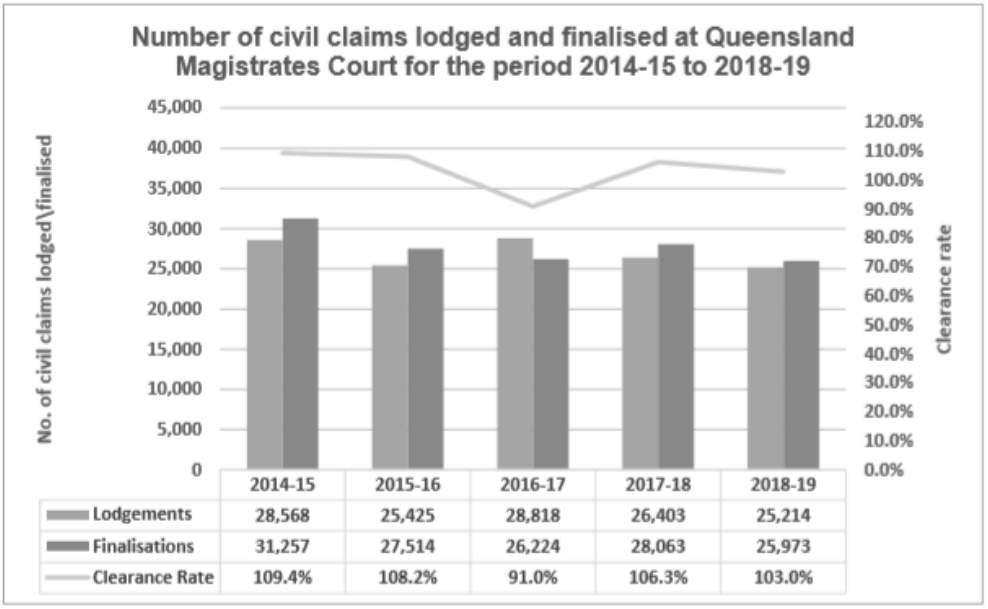

Figure 3.G: Number of Child Protection applications lodged and finalised at Queensland Magistrates (Children's) Court for the period 2014-2015 to 2018-2019[140]

III CURRENT STATUTORY FRAMEWORK

As introduced in Chapter 2, the current Queensland legislation for child protection is the *Child Protection Act 1999* (Qld).[141] This legislation and the *Children's Court Rules 2016* (Qld) and the *Director of Child Protection Litigation Act 2016* (Qld) provide regulatory structure for child protection matters. Information is provided as to why there was a perceived need for policy reform based on recommendations from the Queensland Child Protection Commission of Inquiry – the Carmody

[138] Ibid s 61.
[139] Queensland Government (n 4).
[140] Ibid 21.
[141] Chapter 2, Part 3 – *Child Protection Act 1999* (Qld).

Inquiry.[142] This included a finding that the Queensland government budget had tripled in a decade,[143] yet there was still a need for children and families to have a 'voice'.[144]

A *Queensland Children's Court*

The Queensland Children's Court was established, as an inferior court of record, under the *Children's Court Act 1992* (Qld).[145] It is a Magistrates Court specialising in matters involving children under the age of 17 years.[146] It is also a closed-court – with only people directly involved in the case being present to protect children from further harm.[147] No identifiable information about the child or the matter is disclosed.

Magistrates, appointed by the Governor in Council, have powers to hear child protection matters pursuant to the *Magistrates Act 1991* (Qld)[148] and the *Child Protection Act*.[149] These matters include those relating to child protection or applications by the DCSYW or the DCPL.[150]

B *Children's Court Rules 2016 (Qld)*

The *Children's Court Rules* govern the procedures of the Children's Court, which has jurisdiction over child protection matters.[151] These Rules are consistent with the policy objectives set out in the *Children's*

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[142] Chapter 2, Part 3B – Carmody Inquiry.
[143] Queensland Child Protection Commission of Inquiry, *Taking Responsibility: A Roadmap for Queensland Child Protection* (June 2013) 77.
[144] Ibid 100.
[145] *Children's Court Act 1992* (Qld) s 4.
[146] Queensland Government, 'Children's Court', *Queensland Courts* (Government, 2019) <https://www.courts.qld.gov.au/courts/childrens-court>.
[147] Ibid.
[148] *Magistrates Act 1991* (Qld) s 8.
[149] *Children's Court Act 1992* (Qld) s 14.
[150] Queensland Government, 'About Children's Court (Magistrates Court)' *Queensland Courts* (Government, 2019) <https://www.courts.qld.gov.au/courts/childrens-court/about-childrens-court-magistrates-court>.
[151] Magistrate's Court of Queensland, *Children's Court Child Protection Proceedings* (Benchbook), July 2016, 7.

Court Act and the *Child Protection Act*[152] (which confers jurisdiction to the Children's Court)[153] and are meant to be drafted to be easily understood by individuals within the Court system, but in particular, self-represented litigants.[154]

Court procedures are governed by the Rules, [155] which are made by the Governor in Council by agreement with the President of the Children's Court.[156] The President's role is to ensure systematic and efficient exercise of the court's jurisdiction.[157] In accordance with amendments made to the *Children's Court Act*, the Chief Magistrate's role is similar.[158] It allows for the issue of procedural practice directions,[159] eg court guidelines complementing existing legislation, rules and regulations, such as appearances by practitioners and parties and case management.[160] The majority of child protection applications are heard and determined in the Children's Court by a magistrate.[161] These applications include making decisions on court assessments[162] and child protection orders,[163] and deciding applications on transferring orders[164] or proceedings[165] to another state.[166]

The *Children's Court Rules* provide that if there is an inconsistency with another Rule, the order will prevail to the extent of the inconsistency.[167] By allowing this override to the statutory rules, there is a potential breach of the fundamental legislative principle that subordinate legislation should relate solely

[152] Explanatory Notes, *Children's Court Rules 2016* (Qld) 3. It also is in line with the policy objectives of the *Adoption Act 2009* (Qld), but this does not form part of the research and will not be discussed.
[153] *Child Protection Act 1999* (Qld) s 54.
[154] Explanatory Notes (n 152).
[155] *Children's Court Act 1992* (Qld) s 7(1).
[156] Ibid s 7(2).
[157] Magistrate's Court of Queensland (n 151).
[158] *Child Protection Reform Amendment Act 2014*, s 43.
[159] Ibid s 42.
[160] Department of Justice and Attorney-General and Queensland Government, 'Practice Directions', *Queensland Courts* (Web page, 2011-2019) <https://www.courts.qld.gov.au/court-users/practitioners/practice-directions>.
[161] Magistrate's Court of Queensland (n 151) 9.
[162] *Child Protection Act 1999* (Qld) s 39.
[163] Ibid s 54.
[164] Ibid s 214.
[165] Ibid s 228.
[166] *Director of Child Protection Litigation Act 2016* (Qld), see text to n 101.
[167] *Children's Court Rules 2016* (Qld) s 7.

to matters appropriate to their own legislative levels.[168] The government agreed that the potential breach by the Children's Court is justified,[169] on the ground that flexibility is required when making decisions involving children and families. On reflection, the most important justification is where a child is to be a witness in a child protection trial. The rules of evidence often limit child witnesses from testifying in a trial.[170] Competency and rules against hearsay, as examples, are significant ways in which children can be silenced.[171] It was argued that, specifically in child protection matters, the court could be able to inform itself in an appropriate manner.[172] This meant that the Children's Court is not bound rigidly to apply the *Children's Court Rules* if doing so would be contrary to the *Child Protection Act* and there is sufficient flexibility to efficiently and fairly administer justice.[173]

These Rules were not reviewed until 2013 when the Carmody Inquiry confirmed that the child protection system was under extreme pressure and there was a potential risk of systemic failure. A sustainable and effective system was need over the next decade.[174] This, along with the enactment of the DCPL Act provided an impetus for review.[175] Recommendations, including the creation of a framework for implementing a case management approach to child protection proceedings, and a case management committee,[176] were implemented to provide a structure for the management of court proceedings.[177] The aims being minimal delay and overall quality improvement in evidence and decision making.[178]

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[168] *Legislative Standards Act 1992* (Qld) s 4(5)(c).
[169] Explanatory Notes (n 152) 4.
[170] Ibid. *Child Protection Act 1999* (Qld) s 105.
[171] Australian Law Reform Commission, *Seen And Heard: Priority For Children In The Legal Process* (ALRC Report 84, July 2010) 14.57.
[172] Explanatory Notes (n 152).
[173] *Child Protection Rules 2016* (Qld), ss 3(b) and 7.
[174] Explanatory Notes (n 152) 2-3.
[175] Ibid.
[176] *Queensland Child Protection Commission of Inquiry* (n 143) 459. This committee was established by the Department of Justice and Attorney-General by way of recommendation (13.1) of the Carmody Inquiry. It is chaired by the Children's Court president and includes the Chief Magistrate and representatives of the Attorney-General's office, Legal Aid Queensland, the Queensland Law Society, the DCSYW and the Director of the DCPL.
[177] Explanatory Notes (n 152) 2-3.
[178] Ibid.

C *Director of Child Protection Litigation Act 2016 (Qld)*

This legislation provides for the DCPL,[179] an independent statutory office who reports to the Attorney-General and Minister for Justice,[180] and who administers functions, including the ability to apply for child protection orders and conduct child protection proceedings.[181] The DCPL has sole responsibility for deciding whether an application for a child protection order should be made, the type of order to be made, and to participate in litigation.[182] Historically, this role was held by departmental staff at the forefront of front-line responsibilities, including litigating child protection matters.[183] This blurred the role of the Department and created a need for separation between internal child protection processes and the need for independent legal advice for child protection applications.[184]

The DCPL Act provides for collaboration with the Department in working towards fair, timely and consistent outcomes;[185] action for the least intrusive child protection order;[186] appropriate evidence for applications for child protection orders;[187] and adhering to principles relevant in exercising powers under the *Child Protection Act.*[188] For example, if the Department is satisfied there is a need for a child protection order, the matter must be referred to the DCPL by way of a brief of evidence.[189] The DCPL must determine whether or not a child protection order application should be made, and if so, the type that

[179] The Director's appointment is for a term of up to five years but may be reappointed for further terms. Eligibility for this role is based on the person's being admitted to legal practice for at least 10 years and has a proven leadership and innovative management qualities within a senior government or private sector position. Explanatory Memorandum, Director of Child Protection Litigation Bill 2016 (Qld), 1-2.
[180] Ibid.
[181] *Director of Child Protection Litigation Act 2016* (Qld) s 9.
[182] Ibid.
[183] Queensland Parliament, *Record of proceedings* [Hansard], 11 May 2016, 1685 (Ms Davis, Aspley - LNP).
[184] Ibid.
[185] *Director of Child Protection Litigation Act 2016* (Qld) s 6(1)(a).
[186] Ibid s 6 (1)(b).
[187] Ibid s 6(1)(c).
[188] Ibid ss 6(2) and (3).
[189] Explanatory Memorandum, Director of Child Protection Litigation Bill 2016 (Qld), 2.

should be sought.[190] If an application for an order is made, it is the DCPL's responsibility to litigate the Children's Court proceedings.[191]

IV CHILD PROTECTION INTERVENTION PROCESS

Children who are deemed to be in need of care and protection[192] come to the DCYW's attention in various ways.[193] Anyone can make a report on child protection and welfare issues including members of the public, professionals, parents, relatives or the children themselves (Figure 3.H).[194] Some professionals, known as 'mandatory reporters' (eg police, doctor, registered nurse, teacher)[195] are required to make a report to the DCSYW if they reasonably suspect that a child is suffering, has suffered, or is an unacceptable risk of suffering significant harm caused by physical or sexual abuse and does not have a parent willing and able to protect them.[196] Regardless of the reporter, these concerns are not limited solely to physical, sexual, or emotional abuse, but may also involve issues relating to economic problems, social isolation, or a wider range of family concerns, eg substance abuse.[197]

[190] Ibid.
[191] Ibid.
[192] *Child Protection Act 1999* (Qld) s 10.
[193] Australian Institute of Health and Welfare, *Child Protection Australia 2017-2018* (Child Welfare Series No 70, 2019) 1.
[194] Ibid.
[195] *Child Protection Act 1999* (Qld) s 13E(1).
[196] Ibid s 13E(2).
[197] Ibid s 13E(1); Australian Institute of Health and Welfare (n 193).

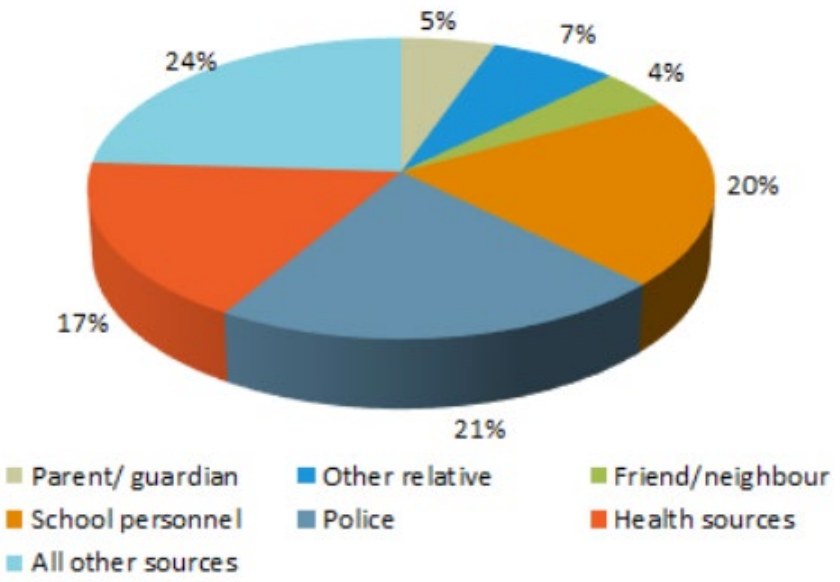

Figure 3.H: Proportion of notifications, by primary source, Queensland 2018-2019[198]

A *Notification / Intake*

The DCSYW has a dedicated child protection intake service that screens these incoming reports to determine if action is necessary for the best interests of the child.[199] Reports received that require further action be undertaken are classed as either 'family support issues' (assistance provided from both government and non-government support agencies with the child remaining in the home) or a 'child protection notification' (whereby assessments and investigations may be warranted).[200] As a result, this thesis deals solely with child protection notifications whereby family support services are not deemed applicable by the DCSYW. Table 3.A provides the most recent synopsis of children receiving child protection services in Australia for the 2017-2018 year.

[198]Queensland Government, 'Notifications', *Department of Child Safety, Youth and Women* (Webpage, 12 October 2019) <https://www.csyw.qld.gov.au/child-family/our-performance/intake-phase/notifications>.
[199] Australian Institute of Health and Welfare (n 193).
[200] Ibid.

Child protection component	NSW[a]	Vic	Qld	WA	SA	Tas[b]	ACT[c]	NT	Total
					Number				
Children who were the subject of an investigation of a notification	32,547	30,336	19,526	10,347	2,967	1,071	1,437	6,740	104,971
Children on care and protection orders	24,027	17,204	11,479	6,238	4,353	1,549	1,032	1,367	67,249
Children in out-of-home care	19,795	11,271	11,158	5,276	4,151	1,419	944	1,320	55,334
Children receiving child protection services	**52,146**	**43,333**	**29,573**	**14,947**	**6,538**	**2,439**	**2,251**	**7,385**	**158,612**
					Number per 1,000				
Children who were the subject of an investigation of a notification	18.6	21.8	16.9	17.4	8.1	9.5	15.5	107.5	19.0
Children on care and protection orders	13.8	12.4	9.9	10.5	11.9	13.8	11.1	21.8	12.2
Children in out-of-home care	11.3	8.1	9.6	8.9	11.3	12.6	10.2	21.1	10.0
Children receiving child protection services	**29.8**	**31.1**	**25.5**	**25.1**	**17.9**	**21.7**	**24.3**	**117.8**	**28.7**

Table 3.A: Children receiving child protection services, by states and territories, 2017-2018[201]

In 2018-19, the Department recorded 25,381 notifications relating to 22,767 children, an increase of 7.3 per cent from 23,658 in 2017-2018,[202] with an 8.9.1 per cent increase in the number of children subject to notifications (20,899 in 2017-18) (Figure 3.I).[203]

[201] Australian Institute of Health and Welfare (n 193) 12.
[202] Queensland Government (n 198).
[203] Ibid.

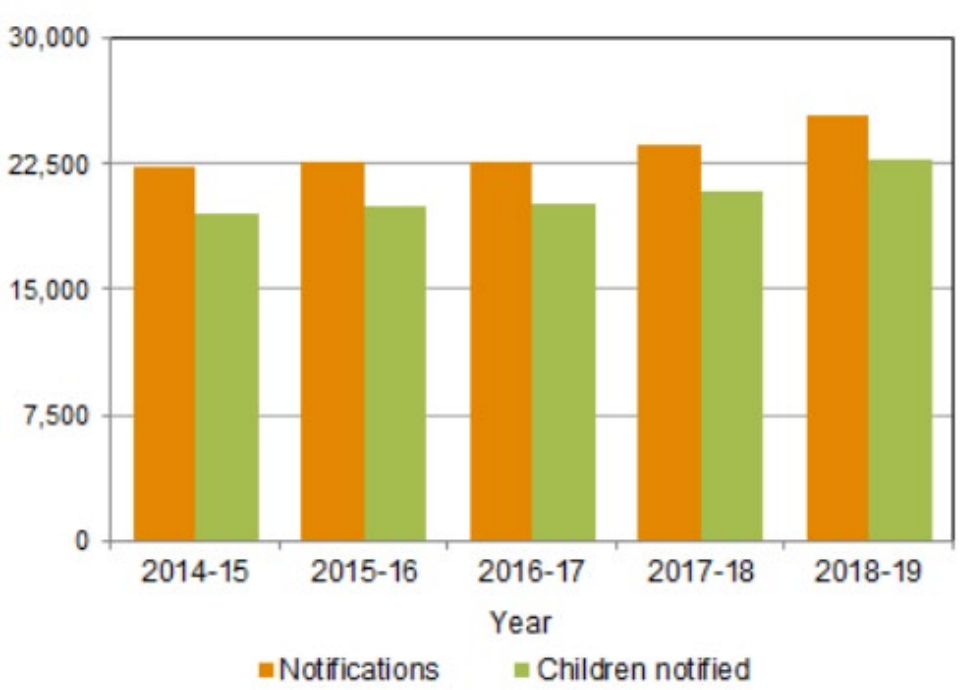

Figure 3.I: Number of notifications and children subject to notification, Queensland 2014-2015 to 2018-2019[204]

B *Investigation and Assessment*

Departmental investigations and assessments examine concerns raised about the child;[205] assess his or her immediate safety and whether there has been harm (or a risk of future harm); consider whether there is a need for protection; and consider whether ongoing child protection intervention is required.[206] During this period, in assessing the degree of harm and need for protection, DCSYW may seek to physically sight or interview the child where practicable.[207] Further, they can obtain information by checking information systems for any previous child protection history, having discussions with appropriate agencies and individuals (eg medical, educational, police), and interviewing families (including the child) and

[204] Ibid.
[205] Eg is the notification substantiated? Australian Institute of Health and Welfare, *Child Protection Australia 2017-2018* (Child Welfare Series No 70, 2019) 3.
[206] *Child Protection Act 1999* (Qld), Chapter 2. Queensland Government, 'Investigation and assessment', *Department of Child Safety, Youth and Women* (Webpage, 6 June 2018) < https://www.csyw.qld.gov.au/child-family/protecting-children/responding-child-abuse/investigation-assessment>.
[207] *Child Protection Act 1999* (Qld), Chapter 2. Australian Institute of Health and Welfare (n 193) 21.

caregivers.[208] The most recent information provides (Table 3.B) that of the 15,661 Queensland children being subjected to investigation, 26.4 per cent (4,141 children) were substantiated and 73.6 per cent (11,520 children) were unsubstantiated.[209]

Investigation outcome	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total
					Number				
Substantiated	n.a.	12,426	4,141	3,471	1,025	520	175	1,466	23,224
Not substantiated	n.a.	11,761	11,520	3,599	801	176	969	2,956	31,782
Total children in finalised investigations	*n.a.*	*24,187*	*15,661*	*7,070*	*1,826*	*696*	*1,144*	*4,422*	55,006
					%				
Substantiated	. .	51.4	26.4	49.1	56.1	74.7	15.3	33.2	42.2
Not substantiated	. .	48.6	73.6	50.9	43.9	25.3	84.7	66.8	57.8
Total children in finalised investigations	. .	*100.0*	*100.0*	*100.0*	*100.0*	*100.0*	*100.0*	*100.0*	*100.0*
Total children subject to an investigation only	. .	**24,961**	**17,404**	**8,576**	**2,107**	**865**	**1,208**	**6,018**	**61,139**

Table 3.B: Children subject of finalised investigation only, by investigation outcome and states and territories, 2017-2018[210]

C *Substantiation and Intervention*

On completing investigations, if there is sufficient reason to believe that the child has been, or is likely to suffer harm, abuse or neglect, DCSYW deems the matter to be 'substantiated'.[211] It is then to use appropriate levels of involvement, including the provision of support services (where appropriate), to ensure the child is safe.[212] The most recent statistics (2017-2018) provide the most common type of substantiated abuse was emotional (59 per cent), followed by neglect (17 per cent), physical abuse (15 per cent), and sexual abuse (9 per cent) (Figure 3.J).[213]

[208] Australian Government, 'Child Protection Services, *Productivity Commission Report on Government Services 2018* (Report, 2018) 16.38 < https://www.pc.gov.au/research/ongoing/report-on-government-services/2019/community-services/child-protection/rogs-2019-partf-chapter16.pdf>.
[209] Australian Institute of Health and Welfare (n 193) 21.
[210] Australian Institute of Health and Welfare (n 193) 14.
[211] *Child Protection Act 1999* (Qld) s 14.
[212] Australian Institute of Health and Welfare (n 193) 14.
[213] Australian Institute of Health and Welfare (n 193) 24.

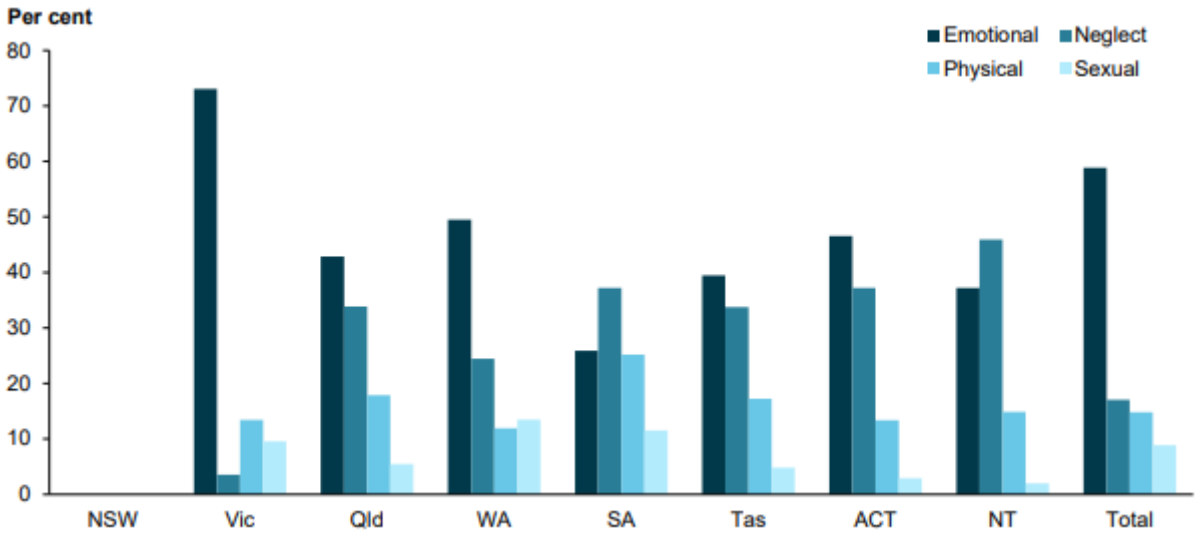

Figure 3.J: Children who were subjects of substantiations of notifications received by primary type of abuse or neglect and states and territories (%), 2017-2018[214]

Substantiations do not necessarily need sufficient evidence for a successful prosecution, nor do they mean that treatment is required. However, if the matter has been substantiated, DCSYW intervention may be required to protect the child. [215] Intervention is defined as the actions taken by the DCSYW, where required, to provide the assistance needed for the child, eg family supports and arranging for the child to be placed under care agreements.[216] This can be provided through a referral to support services, departmental supervision and support, a placement for out of home care or an application for child protection by way of a court order.[217]

A comprehensive account is now given in relation to the range of care and protection orders, and of custody, permanent and guardianship orders. The diversity and nuance demonstrated in the orders that are available shows how, particularly after the passage of the *Child Protection Act 1999* (Qld), the child

[214] Ibid.
[215] Australian Government (n 208) 16.39.
[216] Tim Carmody, *Queensland child protection commission of inquiry* (Queensland Child Protection Commission of Inquiry, June 2013) 647; Institute of Health and Welfare, 'Child protection Australia 2012-2013 Report' *Australian* Government (Report, 2014)
[217] Australian Government (n 208) 16.39.

protection system has juridified and intentionally been drawn under the rule of law (expressed in the decisions of the courts).

D *Care and Protection Orders*

Court involvement is meant to be a measure of last resort, when all other avenues of effective resolution have been exhausted.[218] Thus, when intervention is required, the DCSYW may apply to the court for various types of care and protection orders which provide it with responsibility for the child's welfare.[219] The scope of its involvement is mandated by the type of order made, including supervision of persons with authority to care for the child;[220] and having concern for the child's welfare (eg regarding education, health, religion).[221] The types of care and protection orders include guardianship or custody orders (transfer of legal guardianship) which convey responsibility for the child's welfare to a guardian.[222] These orders do not readily grant the daily care, welfare and decision making responsibilities to the DCSYW. The orders that grant those responsibilities to the DCSYW are custody orders. [223]

The duration of orders varies with those not granting custody or guardianship not being more than one year;[224] custody or short-term guardianship orders not more than two years;[225] and a long-term guardianship order ending on the day prior to the child turning 18 years.[226] Based on the most recent information available (30 June 2018) approximately 56,412 children (9,995 in Queensland) were under care and protection orders in Australia—a rate of 10.1 per 1,000 children (Table 3.C).

[218] Australian Institute of Health and Welfare (n 193) 3.
[219] Australian Government (n 208) 16.4.
[220] Ibid.
[221] Ibid.
[222] Ibid.
[223] Ibid.
[224] *Child Protection Act 1999* (Qld) s 62(2)(a).
[225] Ibid s 62(2)(b).
[226] Ibid s 62(c).

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total
Number	20,331	13,303	9,955	5,542	3,872	1,380	904	1,125	**56,412**
Number per 1,000	11.5	9.6	8.5	9.3	10.6	12.3	9.6	17.9	**10.1**

Table 3.C: Children on care and protection orders, by state and territory, 30 June 2018[227]

An account is given of the different care and protection orders available. However, greater attention is given to permanent care and guardianship orders, as they are the orders that should the parents contest the DCSYW's application, will require court proceedings and, in many cases, self-representation by parents.[228]

3 *Intervention with Parental Agreement ('IPA')*

An IPA is needed if there is no current assessment order granting custody to the DCSYW, there is reasonable suspicion that the child is in need of protection or an investigation is warranted[229] and interim protection required.[230] This provides the DCSYW with an opportunity to work intensively with families while the child remains in the home for all, or most of the intervention period.[231] This is useful in preventing children from entering into the child protection system.[232] The DCSYW is not required to consider an IPA if it is believed that the child will be at immediate risk of harm should the parents withdraw their consent.[233]

[227] Australian Institute of Health and Welfare (n 193) 42.
[228] Chapter 3, Part 2A – Self-Represented Litigants.
[229] *Child Protection Act 1999* (Qld) s 51Z(a)(i).
[230] Ibid s 51Z(a)(ii).
[231] Ibid s 51ZC.
[232] Queensland Government, 'Intervention with Parental Agreement' *Department of Child Safety, Youth and Women* (Webpage, 2 February 2020) < https://www.csyw.qld.gov.au/child-family/protecting-children/ongoing-intervention/intervention-parental-agreement>.
[233] Queensland Government, 'Ongoing Intervention' *Department of Child Safety, Youth and Women* (Practice Manual, 6 July 2017) < https://www.csyw.qld.gov.au/childsafety/child-safety-practice-manual/chapters/3-ongoing-intervention/key-steps/1-decide-type-ongoing-intervention>.

For this process to work, the DCSYW must be satisfied that the parents are willing and able to work with them during the investigative process.[234] DCSYW officers must also be satisfied that, at the end of the intervention, parents will be able to meet the child's protection and care needs,[235] and at least one parent must be willing to work towards developing and implementing a case plan for these safety needs.[236] Reasonable attempts[237] must be made to obtain consent of both parents prior to entering into the agreement.[238] However, if this cannot be obtained, the DCSYW must make reasonable attempts to give them both a copy of any agreement reached with the consenting parent.[239] If one of the parents refuses, an agreement cannot be entered into.[240]

When assessing whether an IPA is appropriate, the child's immediate safety, the level of risk, and the children's views and wishes (depending on their age and comprehension skills) must be considered.[241] This includes arranging for an independent person to help in participation and decision making for Aboriginal and Torres Strait Islander ('ATSI') children. [242] A further consideration is the parents' capacity to understand and acknowledge the child protection concerns.[243] This is not appropriate where there are serious risk factors associated with the parent's ability to consent (eg alcohol or substance misuse, intellectual disabilities);[244] an inability or unwillingness to work with the DCSYW or support services; a demonstrated lack of engagement during previous interventions;[245] and any behaviours that would place the child at an unacceptable risk of harm. [246]

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[234] *Child Protection Act 1999* (Qld) s 51ZB(1)(b).
[235] Ibid s 51ZB(1)(c)(ii).
[236] Queensland Government (n 233).
[237] *Child Protection Act 1999* (Qld) s 51ZE(4)(b).
[238] Ibid s 51ZE(4)(a).
[239] Ibid s 51ZE(5).
[240] Ibid s 51ZE(6).
[241] Ibid s 51ZB(1)(a).
[242] Ibid s 7(o).
[243] Ibid s 106(1).
[244] Ibid s 106(2).
[245] Ibid s51ZE(5).
[246] Ibid.

At 30 June 2019, there were 2,095 children subject to an IPA in Queensland (16.9 per cent (12,12,391) of all children subject to ongoing intervention). The number of children subject to an IPA in Queensland decreased by 8 per cent from 2,276 (30 June 2018) to 2,095 (30 June 2019),[247] with a decrease of 4.6 per cent over the past five years, from 2,195 (30 June 2015) to 2,095 (30 June 2019).[248]

4 *Temporary Assessment Order ('TAO')*

A TAO is a short-term order that authorises investigations necessary to assess whether a child is in need of protection where the parents' cooperation or consent is not forthcoming or able to be obtained.[249] An application for a TAO is made by a DCSYW officer (or police) to a magistrate and must be made within 8 hours of the child being taken into care on the ground that there is considered to be an immediate risk of harm.[250] These applications must be supported by a sworn written statement stating the grounds, the nature of the order sought, and the proposed care for the child.[251] An order can only be made if the magistrate is satisfied that an investigation is warranted in assessing whether the child is in need of protection; the investigation cannot be appropriately carried out without the order;[252] and all reasonable steps to gain parental consent have been exhausted.[253]

The TAO must state the time the order ends, which cannot be more than three business days after it is made.[254] If deemed appropriate during the investigative phase, the order can provide for the child to be taken into immediate DCSYW custody, with authorisation of medical treatment and restriction of contact with a parent until an application is heard by the court.[255] The TAO can only be extended if it has not

[247] Queensland Government, 'Intervention with Parental Agreement' *Department of Child Safety, Youth and Women* (Webpage, 2 February 2020) <https://www.csyw.qld.gov.au/child-family/our-performance/ongoing-intervention-phase/intervention-parental-agreement>.
[248] Ibid.
[249] *Child Protection Act 1999* (Qld) s 24(2).
[250] Ibid s 18.
[251] Ibid s 26.
[252] Ibid s 27(1).
[253] Ibid s 27(2).
[254] Ibid s 29.
[255] *Child Protection Act 1999* (Qld) s 45(1).

previously ended[256] (and may not be extended more than once).[257] It can only be extended until the end of the following business day after the order would have ended if the magistrate is satisfied that the DCSYW intends on applying for a Court Assessment Order ('CAO') or child protection order within this extended period.[258] An example would be where there is no ability to make application before the TAO would end (eg decision is made on a Saturday, but the order ends on the Sunday).[259]

3 Temporary Custody Order ('TCO')

TCOs were introduced in 2010 to enable applications for short-term orders where the DCSYW considers, without investigation or assessment, that a child is in need of protection.[260] It authorises actions necessary to ensure the immediate safety of the child while the DCSYW decides the most appropriate action for their care and protection (eg applying for an appropriate child protection order).[261] Applications are similar to that of a TAO. However, the magistrate can decide an application for a TCO without the parents being notified or being heard on the application.[262] In making this decision, the magistrate must be satisfied that the child will be at an unacceptable risk of harm if the order is not made; and that the DCSYW will, during the term of the order, decide and apply the most appropriate course of action to be undertaken to protect the child from ongoing harm or risk of harm.[263] Again, not unlike the TAO, the TCO must provide for the time it ceases to be effective, which cannot be more than 3 business days after it is made.[264] If the magistrate deems it appropriate during the investigative phase, the order can provide for the child to be taken into immediate custody, with authorisation of medical treatment and restriction of contact with a parent until an application is heard by the court.[265] A magistrate can only extend a TCO if satisfied that

[256] Ibid s 34(3).
[257] Ibid s 34.
[258] Ibid s 34.
[259] Ibid s 34(4).
[260] Queensland, *Parliamentary Debates,* 10 June 2010, Hansard, 2033 cited in Magistrate's Court of Queensland, *Children's Court Child Protection Proceedings* (Benchbook), July 2016, 29.
[261] *Child Protection Act 1999* (Qld) s 51AB.
[262] Ibid s 51AD.
[263] Ibid s 51AE.
[264] Ibid s 51AG.
[265] Ibid s 51AF.

the order has not ended[266] (and may not be extended more than once). [267] It can only be extended until the end of the following business day after the order would have ended if the magistrate is satisfied that the DCSYW intends to apply for a child protection order within this extended period.[268] An example would be where there is no ability to make application before the TCO would end (eg the decision is made on a Saturday, but the order ends on the Sunday).[269]

The main difference between a TCO and a TAO is that for a TCO, the DCSYW has already made the decision that a child is in need of protection, whereas with a TAO, they are still undertaking investigation and assessment. The magistrate may (as opposed to 'must' with the TAO) make an order if satisfied that the child will be at an unacceptable risk of harm if the order is not made; and that the DCSYW will, during the term of the order, decide and apply the most appropriate course of action to be undertaken to protect the child from ongoing harm or risk of harm.

4 Court Assessment Order ('CAO')

CAOs authorise actions required as part of the investigation into assessing whether a child is in need of protection if parental consent cannot be obtained - and more than three days is necessary to complete the investigation and assessment.[270] The application for a CAO is a sworn written application made by the authorised DCSYW officer stating the grounds on which the application is made, the nature of the order sought and the proposed care for the child.[271] The court must immediately fix a time and place for the application to be heard on the basis of the best interest of the child for the matter to be heard as soon as practicable.[272]

[266] Ibid s 34(3).
[267] Ibid s 51AH(6).
[268] Ibid s 51AH(1).
[269] Ibid s 51AH(3).
[270] *Child Protection Act 1999* (Qld) s 38.
[271] Ibid s 39.
[272] Ibid s 40.

The difference between the CAO and the temporary orders are that the parents become respondents to the application[273] and the applicant (usually the DCSYW) must serve a copy of the application on them or the child's long-term guardians.[274] The court may only decide the application in the absence of the parents if they have been provided with reasonable notice and fail to attend, or the court is satisfied that it was not practicable to provide them with notice.[275] Further, the court may only make a CAO if satisfied that an investigation is necessary and that it cannot be properly undertaken unless the order is made.[276] The order must provide for the time it ends, which must not be more than four weeks after the day of the application hearing being first brought before the court.[277] If deemed appropriate in the circumstances, the magistrate can make a CAO for the DCSYW (or police) for the child to be taken into immediate custody, with authorisation of medical treatment and restriction on parental contact. They may also be provided an authority to enter and search premises where entry has previously been denied for effective order enforcement.[278]

The DCSYW may apply to the court to extend the order, but not for more than four weeks (orders last for 28 days),[279] and the court must be satisfied that the order has not ended, and that any extension is in the best interest of the child. Only one extension may be granted for a period of up to 28 days.[280] The CAO begins from the date of the application being heard by the court.

[273] Ibid s 42.
[274] Ibid s 43.
[275] Ibid.
[276] Ibid s 44.
[277] Ibid s 47.
[278] Ibid s 45.
[279] Ibid s 48.
[280] Ibid s 49.

5 *Directive Order*

There are two types of directive order (which is the least intrusive order that a court can make). The first directs a parent to do or not do something directly related to the child's protection.[281] For example, the court might direct that the parent not leave the child alone with an individual convicted of seriously harming the child.[282] The second type of directive order places restrictions on parental contact with the child.[283] For example, a parent who has harmed a child may be directed to have no contact with them, or may have contact only by way of supervision, eg a family member or DCSYW officer.[284]

The DCSYW is likely to apply for an order when the parents will not voluntarily take appropriate actions; the child can safely remain at home (if the parents take the requisite actions and understand them); a specific directive order is able to be made; a parent's failure to comply with the order puts the children at risk of unacceptable harm; and the parents are likely to adhere to the order recommended.[285] DCSYW officers are advised that an order may be made if the child could remain at home with a protective parent if the other parent, who may be a risk of harm to the child, was restricted or had no contact; the protective parent consents to the child being cared for by another person (eg a relative), and the parent who is a risk to the child was restricted or had no contact. Further, orders may be made if there is a Family Court order that needs to be overridden for child protection reasons, allowing the protective parent to apply for variation of the Family Court order; there is a need to prevent harassment of the child in (eg telephone, social media threats), and prosecution may be required to enforce the contact order (the order may be made in conjunction with any other child protection order). Finally, orders may also be made where the child's safety could be safeguarded through supervision of the parent whom the protection concerns apply

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[281] *Child Protection Act 1999* (Qld) s 61(a).
[282] Ibid s 61(b) (ii).
[283] Ibid s 61(b) (i).
[284] Explanatory Notes, *Child Protection Bill 1998* (Qld) 27.
[285] Department of Communities Child Safety and Disability Services, 'Child Safety Practice Manual' *Department of Communities, Disability Services and Seniors* (Webpage, 2012) Chapter 3 <https://www.communities.qld.gov.au/resources/childsafety/practice-manual/cspm-collated.pdf> cited in Magistrate's Court of Queensland, *Children's Court Child Protection Proceedings* (Benchbook), July 2016, 55.

and there is someone deemed able and willing to undertake the supervision.[286] A directive order can be made to work collaboratively with a supervision order and can be in place during an IPA.[287]

E *Custody, Permanent and Guardianship Orders*

Custody orders fall under the umbrella of care and protection orders and refer to orders that place children in the DCSYW's custody.[288] Unlike guardianship orders, custody orders do not confer responsibility regarding the child's long-term welfare.[289] They generally involve the DCSYW being responsible for the daily care and welfare of the child, while the parents retain guardianship and decision making responsibilities.[290] Permanent care orders involve the transfer of all duties, powers, responsibilities and authorities to a third party carer, as nominated by the court.[291] This can also be applied under a long-term guardianship order (up to 18 years) without guardianship ever being transferred.[292] It is these custody, permanent and guardianship orders that are the most common purpose of child protection litigation.

1 Short-Term Custody Order

A short-term custody order grants custody of the child to a suitable family member (other than the parents)[293] or to the DCSYW,[294] and cannot be for a period of more than two years. The court must have regard to any reports or recommendations made by the DCSYW as a person's criminal, domestic violence and traffic history before they make an order in favour of anyone other than the DCSYW.[295] Preference is to give custody to a member of the child's family. This is granted where the child cannot be in the home under any less intrusive order; reunification is the aim of the DCSYW; there is a relative who is

[286] Ibid.
[287] Magistrate's Court of Queensland, *Children's Court Child Protection Proceedings* (Benchbook), July 2016, 55.
[288] Australian Government (n 208) 16.4.
[289] Ibid.
[290] *Child Protection Act 1999* (Qld), Part 6, Division 4.
[291] Australian Government (n 208) 16.4.
[292] Ibid.
[293] *Child Protection Act 1999* (Qld) s 61(d)(i).
[294] Ibid s 61(d)(ii).
[295] Ibid s 59(5).

willing and able to assume short term custody and there is no conflict that will deter contact between the child and parents; there is no reason to have 'no contact' for a parent; or the family member is prepared to accept full financial responsibility for the child during the term of the order.[296] If there is any uncertainty, an order should be sought granting custody to the DCSYW until such time as the child can be placed with an appropriate family member.[297]

If it is necessary to stop parental contact with the child or actively remove them from the parent owing to serious harm, an order granting short-term custody will be sought by the DCSYW.[298] It is at this stage that the DCSYW, through OCFOS, can refer the child protection matter to the DCPL.[299] The DCSYW must be satisfied that the threshold for intervention has been reached, eg the child is in need of protection; a child protection order is necessary; the current order is no longer appropriate; or the guardian is not complying with the permanent care order.[300]

Before reaching any final decision, the DCPL consults with the DCSYW to clarify any outstanding issues from its review of the matter.[301] These may be any perceived gaps or weakness in the evidence, or an application for different type of order proposed by the DCSYW. They include making application for an order that is of a different duration to that proposed by the DCSYW, but is still appropriate for the child's protection; or referring back to the DCSYW for further consideration.[302] The DCPL's involvement comes to an end at this stage as it cannot give directions to the DCSYW as to how to deal with the matter. [303] However, the matter can be referred back to the DCPL at any time if further information is obtained by

[296] Magistrate's Court of Queensland (n 287).
[297] Ibid 57.
[298] Ibid.
[299] Director of Child Protection Litigation, 'Director's Guidelines' *Direction of Child Protection Litigation* (Webpage, 1 July 2018) 10 < https://www.dcpl.qld.gov.au/__data/assets/pdf_file/0012/576984/directors-guidelines-issued-under-the-director-of-child-protection-litigation-act-1-july-2018.pdf>.
[300] Ibid.
[301] Ibid 15.
[302] Ibid 15-16.
[303] Ibid 20.

the DCSYW that is material to determining whether the child is in need of protection and whether an order is appropriate; there has been a material change in the child's circumstances; or any other relevant indication that the DCPL should reconsider the matter. [304]

2 Short Term Guardianship Order

It is imperative to distinguish between 'custody', where the child is taken into care for their protection and wellbeing and 'guardianship' where someone makes decisions about the child's life. The Queensland Family and Child Commission provides that sometimes these decisions are not able to be made owing to the parents' inability to be found; emergent situations; or substance abuse or mental health issues.[305] Thus, a **s**hort-term guardianship order allows the DCSYW to serve as the child's guardian, making decisions about the child's life for up to two years.[306] It can only be made in favour of the DCSYW with preference that parents retain guardianship unless it is not in the child's best interest.[307]

These orders are recommended when the child cannot safely stay in the family home using a less intrusive order based on the most recent safety assessment.[308] They are also recommended when the DCSYW is working towards family reunification and there may be no parent available to exercise guardianship or be involved in case planning, or they are unreliable;[309] it is necessary to remove guardianship due to the serious nature of the harm or the parents incapacity is causing the harm sustained;[310] or there has been an assessment whereby it is held that the parent will not make appropriate decisions concerning the child (eg schooling, health) and it is in the child's best interest that guardianship vest in the DCSYW.[311]

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[304] Ibid.
[305] Queensland Government, 'How the courts work', *Queensland Family & Child Commission* (Webpage, 2010-2016) <https://www.qfcc.qld.gov.au/kids/guide-child-protection-kids/how-courts-work>.
[306] Ibid.
[307] *Child Protection Act 1999* (Qld) s 62(2)(b).
[308] Queensland Government (n 233).
[309] Ibid.
[310] Ibid.
[311] Ibid.

3 Long-Term Guardianship Order ('LTG')

Long term guardianship orders refer to the formal transfer of legal guardianship to the DCSYW. This involves a considerable amount of intervention in the family's life, and these orders are sought only as a measure of last resort. They generally provide that the DCSYW is responsible for the child's daily care and welfare, while the parents regain legal guardianship.[312] These final long-term guardianship orders are for a period greater than two years, and generally until the child reaches 18 years.[313] The order can be granted to the DCSYW or another person until the child reaches 18 years. However, before making this order, the court must be satisfied that there is no parent willing or able to protect the child or that their emotional security will be best met on a long term basis by the making of the order.[314] The order can also be made in favour of a suitable family member (other than the parent);[315] or a suitable person nominated by the DCSYW.[316]

V CONCLUSION

This chapter gives a detailed account of the roles, responsibilities and interactions between the parties involved in the Queensland child protection system. Its purpose is to provide context and analysis to the labyrinth of confusion that a self-represented litigant may face when confronting the governmental 'Goliath' that is the DCSYW, without any legal representation or assistance.

Initially, the DCSYW was both principal agency for governmental responses to child protection and being their representative in child protection proceedings. The Carmody Inquiry unlocked various levels of need both within the DCSYW and litigants. However, instead of providing legal assistance and support to both

[312] Australian Institute of Health and Welfare (n 193) 37.
[313] Ibid.
[314] *Child Protection Act 1999* (Qld) s 59(3). Magistrate's Court of Queensland (n 287) 58.
[315] *Child Protection Act 1999* (Qld) s 61(f)(i).
[316] Ibid s 61(f)(ii).

parties, they opted to solely assist the already government funded DCSYW in navigating their own child protection processes via the establishment of their own in-house legal team (OFOCS) and its associated caretaker (DCPL). To date, litigants have not been received this benefit and many are made to self-represent in most child protection hearings. Bearing in mind the level of education and expertise already afforded to other parties (magistrates, legal representatives, government officers, etc), the expectation that a litigant of limited education and socio-economic means would be able to traverse the same system and will be automatically be set up to fail. Accordingly, based on the introduction of both the OCFOS and DCPL, it would appear that the state now wields even more power with this two-tiered safety approach in child protection.

CHAPTER 4 – LEGAL SERVICE OPTIONS

I INTRODUCTION

In this chapter, I continue the literature review by providing a more in-depth discussion of the legal service options for self-represented litigants in Queensland child protection. I include an analysis of the structures, funding and service delivery of the legal service options available in Queensland, as well as in other Australian jurisdictions, and a comparison with the United States and Canada.

Litigation processes like those found in the Queensland child protection court are difficult to navigate, especially without legal representation. As a result, many self-represented litigants consult with lawyers in child protection matters for limited purposes such as obtaining legal advice, representation, or assistance in applying for further legal assistance.

While there are many legal service options available to litigants, there are many roadblocks which hinder attaining them. The legal service options available in Queensland child protection include Legal Aid Queensland, which is perhaps the most well-known government funded service providing legal assistance to marginalised individuals within child protection matters. Legal Aid Queensland relies on a means and merits test throughout child protection proceedings. However, it is at trial phase where many litigants fail funding criteria eligibility. This is set out below in section IIA. Another legal service option is to seek legal assistance from a community legal centre, such as LawRight or even a court appointed (Legal Aid Queensland funded) duty lawyer. However, these two options can only provide guidance for self-representation, as neither are able attend court or child protection proceedings on behalf of litigants. Further, the litigant may find a lawyer who will work either 'pro bono' (without fee) or engage in unbundling services (with a fee). While these options, prima facie, appear viable, there is a risk to the

self-represented litigant as to both quality (legal experience offered) and quantity (affordability of services).

II LEGAL SERVICE OPTIONS AVAILABLE FOR SELF-REPRESENTED LITIGANTS

It has been suggested that the Australian legal system is not prepared to deal with self-represented litigants in general.[1] This is disadvantageous to the self-represented litigant as they are not, in most cases, sufficiently able to understand court procedures and legal terminology. However, this does not address the question of whether the disadvantage is caused by the legal system being poorly designed to accommodate the self-represented litigant or the lack of legal representation afforded to them.[2] Dewar et al suggest a number of factors that may lead to a litigant's decision to represent themselves, including difficulties in obtaining legal aid; the cost of legal services; and a wish to use the court as a forum to air grievances or to seek revenge, or as an instrument of harassment.[3] There are both negative and positive reasons for self-representation that may be driving perceptions of why litigants self-represent.[4] The Queensland Law Society ('QLS') considers that parents should be supported through child protection proceedings by providing them with appropriate information about how to access and apply for legal advice or representation, and ensuring that they are provided with reasonable timeframes.[5] The problem arises at the trial stage where parents are often left to self-represent. These matters are serious in nature

[1] Duncan Webb, 'The right not to have a lawyer' (2007) 16 *Journal of Judicial Administration* 165-178 as cited in Elizabeth Richardson, Tania Sourdin and Nerida Wallace, 'Self-Represented Litigants: Literature Review' (Australian Centre for Court and Justice System Innovation, 2012) 15.
[2] The Right Honourable Harry Woolf, *Access to justice: Interim report to the Lord Chancellor on the civil justice system in England and Wales* 1995, 119; Webb (n 1).
[3] John Dewar, Barry Smith and Cate Banks, *Litigants in Person in the Family Court of Australia – Research Report No 20* (Family Court of Australia, 2000) 11-12. See also Victorian Law Reform Commission, *Civil Justice Review: Report* (Melbourne: Victorian Law Reform Commission, 2008) 564 as cited in Elizabeth Richardson, Tania Sourdin and Nerida Wallace, 'Self-Represented Litigants: Literature Review' (Australian Centre for Court and Justice System Innovation, 2012) 16.
[4] Ibid 17.
[5] Letter from Christine Smyth, Queensland Law Society President, to Department of Communities, Child Safety and Disability Services, 16 January 2017, 9.

and the consequences are significant. Ultimately, they may lead to the loss of children residing with their parents.

A *Legal Aid Queensland*

Instilled within Legal Aid Commissions' ('Legal Aid') framework[6] is the responsibility to provide marginalised individuals with access to justice.[7] They are funded by both federal and State governments, yet are established as independent statutory agencies under the Commonwealth Agreement for the Provision of Legal Assistance Services.[8] This Agreement provides funding for matters specific to federal law, while state or territory funding falls under its own law.[9] Surplus Commonwealth funds cannot be used for non-federal matters.[10] Accordingly, applications for grants of aid are subject to Commonwealth Legal Aid Guidelines,[11] which set the terms and conditions for state-funded legal representation in Commonwealth matters.[12]

To be considered for legal assistance, litigants must apply for a Legal Aid grant.[13] These applications, by way of the Agreement Guidelines, are subject to means and merits tests which are based on applicants' income, assets and claim merits.[14] This necessarily means that not everyone meets the eligibility requirements.[15] Queensland uses the Simplified Legal Aid Means Test, which takes into consideration

[6] *Legal Aid Queensland Act 1997*, Division 2.
[7] *Legal Aid Queensland Act 1997*, s 3; Chris Povey, Lucy McKernan, Gregor Husper, and Emily Webster, *Senate Legal and Constitutional Affairs Committee on the Inquiry into Access to Justice* (Submission, 30 April 2009) 18 [12.2].
[8] Mark Rix, 'Legal Aid, the Community Legal Sector and Access to Justice: What has been the Record of the Australian Government?' (International Symposium on Public Governance and Leadership: Managing Governance Changes Drivers for Re-constituting Leadership, 24-25 May 2007) 3.
[9] Ibid 2-3.
[10] Ibid 3-4.
[11] Ibid 2-3.
[12] Ibid 3.
[13] Ibid 2.
[14] Ibid 3
[15] Ibid.

the number of dependants in the applicant's home, as well as the employment status of the adults[16] when calculating the contribution, if any, to be made.

In some instances, applicants may have to contribute to some, or all, costs of legal representation based on their (and in some cases, their partner's) financial situation.[17] As at 2020, Queensland set the maximum income eligibility threshold, for a couple (one in the workforce and one child) at $1,030 per week.[18] Applicants who receive full Centrelink[19] benefits will pass the means test,[20] but not necessarily the merits test. [21]

Grants of aid are available for eligible litigants (under the means test) to be represented in proceedings brought by the Office of the Child and Family Official Solicitor ('OCFOS') and the Director of Child Protection Litigation ('DCPL') for matters relating to child protection.[22] However, the merits test only applies to contested hearings (trial) whereby additional guidelines must be met, eg the litigant must be able to obtain an outcome different from that sought by the DCPL.[23]

Regarding the application's merits, three subtests must be met.[24] The first is the 'reasonable prospects of success' test which questions the merit of the case. The second test is the 'prudent self-funding litigant' test. This is satisfied once Legal Aid considers that, if the applicant had their own financial resources,

[16] Ibid 6.
[17] Ibid 3.
[18] Legal Aid Queensland, 'Policies and Procedures', *Legal Aid Queensland* (Grants Policy Manual, 2015-2020) <http://www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Grants-Policy-Manual/The-Means-Test >.
[19] Centrelink is the Commonwealth Government Agency that provides income support and a variety of payments on behalf of policy departments, such as the Department of Communities, Child Safety and Disabilities. Without any additional funding, people on Centrelink support will not be able to obtain legal aid or private legal representation, without suffering hardship.
[20] Senate Legal and Constitutional Affairs Committee, 'Inquiry into Access to Justice', *Australian Human Rights Commission* (Legal Submission, October 2009) 14 <https://www.humanrights.gov.au/sites/default/files/content/legal/submissions/2009/20091020_access_justice.pdf>.
[21] Rix (n 8) 6-7.
[22] Legal Aid Queensland, 'Guidelines-State-Civil', *Legal Aid Queensland* (Grants Policy Manual, 2015-2018) <http://www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Grants-Policy-Manual/Guidelines-State-Civil#toc-guideline-1-child-protection-2>.
[23] Legal Aid Queensland (n 22).
[24] Rix (n 8) 7.

they would risk it to fund the proposed action. This test is used to reduce costs, thus minimising any bias between those who qualify for assistance and those who are merely 'marginally excluded'.[25] The final test is the 'appropriateness of spending limited public funds test'. This is satisfied if Legal Aid considers that the benefit to the applicant (and community) outweigh the cost.[26] Once this last criterion has been met, Legal Aid must determine whether funding should be provided.[27] If there are no competing priorities, funding may be made available to the extent that Legal Aid considers appropriate.[28]

1 *United States*

In the US, applicants must also pass a 'means test'.[29] Applicants undertake a comprehensive needs assessment regularly to ensure guidelines are met, with some not being eligible for assistance for other reasons, eg merit based assessment.[30] Legal aid is available to those individuals whose income falls below 125 per cent of the Federal Poverty Income Guidelines (or USD25,750[31] per annum).[32] For the 2020 financial year, the US Legal Services Commission appropriated USD550 million – an increase of USD135 million from 2019.[33] Grants of aid are competitive and provide funding for independent non-for profit legally aided organisations, which are distributed according to its population.[34] At least 38 states provide

[25] Ibid 7-8.
[26] Ibid.
[27] Legal Aid Queensland, 'Basis of determination of a grant of legal assistance', *Legal Aid Queensland* (Grants Policy Manual, 2015-2018) < http://www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Grants-Policy-Manual/Basis-of-determination-of-a-grant-of-legal-assistance>.
[28] Ibid.
[29] Family Law Council Litigants in Person Committee, *Litigants in Person* (Report to Commonwealth Attorney-General's Department, August 2000) 3.20.
[30] Legal Services Corporation, 'The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans' (NORC at the University of Chicago for Legal Services Corporation, 2017) 38.
[31] For a family of 4. Office of the Assistant Secretary for Planning and Evaluation, '2019 Poverty Guidelines'. *U.S. Department of Health and Human Services* (Government, 2019) < https://aspe.hhs.gov/2019-poverty-guidelines>.
[32] Global Disability Rights Now!, 'Legal Aid in the United States', *Global Disability Rights Now!* (Eligibility for Legal Aid, 2017) <https://www.globaldisabilityrightsnow.org/tools/usa-vietnam/legal-aid-united-states>.
[33] American Bar Association, 'U.S. House Passes Proposed $550 Million for LSC in FY2020, *American Bar Association* (Advocacy, 2019) <https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/access_to_legal_services/legal_services_corporation/latest_developments/>
[34] Global Disability Rights Now! (n 32).

additional state based funding, as well as a direct percentage of court filing fees for legal aid services.[35] California is the most populous state and its state budget allocates approximately USD15 million.[36]

2 *Canada*

While there is no national public legal assistance scheme in Canada,[37] provincial and territorial legal services are provided by Legal Aid.[38] Not unlike Australia, these Legal Aid services provide service plans to assist marginalised individuals to get the legal support they need through outside services such as community-based advocacy groups[39] as they are not always sufficiently supported by government funding.[40] Even where the right to representation is granted by statute, the legislation may still limit availability.[41] For example, individuals may apply for legal aid and pass the means test, but if their claim is not deemed meritorious, they may, nevertheless, fail.[42]

Statistics Canada (Canada's national statistics agency) provides that low income cut off calculations ('LICO') have long served as the default measure of the poverty line.[43] Welfare incomes across the country were consistently far below most socially accepted measures of adequacy with the welfare income of a family of four being CAD33,920 per annum (approximately CAD652 per week or CAD2,827 per month).[44] Applicants earning incomes at LICO levels automatically qualify for full coverage, while the

[35] Ibid.
[36] Ibid.
[37] Dr Melina Buckley, 'A National Framework for Meeting Legal Needs: Proposed National Benchmarks for Public Legal Assistance Services' (Report of Canadian Bar Association Access to Justice Committee, August 2016) 6.
[38] Ibid.
[39] Ibid.
[40] Sande L Buhai, 'Access to Justice for Unrepresented Litigants: A Comparative Perspective' (2009) 42(4), *Loyola of Los Angeles Law Review* 984.
[41] Ibid 1012.
[42] Ibid.
[43] K Kehoe and D Wiseman, 'Reclaiming a Contextualized Approach to the Right to State-Funded Counsel in Child Protection Cases' (2012) 63 *University of New Brunswick Law Journal*, 194.
[44] Based on a population size of 30,000 to 99,999 in 2018. Statistics Canada, 'Low income cut-offs (LICOs) before and after tax by community size and family size in current dollars', *Statistics Canada* (Government, 4 March 2020) <https://www150.statcan.gc.ca/t1/tbl1/en/cv.action?pid=1110024101#timeframe>.

'working poor' (those earning up to 200 per cent of the LICO levels) receive coverage, albeit with contributions attached.[45]

3 *Australia*

Legal Aid in Australia provides a 'mixed model' service delivery whereby in-house lawyers and private practitioners deliver legal services to those with a grant of aid.[46] The use of private practitioners allows for service provision for those living in rural and remote areas.[47] The Law Council of Australia takes the view that Australian lawyers are prepared to undertake legally aided work for less remuneration than would be paid privately.[48] Most Legal Aid statutes are required to ensure that these fees are determined to be less than ordinary legal professional costs.[49] Based on the most recent Scale of Fees provided by Legal Aid Queensland, the hourly rate for lawyers in legally aided child protection matters is AUD140.[50] The most recent information at the national level provides that in 2017-2018, the Commonwealth's total legal expenditure was AUD856.78 million, an increase of 3.8 per cent over the 2016-2017 year.[51]

It is not financially viable for a law firm to have their high fee earning lawyers undertaking large amounts of legal aid work.[52] This is especially the case where detailed fee structures are applicable and lawyers,

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[45] Kehoe and Wiseman (n 43) 196-197.
[46] Rix (n 8) 2.
[47] Ibid.
[48] Senate Legal and Constitutional Affairs Committee, 'Inquiry into Access to Justice', *Australian Human Rights Commission* (Legal Submission, October 2009) 21-22 <https://www.humanrights.gov.au/sites/default/files/content/legal/submissions/2009/20091020_access_justice.pdf>.
[49] Ibid.
[50] Legal Aid Queensland, 'Scale of fees-civil law', *Legal Aid Queensland* (Government, 1 October 2018) <http://www.legalaid.qld.gov.au/files/assets/public/work-instructions/grants/scale-of-fees-civil-law-1-october-2018.pdf>.
[51] Australian Government Attorney-General's Department, *Legal Services Expenditure Report 2017-2018* (Report, 2019) 1. The Commonwealth's external legal expenditure is made of professional fees paid to law firms, disbursement costs and costs of counsel briefs. In 2017-2018 external legal expenditures increased by $55.05 million (13.2 per cent) from 2016-2017. Commonwealth total professional fee expenditure to legal service providers increased by 13.4 per cent to $347.81 million. Of this, professional fees represented 73.7 per cent. From 2013-2018, the average increase in total external legal service expenditure was 8.3 per cent.
[52] Senate Legal and Constitutional Affairs Committee, 'Inquiry into Access to Justice', *Australian Human Rights Commission* (Legal Submission, October 2009) 19 <https://www.humanrights.gov.au/sites/default/files/content/legal/submissions/2009/20091020_access_justice.pdf>.

despite the time spent on a matter, will only be funded for a set number of hours.[53] Thus, some lawyers may be in a hurry to try to resolve matters, or leave in the middle of proceedings as they had reached their funding 'cap'.[54] Accordingly, the trend has been that this work is increasingly being undertaken by inexperienced lawyers.[55] In some instances, lawyers are no longer offering legally aided services due to the low rates of remuneration,[56] while others may agree to take on the work, but relegate it to junior lawyers.[57]

Litigants relying on public assistance are limited by assessments (eg means and merits tests) of their case; funding 'caps'. This forces them into seeking legal redress by other means including self-representation.[58] Self-represented litigants are not limited in the same way as those who are legally aided,[59] as they are not subjected to continual testing designed to ensure that only worthy applications are made. [60] Further, they are advantaged in that they are not limited by time constraints or merits review.[61] This use of means and merits testing has significantly reduced the number of applications for legal aid.[62] This also means there is a higher number of self-represented litigants appearing before child protection courts, as well as a considerable impact in higher litigation costs - making access to justice slower and less effective.[63]

Legal Aid Queensland introduced funding 'caps' in 1996,[64] and these restricted costs for legal assistance in matters other than the enforcement of final orders.[65] The purpose was to have in-house lawyers handle

[53] Tamara Walsh and Heather Douglas, 'Lawyers, Advocacy and Child Protection' (2011) 35(2) *Melbourne University Law Review* 19 644.
[54] Ibid.
[55] Family Law Council Litigants in Person Committee (n 29) 2.32.
[56] Ibid.
[57] Ibid.
[58] Ibid 2.28.
[59] Ibid.
[60] Ibid.
[61] Ibid.
[62] Rix (n 8) 8.
[63] Ibid.
[64] Mary Anne Noone, 'The State of Australian Legal Aid' (2001) 29(1) *Federal Law Review* 2, 42.
[65] Family Law Council Litigants in Person Committee (n 29) 1.33.

more expensive cases, where possible.[66] 'Cap' guidelines have had substantial impacts, including legal practitioners being placed in a position where a client's aid runs out and they would either have to continue pro bono, or withdraw from the matter. Further, this may put pressure on litigants to settle, albeit inequitably, before their funding runs out. Studies have also provided that some opponents may use funding 'caps' to run up litigant costs, forcing them to settle, or walk away.[67] Inherently, the need to maintain funds or remain below the funding 'cap' may cause litigants to become unrepresented part way through their proceedings.[68]

B *Community Legal Centres*

The concept of Community Legal Centres ('CLCs') originated in the 1970s, with the intention of empowering communities in relation to their legal rights and responsibilities,[69] promoting 'legal literacy', and providing tools to assist them in making empowered and informed choices relating to their legal issues.[70] The aim of CLCs is therefore to provide effective legal services for marginalised individuals from lower-socio economic areas.[71] CLCs differ from Legal Aid in that they are community based, not-for-profit organisations[72] with a focus mainly on civil matters (eg child protection).[73] They develop their own eligibility criteria, including a means test, which tends to be more generous than Legal Aid.[74] There are approximately 200 community legal centres in Australia,[75] 127 of which are funded under the

[66] Ibid.
[67] Ibid.
[68] Ibid 1.34.
[69] Jeff Giddings and Michael Robertson, ''Lay people, for God's sake! Surely I should be dealing with lawyers?': Towards an assessment of self-help legal services in Australia' (2002) 11(2) *Griffith Law Review* 438.
[70] Ibid.
[71] Rix (n 8) 10.
[72] Australian Government Productivity Commission, *Access to Justice Arrangements* (Productivity Commission Draft Report Overview, April 2014) 29.
[73] Australian Government Productivity Commission (n 72) 31.
[74] Ibid 33.
[75] Senate Standing Committees on Finance and Public Administration, 'Legal Assistance Services', *Access to Legal Assistance Services* (Webpage, 2019) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Legalassistanceservices/Report/c02>.

Commonwealth Community Legal Services Program.[76] Approximately 44 are located in rural and remote areas.[77] Twenty CLCs receive state or territory funding assistance; and over 50 CLCs receive nothing, meaning that approximately 36.5 per cent are funded from non-government sources.[78]

CLCs are part of the Commonwealth's support to Legal Aid and have an important role in their approach to addressing the legal needs of the marginalised community.[79] The Commonwealth has a 'collaborative arrangement' with the state or territory governments under which legal service programs operate under a single service agreement known as the Community Legal Service Program ('CLSP').[80] Under this program, CLCs collect and report information to the Commonwealth to allow an overall program evaluation (by all collaborators) in terms of outcomes and objectives,[81] as well as future planning for service and funding.[82] Funding is typically administered by Legal Aid and the CLSP,[83] which provides the tools required for reporting and the controlled application of CLC funding.[84] Grants and funding are secured from federal and state governments, as well as non-government agencies such as universities, public charitable institutions, and independent grant bodies.[85]

Most government funding to support legal service delivery is through the National Partnership Agreement on Legal Assistance Services (2015-2020).[86] Over this period, the estimated total budget for Queensland

[76] Senate Standing Committees on Legal and Constitutional Affairs, 'The adequacy of funding and resource arrangements for community legal centres', *Parliament of Australia* (Government, 2019) [7.12] <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2008-10/access_to_justice/report/c07>.
[77] Senate Legal and Constitutional Affairs Committee, 'Inquiry into Access to Justice', *Australian Human Rights Commission* (Legal Submission, October 2009) 22 <https://www.humanrights.gov.au/sites/default/files/content/legal/submissions/2009/20091020_access_justice.pdf>.
[78] Ibid.
[79] Rix (n 8) 12.
[80] Ibid.
[81] Ibid.
[82] Ibid.
[83] Povey, McKernan, Husper and Webster (n 7) 47 [24.3].
[84] Ibid.
[85] Ibid.
[86] Council of Australian Governments, 'National Partnership Agreement on Legal Assistance Services', *Attorney General* (Government, 2019) [29] 11

legal assistance services is approximately AUD261 million, with Legal Aid receiving AUD215 million and CLCs receiving close to AUD46 million.[87] Queensland, over the 2017-2020 period, has allocated approximately AUD35 million.[88] The Commonwealth's share of these funds is to be used solely for matters falling in federal jurisdiction, with the exception of those relating to the safety or welfare of children connected with family law proceedings.[89] This does not include child protection. Further, not all of this funding is spent on direct legal service delivery.[90] A portion is used to support community legal education and policy related activities,[91] meaning that the average sum for providing services to individual clients is reduced.[92]

The manner in which the Commonwealth has funded both Legal Aid and CLCs continues to make it difficult to cope with the growing demand for services.[93] This has placed more pressure on the community legal services to meet the growing demand on services.[94] The Commonwealth's decision to provide funding to Legal Aid only for matters falling under its jurisdiction[95] serves to add more pressure on CLCs to meet the overwhelming demand.

C *Other Legal Assistance Schemes*

1 *Pro Bono*

<https://www.ag.gov.au/LegalSystem/Legalaidprogrammes/Documents/NationalPartnershipAgreementOnLegalServices.pdf>.

[87] Ibid.

[88] Queensland Government, 'Investment in legal assistance services 2017-2020', *Queensland Government* (Government, 1995-2019) <https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/legal-advice-and-investment/legal-investment/legal-assistance-service-investment/investment-in-legal-assistance-services-2017-20>.

[89] Council of Australian Governments (n 86).

[90] Rix (n 8) 11.

[91] Ibid.

[92] Ibid.

[93] Rix (n 8) 15-16.

[94] Ibid.

[95] Ibid.

A pro bono lawyer is one who 'works without fee (or without expectation of or at a reduced fee) advises and/or represents a client where there is no other access to the legal system….'.[96] This is a misnomer as the pro bono service model is relatively modest and not 'free', as lawyers incur opportunity costs by giving up their time and resources to provide this service.[97] These services have always been performed by legal professionals and, amongst their other benefits, help attract and retain young lawyers who are keen to contribute to society ordered by a just rule of law.[98] It is not just lawyers providing these services, as partnering organisations (eg CLCs) also volunteer their time and resources to organise, train and manage these lawyers.[99] When calculated, based on the number of lawyers, larger firms undertaking pro bono services equal approximately three per cent of the legal assistance sector, which is less than one per cent of the entire legal profession.[100]

Prior to the 1970s, most legal services for marginalised individuals were undertaken by lawyers through lower 'level schemes'[101] provided by law societies.[102] From this time, governments' contributions were made through Legal Aid and CLCs, which began to coordinate the pro bono movement through legal volunteers.[103]

By the early 1990s, the Commonwealth increasingly began to reserve legal aid funds specifically for criminal and family law matters (which now take up the majority of legal aid budgets leaving areas of law

[96] Law Council of Australia, 'Information on Pro Bono', *Australian Pro Bono Centre* (Webpage, 2020) <https://www.probonocentre.org.au/information-on-pro-bono/definition/other-definitions/>
[97] Australian Government Productivity Commission (n 72) 36.
[98] Michael Kirby, 'Unmet needs for legal services in Australia: Ten Commandments for Australian Law Schools' (2016) 34(1) *Law in Context*, 132-133.
[99] Australian Government Productivity Commission (n 72) 36.
[100] Ibid.
[101] Low level schemes were basically self-imposed designations whereby a solicitor may represent themselves as specialists in certain areas of law. The community is not given any assurances of their competence. Inge Lauw, 'Specialisation, Accreditation and the Legal Profession in Australia and Canada', *Austlii* (Murdoch University Electronic Journal of Law, 1994) <http://www5.austlii.edu.au/au/journals/MurUEJL/1994/11.html>.
[102] Queensland Public Interest Law Clearing House, 'Pro Bono Legal Services – A Queensland Perspective' (*Legalpedia Queensland*, 2016) 3 <http://www.legalpediaqld.org.au/index.php?title=Pro_bono_legal_services_-_a_Queensland_perspective>.
[103] Ibid.

(eg civil law) under-resourced).[104] Many private legal practitioners observed the growing demand for civil law assistance and recognised they could help fill this gap[105] with junior lawyers, who were keen to embrace their social responsibility.[106]

By 2014, it was suggested that every lawyer, on average, actually provided approximately 30 hours pro bono assistance per annum. This reflects larger law firms, government agencies and in-house lawyers taking on the majority of pro bono work.[107] By 2017-2018, Commonwealth service providers had provided a commitment of at least 35 hours of pro bono work per person, per annum.[108]

Many law firms participate in structured referral schemes that are aimed at assisting marginalised litigants who may have had difficulty obtaining legal assistance in past.[109] In Queensland, these structured pro bono programs can be obtained through LawRight (formerly Queensland Public Interest Law Clearing House ('QPILCH')).[110] Legal Assistance Schemes are also coordinated through Australia's Bar Associations to provide pro bono advocates for select cases, as well as duty lawyers to service busy courts.[111] However, this system is not perfect as many lawyers do not participate, and proper preparation cannot be undertaken 'on the run'.[112] Further, under pressure from government, some larger firms provide pro bono support with legal work being tendered out as an incentive for winning government bids.[113]

It is clear that pro bono legal services have been organised to fill the gap primarily in the area of civil law other than family law (eg child protection). Government funding has primarily focused on criminal and

[104] Ibid.
[105] Ibid.
[106] Ibid.
[107] Australian Government Productivity Commission (n 72) 36.
[108] Australian Government Attorney-General's Department, *Legal Services Expenditure Report 2017-2018* (Report, 2019) 12.
[109] Queensland Public Interest Law Clearing House (n 102) 2.
[110] Ibid 2-3.
[111] Kirby (n 98) 133.
[112] Ibid.
[113] Ibid.

family law.[114] The legal profession continues to provide pro bono services, with governments keen for it to continue this long tradition.[115] However, its role in assisting marginalised Australians to access justice is misunderstood.[116] Based on the independent and exceptional nature of lawyers within the Australian legal system, obtaining representation is expensive, making it difficult for litigants to obtain access to justice.[117] The pro bono system is a partial solution to legal practicality. It does not, however, address the basic constitutional challenge of being able to afford access to justice as an essential need.[118]

2 *Duty Lawyers*

Duty lawyer services are meant to provide pro bono advice and representation to self-represented litigants so that they are not disadvantaged.[119] Legal Aid funds them to provide 'legal services provided by a barrister or solicitor attending at a proceeding of a court or tribunal, that consist of appearing on behalf of a person at, or giving legal advice to a person in connection with, the proceeding, otherwise than by prior arrangement with the person.'[120] In layman's terms, it is the provision of a 'free' lawyer who may be able to assist self-represented litigants, including those who appear in child protection matters.[121] They are only available on the day of court and are not able to appear on behalf of the self-represented litigant, take on their case, or represent at trial.[122] They are able to explain court processes and procedures, provide advice and options available, discuss legal aid eligibility requirements and assist with the requisite forms.[123] However, some lawyers do not believe that the duty lawyer approach is effective as there is not sufficient time to prepare, or to get to know the litigant or the complexities of their cases, within the short

[114] Queensland Public Interest Law Clearing House (n 102) 14.
[115] Australian Government Productivity Commission (n 72) 36.
[116] Ibid.
[117] Kirby (n 98) 133.
[118] Ibid.
[119] Povey, McKernan, Husper and Webster (n 7) 40 [20.5].
[120] Family Law Council Litigants in Person Committee (n 29) 3.31.
[121] Legal Aid Queensland, 'Child Protection Duty Lawyer', *Child Protection Overview* (Webpage, 2015-2018) <https://www.legalaid.qld.gov.au/Find-legal-information/Relationships-and-children/Child-protection-overview/Child-protection-duty-lawyer>.
[122] Legal Aid Queensland (n 121).
[123] Ibid.

time frames available. They consider it a 'band aid solution' to appropriate legal representation.[124] Lawyers acting in this role have acknowledged that, while they operated under significant limitations, they still had an important role in these matters, especially when a parent was not able to obtain legal representation.[125]

3 *LawRight (formerly Queensland Public Interest Law Clearing House ('QPILCH'))*

Duty Lawyer and pro bono services are crucial in ensuring access to justice. However, their services are limited.[126] LawRight is a not-for-profit, community based legal organisation that aims to create strategic connections within the community through coordinating the provision of Queensland pro bono legal services and community legal centres.[127] In 2017-2018, LawRight moved from a negative operating deficit (-AUD41,407) to a modest, yet positive, surplus of AUD118,670.[128] As a public benevolent institution, its source of funding comes from various sources including the Commonwealth (31.5 per cent); grants (13.6 per cent); donations (7.6 per cent); memberships (5.7 per cent); Queensland government (41.4 per cent); and other (0.5 per cent).[129]

LawRight's objectives are to assist marginalised litigants to access justice through the provision of legal services. It does this by identifying matters of public interest requiring legal assistance and then making referrals to those who are able to provide pro bono assistance.[130] In 2017-2018, LawRight received 1,016 applications for assistance. Of these, 516 were directed to a Self-Representation Service and 279 were considered for pro bono referrals.[131] In making referrals, it undertakes detailed assessments so that

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[124] Walsh and Douglas (n 53) 646.
[125] Ibid.
[126] Povey, McKernan, Husper and Webster (n 7) 40 [20.6].
[127] LawRight, 'Strategic Plan 2017-2020', *LawRight*, (Webpage, 2019) <http://www.lawright.org.au/_dbase_upl/LawRight_Strategic_Plan_A4.pdf>.
[128] LawRight, 'Annual Report 2017-2018, *LawRight*, (Webpage, 2019) <http://www.lawright.org.au/_dbase_upl/1718LawRightAnnualReportwebview.pdf> 57.
[129] Ibid.
[130] LawRight (n 127).
[131] The balance applications included 75 persons with public interests matters were referred to LawRight members, 48 were referred to Queensland Law Society and the Bar Association Queensland, and 156 were given advice and referred elsewhere.

available resources are applied to deserving cases.[132] This process is also used to provide explanations to clients as to why they do not have 'reasonable prospects of success'.[133]

The view is that access to justice should not be affected by an inability to obtain adequate legal information or to afford independent legal advice or representation.[134] As at 2018, LawRight collaborated with 800 lawyers, 65 law firms, 170 barristers and 140 law students in Queensland to assist 1,865 clients in need.[135] Overall, 123 individuals were connected through pro bono assistance; 186 were on mental health orders; 525 were self-represented; and 1,025 were from outreach clinics.[136] Of these statistics, approximately 30 firms; and 58 barristers, working with law students and volunteers, contributed 30,000 hours of pro bono assistance to LawRight clients.[137]

These collaborations have attracted approximately AUD7 million in pro bono value[138] with the largest contributors being those firms with the longest national reach and generally specialising in commercial and corporate law. [139] Accordingly, services in family or criminal law are not referred to them, but to in-house members.[140]

In Queensland, more than 140 students volunteer (from seven Queensland based law schools) to provide commitment to the pro bono service.[141] A mirrored benefit is offered as clearing houses provide education

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LawRight, 'Annual Report 2017-2018, *LawRight*, (Webpage, 2019) <http://www.lawright.org.au/_dbase_upl/1718LawRightAnnualReportwebview.pdf> 14.
[132] Queensland Public Interest Law Clearing House (n 102) 9.
[133] Ibid.
[134] Povey, McKernan, Husper and Webster (n 7) 8 [4.5].
[135] LawRight, 'Annual Report 2017-2018, *LawRight*, (Webpage, 2019) <http://www.lawright.org.au/_dbase_upl/1718LawRightAnnualReportwebview.pdf> 6.
[136] Ibid 7.
[137] Ibid 9.
[138] Queensland Public Interest Law Clearing House (n 102) 15.
[139] Ibid.
[140] Ibid.
[141] LawRight, 'Annual Report 2017-2018, *LawRight*, (Webpage, 2019) <http://www.lawright.org.au/_dbase_upl/1718LawRightAnnualReportwebview.pdf> 9.

and training for legal professionals and law students.[142] The community receives pro bono services and the clearing house receives collaboration in maximising its resources.[143] This collaboration with service providers is the model used to address areas of legal services (eg child protection) that are not being met.[144]

LawRight operates clinics that are used as a platform for law firms to provide assistance to marginalised individuals.[145] It enables them to determine the level of pro bono activity required, provide skills and experience, while retaining anonymity.[146] Benefits derived from this model include giving assistance to marginalised clients; a balanced spread of pro bono work between firms; a structured use of resources; monitored service requests based on area of need; and a forum for members of the legal profession to discuss interest issues.[147]

4 *Unbundling Legal Services*

Unbundling legal services ('unbundling') (also known as discrete task assistance, legal coaching,[148] limited scope representation, partial representation and discrete task representation)[149] provides services based on a specific area of legal need.[150] This provision of legal advice means that the litigant can impose limitations on the legal retainer and the work to be undertaken.[151] This differs from traditional legal representation because the lawyer does not assume responsibility for all aspects of the one case, and the litigant only obtains legal assistance, where necessary, for specific tasks and otherwise handles their own

[142] Queensland Public Interest Law Clearing House (n 102) 19.
[143] Ibid.
[144] Ibid 11.
[145] Ibid 10.
[146] Ibid.
[147] Ibid 18.
[148] Giddings and Robertson (n 69) 444.
[149] Ibid 52.
[150] Peter Salem and Michael Saini, 'A Survey of Beliefs and Priorities About Access to Justice of Family Law: The Search for a Multi-Disciplinary Perspective' (2016) Vol. 17, *Cardozo Journal of Conflict Resolution* 667.
[151] Hugh Macken, 'Step-In, Step-Out Litigation' (2003) 41 *New South Wales Law Society Journal*, 48-49.

case.[152] Accordingly, the self-represented litigant maintains control, albeit with an assurance of assistance if required.[153]

Unbundling has been viewed as a cost-effective alternative for those who do not have the financial resources to obtain full legal representation, especially if the matter is not complex.[154] It provides an alternative to those who may not meet legal aid funding requirements and provides for improvement in the quality of their legal self-representation.[155]

While the term may not be as familiar in Australia, unbundling has been practised for some time in the US[156] and Canada.[157] While the process is relatively the same,[158] US lawyers are provided with State Bar Association guidelines on how to ethically provide this service.[159] For example, the California Commission on Access to Justice provides that self-represented litigants must provide lawyers with written informed consent, any changes documented, and the lawyer must advise the self-represented litigant on matters, even if not requested.[160] Further, the California Rules of Court allow lawyers to prepare litigant documents without disclosing their (lawyer) identity.[161] In fact, the most commonly raised ethical objection to unbundling services relates to lawyers 'ghost writing' documents with the suggestion that it misleads the court.[162]

[152] Family Law Council Litigants in Person Committee (n 29) 3.43.
[153] Ibid.
[154] Buhai (n 40) 986-987.
[155] Family Law Council Litigants in Person Committee (n 29) 3.45.
[156] Ibid 3.40.
[157] M Bruineman, 'Chill effect on unbundling unnecessary', *Law Times News* (Online, 26 June 2017) <https://www.lawtimesnews.com/> cited in Canadian Forum on Civil Justice, 'Unbundled Legal Services and Access to Justice', *Canadian Forum on Civil Justice* (Blog, 2 October 2018) < http://cfcj-fcjc.org/a2jblog/unbundled-legal-services-and-access-to-justice/>.
[158] Buhai (n 40) 986-987.
[159] Ibid 987.
[160] Ibid.
[161] Ibid 986-987.
[162] Virginia Shirvington, 'No unbundling for Ethical Obligations' (2003) 41 *New South Wales Law Society Journal* 58.

In contrast, in Australia, there is a statutory obligation[163] to provide the court with the details of the lawyer who drafted the documents.[164] Given professional indemnity issues, the lawyer must make sure that the litigant is aware of their role, including limitations as to advice being restricted to particular legal services.[165] They must also emphasise their obligation to ensure that proper instructions are provided, their best interests are carried out and neither the court, nor any other party, is misled.[166] The use of unbundled legal services does not release the lawyer from their usual ethical obligations.[167] For example, if a lawyer drafts documents, their duty as a court officer and to the public remains.[168]

The Canadian position in relation to this service is similar to that of the US and Australian legal professions.[169] There is a requirement whereby the client receives documentation confirming the limited nature of the retainer and a clear outline of the scope of services to be provided.[170] Further, there are statutory obligations and responsibilities held to the litigant, the profession and the public. The main distinction is that, in Canada, these services can be undertaken with the expertise of a lawyer or paralegal.[171]

The US, Canadian, and Australian literature suggests that many litigants access unbundled services because they cannot afford legal representation under a retainer of unlimited scope, and have no other viable options.[172] Some earn too much to qualify for legal assistance, others may qualify, but do not

[163] *Legal Profession Act 2007* (Qld) s 152.
[164] Ibid.
[165] Family Law Council Litigants in Persons Committee (n 29) 3.48.
[166] Shirvington (n 162), 58.
[167] Ibid.
[168] Ibid.
[169] Bruineman (n 157).
[170] Ibid.
[171] Canadian Forum on Civil Justice, 'Unbundled Legal Services and Access to Justice', *Canadian Forum on Civil Justice* (Blog, 2 October 2018) < http://cfcj-fcjc.org/a2jblog/unbundled-legal-services-and-access-to-justice/>. The Law Society of British Columbia provides Rules of Professional Conduct for lawyers and Rules of Professional Conduct for Paralegals which provide guidance to professional and ethical standards in relation to these services.
[172] Giddings and Robertson (n 69) 450.

actually receive the assistance due to organisational funding limitations.[173] Accordingly, self-representation was something forced upon them rather than a choice.[174]

Even at reduced rates, unbundled legal costs may still be too expensive, especially if the issues are complex.[175] This may be seen as a substitute for proper legal representation.[176] A litigant who is educated and intelligent will probably understand their rights and obligations within the lawyer-client relationship, whereby those with limited education may not.[177]

Normative and empirical literature provides that there are circumstances whereby litigants want to be more active in their legal representation through taking on tasks normally undertaken by lawyers.[178] Sociological studies further suggest that power and control in lawyer-litigant relationships, albeit involving tasks and decision-making, remain part of this legal service.[179] These studies also suggest that this is a participatory model whereby the litigant's input is being taken seriously and provides a sense of contribution.[180]

While evidence has found that litigants are undertaking a larger role in their own legal service delivery,[181] they are not suitable for everyone. Self-represented litigants should have sufficient control and confidence, possess negotiation skills and operate in a context whereby emotions are not affecting the presentation of the case.[182] This is particularly important when there is a substantial power imbalance and

[173] Buhai (n 40) 979-980.
[174] Giddings and Robertson (n 69) 450.
[175] Buhai (n 40) 987-988.
[176] Gordon Renouf, Jill Anderson and Jenny Lovric, 'Pro bono opportunity in Discrete Task Assistance' (2003) 41 *New South Wales Law Society Journal*, 55.
[177] Shirvington (n 162) 59.
[178] Giddings and Robertson (n 69) 440-441.
[179] Ibid.
[180] Ibid.
[181] Ibid 52-53.
[182] Ibid 454.

the 'opposition' is powerful, skilled and well-resourced.[183] For example, in the context of court appearances, a self-represented litigant may not be sufficiently skilled to interpret legislation or to cross-examine witnesses with the requisite detachment that is often required.[184]

Some litigants are well-informed and skilled enough to address their cases adequately and may do so extremely well. Then there are those who have had some exposure to the court system, would prefer to have legal representation, but are unable to afford it or are unable to obtain publicly funded services.[185] Further, there could possibly be those who have no faith in lawyers and believe they can do a better job on their own.[186] Finally, there are those who suffer from disabilities, poor literacy, language barriers and difficulties in gaining access to technology. For them, self-help is not a viable option and they are reluctantly representing themselves.[187]

Unbundling is not without drawbacks. For example, questions have been raised as to whether the service should remain in simpler matters.[188] In its 2014 report on *Access to Justice Arrangements*, the Productivity Commission recognised that unbundling is not suitable for every matter, but it should not prevent its being made available to litigants where appropriate. However, even then, the service can be disruptive to the lawyer-client relationship.[189] For example, there could be inconsistencies and confusion as to the nature of the representation. Without definitive role division between the parties, the legal matter could be undermined.[190]

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[183] Ibid.
[184] Ibid 452.
[185] Renouf, Anderson and Lovric (n 176) 54.
[186] Giddings and Robertson (n 69) 450.
[187] Ibid 452.
[188] Ibid.
[189] S Beg and L Sossin, 'Should legal services be unbundled' cited in M Trebilcock, A Duggan, and L Sossin (eds) (2012) *University of Toronto Press* cited in Australian Government Productivity Commission, *Access to Justice Arrangements* (Productivity Commission Inquiry Report, September 2014) 646.
[190] Ibid.

Another issue is that lawyers who offer unbundling services may also face obstacles.[191] For example, some court rules provide no flexibility for unbundling in that, once a lawyer is on record, they remain on record.[192] Without leave of the court, these lawyers owe an obligation to the court to continue beyond their limited scope retainer, in order to 'satisfy justice'.[193]

Issues may also arise because of lawyer liability. Approximately 40 US states have changed their professional conduct rules to address issues including: 'whether the client's consent to limited representation should be in writing; what disclosure is required when a lawyer prepares a document but does not appear; how a lawyer withdraws from a case when they make a limited scope appearance; how practical issues are addressed, such as communications with opposing counsel; and how to protect clients from unscrupulous lawyers offering limited scope representation.'[194]

The Law Society for England and Wales released changes providing guidance on: 'duty of care to clients; clearly defining and staying within the retainer's limits; professional conduct duties to the client and the court; professional indemnity insurance and fees; and suggested schedules of services provided and not provided'.[195] The Law Society of Upper Canada (ie Ontario) has also updated its rules by requiring 'written confirmation of the limited scope retainer, as well as changes dealing with interpretation, professionalism and duty of care to clients'.[196]

[191] Centre for Innovative Justice, 'Affordable Justice: a pragmatic path to greater flexibility and access in the private legal services market' (RMIT University, October 2013) 28 cited in Australian Government Productivity Commission, *Access to Justice Arrangements* (Productivity Commission Inquiry Report, September 2014) 648-649.
[192] Ibid.
[193] Ibid.
[194] Ibid.
[195] Australian Government Productivity Commission, *Access to Justice Arrangements* (Productivity Commission Inquiry Report, September 2014) 649.
[196] The Law Society of Upper Canada, 'Unbundling legal services: limited scope retainers and unbundling of legal services, The Law Society of Upper Canada (Webpage, 2013) <http://web.archive.org/web/20180824183943/http://lsuc.on.ca/unbundling/> cited in Australian Government Productivity Commission, *Access to Justice Arrangements* (Productivity Commission Inquiry Report, September 2014) 650.

Australian lawyer associations have not followed this path, which may lead to some lawyers being reluctant to undertake unbundled services.[197] Experiences from the US, UK and Canada suggest that amending guidelines and professional conduct rules would provide greater confidence in entering into these limited-retainer relationships.[198]

The Productivity Commission does not consider these 'risks' to be intractable, as discrete task assistance and limited scope representation are already being provided in Australia.[199] Reforms similar to that of the US, UK and Canada were called for after the release of the Productivity Commission Report.[200] In particular, it was considered that reforms to the *Australian Solicitors Conduct Rules* should provide greater clarity to allow for greater use of unbundling services.[201] The Productivity Commission also agreed that rather than having 'blanket' immunity for unbundling service providers, normal liability rules should apply.[202]

As the practice of unbundling has become more common, the Productivity Commission, supported by the Law Council of Australia,[203] considered that there should be changes to both the court and professional conduct rules to facilitate a shift towards this service.[204] These changes have not eventuated.

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[197] Queensland Public Interest Law Clearing House, 'Proposal for the protection of community-based lawyers providing discrete task assistance to parties in the same proceedings', *National Legal Reform Taskforce* (Website, 23 July 2010) <QPILCH (Queensland Public Interest Law Clearing House) 2005, Costs in public interest proceedings in Queensland, Research Paper, 7 March, Brisbane 2009, Factsheet - Costs Orders, http://www.qpilch.org.au/resources/factsheets/ Costs_Orders.htm (accessed 5 December 2013) 2010, Proposal for the protection of community-based lawyers providing discrete task assistance to parties in the same proceedings - submitted to the National Legal Reform Taskforce, 23 July, Brisbane, http://www.qpilch.org.au/_dbase_upl/ Submission%20on%20Unbundling.pdf> cited in Australian Government Productivity Commission, *Access to Justice Arrangements* (Productivity Commission Inquiry Report, September 2014) 648-649.
[198] Centre for Innovative Justice (n 191).
[199] Australian Government Productivity Commission (n 195) 647.
[200] Ibid 650.
[201] Ibid.
[202] Ibid.
[203] Ibid.
[204] Ibid 20-21.

III CONCLUSION

This chapter has examined the various legal service options available to self-represented litigants and whether there has been a disadvantage to them because of a poorly designed legal system or a lack of access to representation.

Multiple factors have been identified that affect the self-represented litigants' ability to obtain legal representation or access to justice within Queensland child protection courts. Legal costs and funding eligibility (means and merit tests) are perhaps the most frequently discussed. Legal Aid is perhaps the most notable source of assistance for litigants in child protection proceedings. The US, Canada and Australia all subscribe to the provision of service plans to assist marginalised individuals to get legal supports based on a 'means and merits' test and funding 'caps'. This creates significant disadvantage to litigants by way of, for example, time constraints. If their legal aid funding is 'capped' and funds runs out, they will need to seek merits review, ask their lawyer to continue pro bono, or settle the matter without satisfaction.

This is not to say that the litigant does not have other options available to assist them in their child protection matter. Community legal centres, duty lawyers and co-production services (such as unbundling) can be supportive, however, they are limited to advice, information and administrative assistance. However, disabilities, poor literacy, language barriers or difficulty accessing technology are also barriers. Inadequate knowledge and understanding of processes and procedures creates a less than ideal setting, especially, when faced with a well-resourced opponent.

Regardless of the type of legal service options made available to self-represented litigants in Queensland child protection courts, various roadblocks may deny access to justice. This includes lack of funding

(Commonwealth overriding State interests); gaps in time and resources (pro bono and duty lawyer services); limited service capabilities (duty lawyer, CLC services); as well as the potential for limited service capacity (unbundling legal services).

CHAPTER 5 – ACCESS TO JUSTICE, CO-PRODUCTION THEORY AND THE RIGHT TO LEGAL REPRESENTATION

I INTRODUCTION

This chapter gives an account of the approaches underpinning the research: the concept and implications of access to justice, co-production theory and the right to legal representation. This account continues to identify problems arising through the child protection process, as well as the application of these approaches in Australia, the United States and Canada. Further, it will examine how they relate to the reasons why litigants self-represent in Queensland child protection courts (RQ1- RQ3).

II ACCESS TO JUSTICE

Access to justice is usually equated with equality, fairness and respect for individual rights and encompasses idealistic views of procedural and substantive justice.[1] For the purposes of this thesis, the Law Council of Australia's understanding of access to justice addresses the need to be able to present arguments to a court that are as legally and evidentially informed as possible. In its 'Justice Project', the Law Council of Australia indicated that 'access to justice' might include:

> getting the right information about the law and how it applies to you; …understanding when you have a legal problem and knowing what to do about it; …getting the right help with a legal problem, including from a lawyer; …being able to deal with your legal problem and being able to understand the outcome; and…making sure your voice is heard when laws are made.[2]

[1] M Castles, 'Expanding Justice Access in Australia: The provision of limited scope legal services by the private profession?' (2016) 41 *Alternative Law Journal* 2 115.
[2] Law Council of Australia, 'The Justice Project', *The Law Council of Australia* (Webpage, 2017-2020) <https://www.lawcouncil.asn.au/justice-project/access-to-justice>.

A major impediment to securing this access is that marginalised individuals are often hindered in their ability to obtain access to legal advice and representation.[3] There is no doubt that access to justice may be more readily obtained by those with a higher level of education and some level of financial means. With increasing legal costs, as well as legal aid funding being limited and narrowed to a particular range of matters, legal aid and community legal centres have attempted to assist litigants with access to justice. However, without firmly entrenched legal representation, this assistance can only go so far.

The 1970s saw the concept of access to justice emerge with an initial focus on Legal Aid[4] as an institutional means of providing legal representation that was, itself, taken to secure access. Over the decades, there has been increased attention to legal service provision but also a lack of agreement surrounding barriers to access, and how best to approach these untapped legal needs.[5]

Governments have two primary roles – to provide resources and to administer them.[6] Given the complexity of legal procedures, this lack of access is likely to impact on the ability of individuals to obtain a fair and impartial resolution to their legal problems.[7] This is more difficult for marginalised and disadvantaged litigants who cannot afford to pay for legal representation.[8] Where costs are so exorbitant that some litigants are unable to afford legal assistance, they effectively become excluded and their right to a fair hearing may be violated.[9] An example of the complexity involving government resources,

[3] 'Access to Justice', *United Nations and the rule of Law* (Government, 2019) <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>.
[4] Peter Salem and Michael Saini, 'A Survey of Beliefs and Priorities About Access to Justice of Family Law: The Search for a Multi-Disciplinary Perspective' (2016) 17.3 *Cardozo Journal of Conflict Resolution* 664.
[5] Ibid.
[6] J McHale, 'Access to Justice: A Government Perspective', (2012) 63 *University of New Brunswick Law Journal* 353.
[7] Ibid.
[8] Ibid.
[9] Ibid 11 [6.2].

including trained lawyers and case workers, is found in the US case of *Santosky v Kramer*.[10] In this case, it was found that:[11]

> The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predetermined limits restrict the sums an agency may spend prosecuting a given termination proceeding. The State's attorney usually will be expert on the issues contested and the procedures employed at the fact-finding hearing and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the state has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.

From 2013, the Queensland Law Society (through its Access to Justice and Pro Bono Law Committee) has undertaken an annual survey of lawyers to obtain their views about access to justice in Queensland.[12] This survey, known as the Access to Justice Scorecard ('Scorecard'), asks questions about how Queensland legislation is perceived and whether access to justice is being achieved.[13] The results are meant to be used as a tool to provide support for advocacy and awareness, as well as to provide meaningful change to Queenslanders' access to justice.[14] The purpose of the Scorecard is to engage with the legal profession in identifying barriers to accessing justice,[15] as well as identifying improvements required and offering solutions to address access barriers.[16]

[10] *Santosky v Kramer*, 455 US 745 (1982)
[11] Ibid 763.
[12] Queensland Law Society, 'Access to Justice Scorecard: evaluating access to justice in Queensland', *Access to Justice* (Queensland Law Society, 2016) 2.
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Ibid.

Annually, the survey seeks responses from those legal professionals to rate (on an increasing scale from 1 to 10) the state of access to justice in Queensland.[17] In 2019, the Scorecard was 5, which was a slight decrease from 5.2 in 2018 and from 5.33 in 2017.[18] These findings were consistent with previous years and revealed a number of predominant themes, including (but not limited to) the affordability of legal representation and inadequate legal assistance funding.[19]

Affordability for legal representation in more complex matters was considered (as per the previous three years) as being one of the top three barriers to accessing justice.[20] The other two significant barriers to accessing justice were inadequate funding of legal assistance services and the number of judges, magistrates or tribunal members in Queensland.[21]

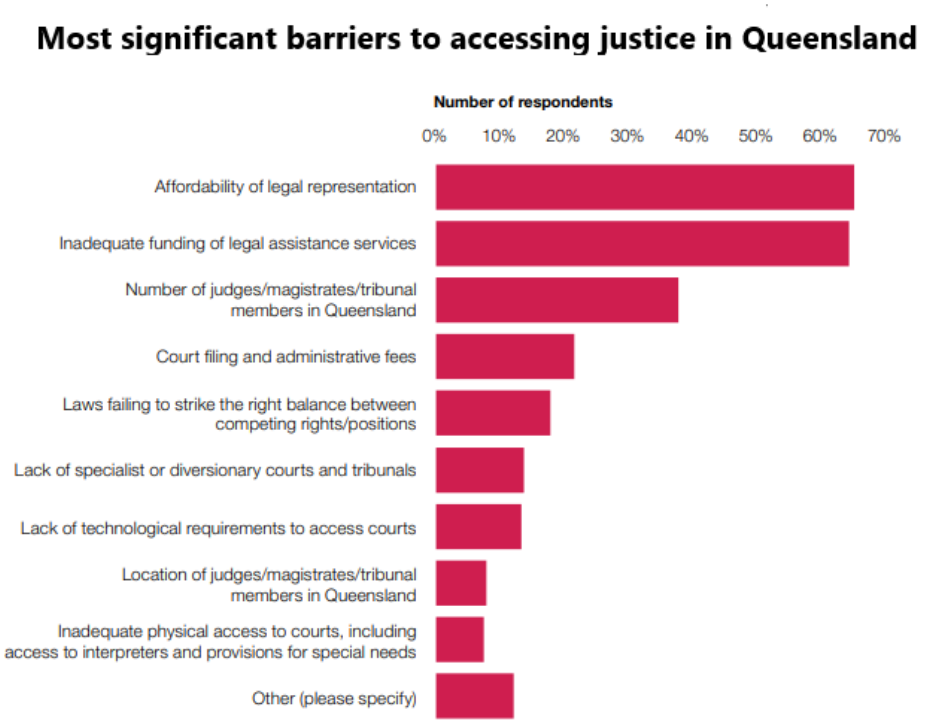

Figure 5.A: Most significant barriers to accessing justice in Queensland[22]

[17] Ibid.
[18] Queensland Law Society (n 12) 3.
[19] Ibid 4.
[20] Ibid.
[21] Ibid. The issue of the number of judges/magistrates/tribunal members in Queensland will not be discussed in this thesis but may provide a platform for further research.
[22] Ibid 5.

Respondent views were expressed across a broad demographic of both young and senior lawyers, small and large firms, rural and regional areas, as well as Brisbane-based practitioners.[23] While no statistical information is available for 2020,[24] in 2019, 21 per cent stated that their practice was in southeast Queensland, with just under a majority of respondents from Brisbane (48 per cent).[25]

The best support for access to justice in Queensland was identified as pro bono work by lawyers, followed closely by improvements in technology.[26] This is an upward trend from 2019, when the scope and quality of legal funding were closely followed by pro bono work.[27] There is a reported drop in the quality and scope of legal assistance services. This area decreased from 55 per cent (2016), as an area best supporting access to justice, to 32 per cent (2019).[28] The explanation given for this decrease was that there was a strong need for improvements rather than a decrease in pro bono services or the actual quality and scope of legal assistance.[29]

III CO-PRODUCTION THEORY

Co-production theory can be best described as a theory of a collaborative approach to legal services whereby the lawyer and client bring their unique positions and skills to the transaction.[30] Thus, the approach relieves the client of exclusively inhabiting the role of a 'consumer' and the lawyer as being the exclusive sole 'supplier'.[31] To be successful, co-production must have a genuine impact on the self-

[23] Queensland Law Society (n 12)12.
[24] All information provided in the thesis is current as at 31 December 2020.
[25] Ibid 12. No statistical data was available in the 2020 Access to Justice Scorecard report.
[26] Queensland Law Society (n 12) 5.
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] Michael Robertson, 'Principal, producer and consumer: the client's role in the co-production of lawyers' services' (2002) 6(1) *The Newcastle Law Review* 36.
[31] Ibid.

represented litigant's trust in the service provider.[32] However, questions of power, influence and control over decision making may yield more trouble than benefit.[33]

Co-production has been viewed as 'engaging customers as active participants in the organisation's work'.[34] It has advantages and disadvantages for both parties.[35] For lawyers, litigant participation can spread the workload to some degree, but can be disadvantageous in that it can bring uncertainty to the process, undermine work quality, or cause harm to a firm's reputation.[36] In contrast, two litigant benefits flow from the practice of co-production: (1) it allows participation (while lowering legal costs); and (2) it gives a greater sense of litigant satisfaction.[37] Disadvantages include questions of who maintains power, influence and control,[38] which ultimately determines who wields decision-making control in the co-production relationship. The overarching goal is to deliver a successful and appropriate outcome for the client; thus, the parties must negotiate and develop their roles and tasks on the basis of their individual strengths.

There are a number of reasons why a client's involvement may vary in service delivery and co-production. First, the nature of service delivery is constantly evolving. For example, legal services have 'well developed rules and established guidelines' which tend to make the client's role limited.[39] The issue of control by the lawyer may also have significant implications for this involvement.[40] Further, client

[32] Ibid.
[33] Ibid.
[34] Ibid.
[35] Ibid 41.
[36] Ibid 41, 51.
[37] Seigyong Auh, Simon J Bell, Colin S McLeod, and Eric Shih, 'Co-production and customer loyalty in financial services' (2007) 83 *Journal of Retailing* 360.
[38] J Heniz (1983) 'The Power of Lawyers' 17 *Georgia Law Review* 891; S Herr (1989/1990) 'Representation of Clients with Disabilities: Issues of Ethics and Control' 17 *New York University Review of Law and Social Change* 609; Kritzer (1998) cited in Robertson (n 30) 48.
[39] P Mills and J Morris, 'Clients as "Partial" Employees of Service Organizations: Role Development in Client Participation' (1986) 1(4) *Academy of Management Review* 727-728 cited in Robertson, (n 30) 40.
[40] Ibid.

participation may be hindered where services are more complex.[41] Regardless of the reasons, client motivations and attitudes are important as some clients may expect to actively participate in the process, while others may not.[42] For example, a client may have a high level of emotional attachment to their matter which may challenge the extent of control the lawyer may have in meeting service provision demand.[43] Another factor that may influence this relationship is the financial cost to the client (another control factor).[44] The client may be influenced by perceived issues regarding the quality of their involvement and the trust held in the lawyer.[45] The importance a client places in service participation may vary owing to the nature of the services required and the expectations held by both parties.

Mills and Moshavi suggest that there are two 'client control mechanisms' which provide both client advantages and disadvantages.[46] For example, a client's reliance on the lawyer's skills and knowledge is valuable for advocacy. However, it does have the ability for the lawyer to exert control, as well as, at times, abuse power (and inevitably trust).[47] The client's 'psychological attachment' involves the client-lawyer relationship being based on equal standing, eg a peer-type relationship with the lawyer.[48] This may not be conducive as the lawyer's ability to assert authority (where required) will be limited and may cause the client to lose trust in this relationship. [49]

Client involvement in service delivery can also be beneficial if quality and productivity are increased.[50] Despite a lack of experience, the more involvement clients have with their matter, the more satisfaction

[41] P Mills and D Moshavi, 'Professional concern: managing knowledge-based service relationships' (1999) 10(1) *International Journal of service Industry Management* 48 cited in Robertson (n 30) 40.
[42] Ibid.
[43] Robertson (n 30) 40.
[44] Ibid.
[45] Mills and Morris (n 39).
[46] Mills and Moshavi (n 41) 41.
[47] Ibid.
[48] Ibid.
[49] Ibid.
[50] Mills and Morris (n 39) 41.

they may receive.[51] This may include knowledge of being able to say that they did all they could for their family. The lawyer may also experience satisfaction as they are able to provide their client with a level of knowledge about their role in co-production,[52] including the unbundling of legal services.

A *Unbundling Legal Services*

The unbundling of legal services was introduced in Chapter 4.[53] They are increasingly part of the regular practice of the Australian legal profession.[54] Many lawyers are familiar with the practice, but not the term[55] and information on client participation in is rare.[56] This service requires a negotiated understanding between the lawyer and client as to how the co-production of service is to be provided. In contrast to the traditional provision of legal services, unbundling sees the client as an active participant, performing tasks normally undertaken by a lawyer.[57] This increases the client's role in production, while the lawyer's services, depending on the client's needs,[58] are correspondingly reduced. Thus, these needs are what drive the client and gives them greater task responsibility.[59] Clients can contribute to the legal service delivery in various ways. They can specify the direct roles each party will provide[60] and, perhaps more importantly, they can supply the knowledge and information required to make the lawyer's role possible.[61] For example, there are situations where the parties may decide that the lawyer will undertake the majority of the work, including evaluating the client's prospects; preparation and negotiation; trouble shooting

[51]C Lovelock and L Wright, *Principles of Service marketing and Management* (Prentice Hall, 1999) 59 cited in Robertson (n 30) 42.
[52]Ibid.
[53] Chapter 4, Part 2C, 4 – Unbundling Legal Services.
[54] Robertson (n 30) 54.
[55] Ibid 55.
[56] J Giddings, J Dewar and S Parker, 'Being Expected to do More with Less: Criminal Law Legal Aide in Queensland, (1999) 23 *Criminal Law Journal* 69 cited in Robertson (n 30) 55.
[57] Robertson (n 30) 36.
[58] Ibid.
[59] Ibid.
[60] R Normann, *The client as customer – the client as co-producer* (Services Management, 2nd ed, John Wiley and Sons, 1991) 467 cited in Robertson (n 30) 38.
[61] M Bitner, W Faranda, A Hubbert and V Ziethaml, 'Customer contributions and roles in service delivery' (1997) 8(3) *International Journal of Service Industry* Management, 197 cited in Robertson (n 30) 38.

(including trial); and assistance with appeals.[62] The expectation is that, the harder and more complex the task, the greater the need for the lawyer's skill and expertise.[63] However, at the other end of the spectrum are those relationships where the parties agree that the client will bear the greater responsibility for task performance, thus making them more active co-producers.[64]

An example of unbundling services as a means of co-production is the case of *Yarnold v JL & MT.*[65] In this case, the parents were self-represented. However, the affidavit material filed on behalf of each parent had been prepared by lawyers (unbundling) and it was clear that the mother had prepared her case with legal assistance (co-production).[66] Her lawyers advised the Queensland Children's Court that they did not hold a grant of legal aid, had not had contact with the mother for some months, and had advised her that they were not in a position to continue representing her. The Court was satisfied, on the balance of probabilities, that each parent had a reasonable opportunity to obtain legal representation.[67] Accordingly, regardless of any preconceived idea of superiority that may be held by the litigant towards the lawyer, co-production theory cannot work without a mutual level of participation. However, this does not come without its burdens. For example, a litigant may find the process overwhelming and complex and may not be able to cope with the emotional stress that comes with participation. Others may simply not care about the details as long as the process is being handled appropriately.[68] It may be inferred that the litigant's involvement in their own representation may be difficult, time consuming, and lacking in detachment.

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[62] Wisconsin Lawyer, 'Mosten's Model for Unbundling' (State Bar of Wisconsin, September 1997) <https://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=20721>.
[63] F Mosten, 'Unbundling of Legal Services and the Family Lawyer' (1994) 28(3) *Family Law Quarterly* 421, 425 cited in Robertson (n 30) 54.
[64] Robertson (n 30) 39.
[65] *Yarnold v JL & MT* [2009] QChCM 2.
[66] *Yarnold v JL & MT* [2009] QChCM 2 [4].
[67] Ibid [5-6].
[68] Douglas E Rosenthal (1974*) Lawyer and Client: Who's in Charge*? Russell Sage Foundation cited in Michael Robertson (2002) 'Principal, producer and consumer: the client's role in the co-production of lawyer's services' 6 (1) *Newcastle Law Review* 52-53.

B *Lawyer-Client Participation Relationship*

Lawyers' services are generally based on their expertise and skillset to provide effective legal representation.[69] In Australia, the lawyer's role with the client is based on authority provided within agency contract principles.[70] The agency contract determines the basis of the lawyer-client relationship under the scope of the retainer.[71] There can be no representation without this agency relationship. Agency law mandates that the lawyer follows the client's directions, effectively placing the client 'in charge'.[72] However, this does not mean the lawyer has no independent discretion as to how the work is undertaken, as they are deemed to be an expert in their field.[73] One could easily assume that the lawyer has control based on their expertise.[74] However, in legal terms, the agency relationship means that it is the client who has the final say.[75] Thus, communication between the parties is vital, yet remains mixed within issues of power and control in relation to the client's participation in the service provision.[76]

This issue of control is very relevant in co-production.[77] One party's influence may be used to control the task division.[78] There is some suggestion that the issue of 'control' may never be answered.[79] However, there has been some support for the 'professional dominance and lay passivity' which implies minimal

[69] Australian Law Reform Commission, *Review of the federal civil justice system* (Discussion Paper No. 62, August 1999) cited in Robertson (n 30) 43.
[70] Mills and Moshavi (n 41) 44.
[71] G Dal Pont, *Lawyers' Professional Responsibility* (7th ed, 2021) 93.
[72] Ibid.
[73] Mills and Moshavi (n 41) 44.
[74] Robertson (n 30) 47.
[75] Ibid.
[76] Ibid 46.
[77] William LF Felstiner and Austin Sarat, '*Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions' (1992)* 77 Cornell Law Review 1482-1483 cited in Robertson (n 30) 49.
[78] Ibid.
[79] Robertson (n 30), 'Principal, producer and consumer: the client's role in the co-production of lawyers' services' (2002) 6(1) *The Newcastle Law Review* 49.

client involvement,[80] as well as support indicating that clients must be able to exercise some form of control.[81]

Complexity is readily assumed in legal service co-production and the prospect of client participation, while assumed in co-production, may be difficult.[82] Some complex legal services are susceptible to unbundling services, but there may be limitations.[83]

In the initial stages of their legal matter, clients engage with lawyers by communicating their legal interests and goals and assuming responsibility for service information and provision of instructions.[84] However, owing to their inherent complexity, legal matters (eg child protection) are continually evolving and rarely straightforward. Accordingly, there is consistent negotiation between the parties as to who holds power at what point in the service provision.[85] Some degree of control over clients may be important,[86] as the service provision is set in the lawyer's 'environment' and, as such, they tend to assume a majority of control over the work.[87] The client may become vulnerable and influenced into participation, especially in decision-making.

The lawyer, however, never has sole control over the legal service production.[88] While client participation can be unpredictable, the degree of participation will depend on the influence that both parties wield.[89] Even if client participation is 'mandatory' (eg provision of information) the lawyer should still hold a

[80] Austin Sarat and William LF Felstiner, *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process (Oxford University Press, 1995)* 19-20 cited in Robertson (n 30) 49.
[81] Ibid.
[82] Mills and Moshavi (n 41) 59.
[83] Mosten (n 63) 59.
[84] Felstiner and Sarat (n 77) 50.
[85] Ibid.
[86] Robertson (n 27) 56.
[87] L Mather, RJ Maiman and CA McEwan, "'The Passenger Decides on the Destination and I Decide on the Route': Are Divorce Lawyers 'Expensive Cab Drivers?'" (1995) 9 *International Journal of Law and the Family* 286 cited in Robertson (n 30) 57.
[88] Robertson (n 30) 58.
[89] Ibid.

degree of control[90] as they may perceive a risk to service quality and their reputations[91] should clients' ability to undertake tasks fall short.[92] Thus, they may prefer to retain control over their service production, especially where there are ethical concerns and the threat of liability or negligence.[93]

The emphasis in this approach is that clients are seeking active involvement in identifying problems, solutions and decision-making.[94] They seek a larger role in addressing their legal problems as they have an intimate knowledge of their social, economic and psychological problems[95] (ie they know their matter better than anyone else). Lawyers need to include practices to identify problems from the client's point of view, involving them in finding solutions, and encouraging them to be pro-active in the decision-making process. [96] Access to justice is more than just a physical ability to appear before a court, it is having the capacity to present arguments that are fully informed by the law and the evidence that it allows to be tendered. The role of co-production in securing access to justice is assumed to be that, together, the lawyer and client can present arguments that are as legally and evidentially informed as possible.[97]

IV THE RIGHT TO LEGAL REPRESENTATION

In considering self-representation, it is important to examine the right to legal representation.[98] It has been maintained that a right to self-representation co-exists with a right to legal representation or, at least,

[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] D Binder, P Bergman and S Price, *Lawyers as Counsellors: A Client Centred Approach* (West Publishing Co, 1991) 18 cited in Robertson (n 30) 51.
[95] Ibid.
[96] Ibid 52.
[97] I.e. in accordance with the understanding of access to justice as set out in the text at n 2.
[98] Family Law Council Litigants in Person Committee, *Litigants in Person* (Report to Commonwealth Attorney-General's Department, August 2000) 1.45.

is a subset of the right to be heard.[99] Once parties have exhausted all efforts to come to an agreement, and there is clearly a need for court proceedings, the rule of law provides that there should be access to justice through the court.[100] Self-represented litigants, perhaps more than any other litigant, may require the principles of fairness, access to justice, legality and competence to be put forward on their behalf as prerequisites for obtaining legal representation.[101] Otherwise, they are likely to face disadvantage owing to a possible lack of procedural fairness and the due process afforded by these same principles.[102]

1 *Lack of Information*

Information on self-represented litigants is generally not readily available (or accessible) from court management systems and, on the basis of the literature reviewed, there have been few attempts to collect such information.[103] This is reflective of an overall lack of statistical information about the court, as well as its users, and the impact on court resources, which are contributing factors to poorly coordinated court systems.[104] For effective policy and program development, access to justice should be based on true quantitative data and planning supported by appropriate research.[105] Courts likely limit their information to that which is relevant to operations and administration rather than a broad stream of information.[106]

[99] Family Law Council Litigants in Person Committee, (n 98) 15 as cited in Elizabeth Richardson, Tania Sourdin and Nerida Wallace, 'Self-Represented Litigants: Literature Review' (Australian Centre for Court and Justice System Innovation, 2012) 15.
[100] Tom Bingham, *The Rule of Law* (Penguin Group (Australia), 2010) 86. Note that Lord Bingham identified access to justice as an aspect of speedy and cost-effective dispute resolution, and not as other aspects of the rule of law such as equality before the law, or substantive or procedural justice.
[101] John Dewar, Barry Smith and Cate Banks, *Litigants in Person in the Family Court of Australia – Research Report No 20* (Family Court of Australia, 2000) as cited in Elizabeth Richardson, Tania Sourdin and Nerida Wallace, 'Self-Represented Litigants: Literature Review' (Australian Centre for Court and Justice System Innovation, 2012) 14-15.
[102] Australian Law Reform Commission, 'The unrepresented party' (Adversarial Background Paper 4, Australian Law Reform Commission, December 1996 as cited in Elizabeth Richardson, Tania Sourdin and Nerida Wallace, 'Self-Represented Litigants: Literature Review' (Australian Centre for Court and Justice System Innovation, 2012) 15.
[103] Australian Institute of Judicial Administration, 'Litigants in Person Management Plans: Issues for Courts and Tribunals' (2001) Vol. 29, *Australian Institute of Judicial Administration Incorporated* 9-10.
[104] Ibid.
[105] McHale (n 6) 359.
[106] Elizabeth Richardson and Tania Sourdin, 'Mind the gap: Making evidence-based decisions about self-represented litigants' (2013) 22(4) *Journal of Judicial Administration* 195-196.

Accordingly, there is little recent qualitative data about self-represented litigants that can assist to explain their judicial experiences.[107]

2 *Commonwealth/State Divide*

In 1996, Legal Aid Queensland introduced the so-called 'Commonwealth/State divide'.[108] The Commonwealth may grant funding assistance to states or territories on any terms or conditions it sees fit,[109] and the states or territories must adhere to these conditions to retain federal legal aid grants. These 'tied grants' are generally linked to a particular purpose, with the Commonwealth able to give effect to policy matters within the states and territories' residual powers.[110]

The Australian Constitution allows states and territories and the Commonwealth to fundraise. However, the Commonwealth has significantly greater abilities in this capacity, where states and territories have greater responsibilities in allocating these funds.[111] This results in states and territories being reliant on 'tied grants' to fund state-based services.[112] The Commonwealth's power has expanded to distribute funds conditionally to states and territories, thus limiting the autonomy of the states and territories in controlling policy.[113]

With respect to legal services, the division of responsibility between Commonwealth, state and territory governments, as well as that of the Public Purpose Funds,[114] has led to confusion as to which level of

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[107] Ibid.
[108] Senate Legal and Constitutional Affairs Committee, 'Inquiry into Access to Justice', *Australian Human Rights Commission* (Legal Submission, October 2009) 10 <https://www.humanrights.gov.au/sites/default/files/content/legal/submissions/2009/20091020_access_justice.pdf>.
[109] *Australian Constitution*, s 96.
[110] Senate Legal and Constitutional Affairs Committee (n 108).
[111] Ibid.
[112] Ibid.
[113] Ibid.
[114] Public purpose funds are obtained from the interest on solicitors' trust accounts and are allocated for legal aid, community legal centres, as well as pro bono services. The Public Purpose Fund in Queensland, which was called the Legal Practitioner's Interest on Trust Accounts Fund, was closed in 2016, and transferred to Consolidated Revenue: *Legal*

government holds principal responsibility for state-funded legal assistance.[115] The Law Council of Australia, which is opposed to this funding divide, has recommended that the Commonwealth find a way to allow the transfer of funds to priority areas of disadvantage rather than waiting on the enactment of legislation.[116] The paramount concern regarding this divide is the dislocation of funding responsibility. For example, while the Commonwealth has responsibility for matters falling within federal legislation (eg family law matters), related civil services such as child protection fall under state and territory legislation and are to be funded by the relevant state or territory.[117] To continue with this funding arrangement means that state and territory governments, while maintaining their Commonwealth grants solely for federal based matters, will see an increase in self-represented litigants in civil matters.[118] Thus, there will be increased court costs arising from the inefficiencies of extended trials, delays, retrials, as well as poorer outcomes for litigants.[119]

3 *Co-production: legal representation and self-representation*

There are many legal service options available to assist litigants in accessing justice within Queensland. These include government services (eg Legal Aid Queensland) and pro bono services.[120] However, the high cost of obtaining legal assistance, coupled with dwindling Legal Aid funding, means that access to legal services continues to be a pressing issue.[121] Accordingly, as this impediment to access to justice has no readily available solution, there is a rise in clients seeking to 'shop' for consumer-based legal assistance,[122] eg co-production services (unbundling).

Profession Act 2007 (Qld) s 783; *Limitations of Actions (Child Sexual Abuse) and Other Legislation Amendment Act 2016* (Qld) s 18.
[115] Ibid.
[116] Ibid 12.
[117] Ibid 11-12.
[118] Ibid 29.
[119] Ibid 29.
[120] Chapter 5, Part 3 – Co-Production Theory.
[121] Robertson (n 30) 59.
[122] Ibid.

However, co-production, while organised to assist clients to obtain some form of advocacy, is not a comprehensive answer to accessing justice. These services have been organised to aid litigants in obtaining legal assistance, yet the solution is not always practical. It does not address the fundamental needs of a litigant being able to afford access to justice.[123] The fundamental question remains whether the Queensland government is prepared to provide socially available access to justice for those self-represented litigants facing trial in Queensland child protection courts.

The challenges posed to self-represented litigants are substantial, as access to justice would be frustrated if denied to litigants on the basis that they were not familiar with the adversarial process.[124] Courts continue to deal with the question of 'how far is too far' with respect to assisting these litigants, so as to avoid any perceived bias or unfairness resulting from a lack of process and procedures. [125]

To date, there has been limited empirical research that considers the different types of legal matters that may be more readily open to self-representation.[126] The literature has canvassed legal self-help approaches, but its focus relates more generally to the perceived increase solely in litigious matters.[127] This research tends to be silent as to experiences and perspectives of self-represented litigants.[128]

US research suggests that litigants from lower socio-economic backgrounds, with limited education, are unlikely to seek out support for their civil legal issues[129] – including those relating to child protection -

[123] Ibid.
[124] Sande L Buhai, 'Access to Justice for Unrepresented Litigants: A Comparative Perspective' (2009) 42(4), *Loyola of Los Angeles Law Review* 996.
[125] J Goldschmidt, 'Self-Represented Litigants: Lessons from the Canadian Experience' (2009) 17 *Michigan State Journal of International Law* 602.
[126] M Lawler, J Giddings, and M Robertson, "Opportunities and Limitations in the Provision of Self-Help Legal Resources to Citizens in Need" (2012) 30(1) *Windsor Yearbook of Access to Justice* 189.
[127] Ibid 187.
[128] Ibid.
[129] Legal Services Corporation, 'The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans' (NORC at the University of Chicago for Legal Services Corporation, 2017) 29.

with 48 per cent seeking professional assistance in relation to children's matters.[130] When help is not sought, these litigants turn to other forms of legal assistance, including friends and family (33 per cent) and internet searches (13 per cent).[131] Twenty-four percent of litigants cited the most common reason for which they self-represent is that they believe they can handle the matters on their own.[132] The second most common reason cited (22 per cent) is that they do not know what assistance is available or where to find it.[133] Other reasons provided included costs of seeking help (14 per cent), not enough time to resource help (13 per cent), and fear of pursing litigation (12 per cent).[134]

As in the US and Australia, there is little data regarding the number of self-represented litigants in Canada. This makes it difficult to form any determinations about service demand to capacity.[135] However, the Alberta Self-Represented Litigants Mapping Project ('Mapping Project') was designed to review the different government and non-government support services available to assist self-represented litigants.[136] Among its objects were recording and sharing information to increase referrals, examining and coordinating these referrals to collaborative organisations, identifying service needs, and determining problems and issues faced in accessing services.[137]

It was found that groups with annual incomes below CAD35,000 may self-represent once they become involved in litigation.[138] While half surveyed had incomes below CAD15,000, their education was held to be above average,[139] with between 80-96 per cent having completed high school, and approximately

[130] Ibid 30.
[131] Ibid 33.
[132] Sarah Sternberg Greene, 'Race, Class and Access to Civil Justice' (2016) 101 *Iowa Law Review*, 1263-1321; Rebecca L Sandefur, 'Accessing Justice in the Contemporary United States. Finding from the Community Needs and Service Study' (2014) American Bar Foundation and University of Illinois at Urbana-Champaign cited in Legal Services Corporation (n 129) 33.
[133] Legal Services Corporation (n 129) 33-34.
[134] Ibid.
[135] M Stratton, 'Alberta Self-Represented Litigants Mapping Project Final Report' (Canadian Forum on Civil Justice, 2007) ix.
[136] Ibid v.
[137] Ibid v-vi.
[138] Ibid 10.
[139] Ibid.

60-65 per cent having some tertiary qualifications.[140] This research contradicts the perception held that litigants from lower-socio economic backgrounds have below average literacy and comprehension skills.[141]

In Australia, Walsh and Douglas conducted two studies on the Queensland child protection system.[142] One study included community service providers and the other involved child protection lawyers.[143] The first five focus groups involved 32 community service providers engaged in direct service delivery and had client bases consisting mainly of mothers whose children were in the care of child protection.[144] These focus groups were selected to collect data on the basis that community service providers generally work as a team, and a key advantage is that they are able to discuss problems with their peer group as they have a firm knowledge of the issues.[145]

The second study involved 26 Queensland child protection lawyers with substantial experience working either privately or within agencies such as Legal Aid or CLCs in Brisbane, Townsville, or Cairns.[146] All had represented parents or children and three had previously worked within child protection departments.[147]

Predictably, the lawyers in these two studies believed strongly in their role and the unique skills sets they brought to cases.[148] Other professionals agreed that, while parents do require assistance, they were not convinced it had to be undertaken by a lawyer.[149] Interestingly, professional positions changed in relation

[140] Ibid.
[141] Ibid.
[142] Tamara Walsh and Heather Douglas, 'Lawyers, Advocacy and Child Protection' (2011) 35(2) *Melbourne University Law Review* 19 624.
[143] Ibid.
[144] Ibid 625.
[145] Ibid.
[146] Ibid.
[147] Ibid.
[148] Ibid 624.
[149] Ibid.

to child protection matters as it was found that specialist advocacy is required to achieve the best outcomes in relation to a child.[150]

A *Right to State Funded Legal Representation*

There is no immediate legislative right to state-funded legal representation in child protection matters within Australia, Canada or the US. There are, however, significant differences in their recognition of their right to legal representation in child protection matters.[151] It should be emphasised that the following account of the right to legal representation in these countries indicates the prevailing legal position and makes observations as to which countries provide greater access to law through legal representation than others. However, these are merely observations of what the law is and what it might achieve in Australia, Canada, and the United States. No normative claim is made as to what the law relating to the right to legal representation ought to be.

1 *Australia*

In Australia, criminal law provides the setting for adjudication on the right to representation. However, the question arises as to whether there is a comparable right in child protection matters. The common law right to a fair trial, in relation to state-funded legal representation, has been confined to the 'serious' 'criminal' 'trial'.[152] It forces an acceptance of serious criminal trials to be automatically eligible for state-funded legal representation. This, therefore, affects Legal Aid funding for other matters (eg child protection) in an environment where the demand is increasing.[153]

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[150] Ibid.
[151] The cases referred to in the following account have been identified through an exhaustive search of Australian, Canadian, and US decisions relating to the right to assistance of counsel in child protection matters. For the United States, Lexis Nexis and Thomson Reuters Westlaw have been undertaken, and for Australia and Canada, Austlii, Canlii, Lexis Nexis and Thomson Reuters Westlaw have been undertaken. All cases identified are included in the following account.
[152]Sally Kift, 'The Dietrich Dilemma' (1997)16 *Queensland University of Technology Law Journal* 233-234.
[153] Ibid.

The leading case in relation to criminal state-funded legal representation is that of *Dietrich v R.*[154] This case established that litigants charged with serious criminal matters are entitled to have their proceedings stayed when a lack of legal representation would result in an abuse of process. However, to date, there is no authority requiring a stay of proceedings on the basis of inadequate legal representation in any civil matter (including child protection), regardless of the consequences.[155] In this case, Dietrich had been charged with importation offences under the *Customs Act 1901* (Cth). Prior to his trial, he applied for, and was refused, a grant of legal aid for representation.[156] He was found guilty and his request for leave to appeal was refused.[157] At trial, the judge noted that he had no power to provide him with state-funded legal representation, nor would he adjourn the matter.[158]

Dietrich sought an appeal to the Victorian Court of Criminal Appeal and, when that was refused, he sought leave to appeal to the High Court of Australia.[159] The basis of his appeal was that there had been a miscarriage of justice and that he should have been provided state-funded legal representation based on the severity of the charges against him or, alternatively, the matter should have been adjourned to allow him to obtain legal representation.[160] Although, in Australia, there is no constitutional right to civil state-funded legal representation, Dietrich relied on Australia's obligations (as a signatory) under international law, particularly the United Nations International Covenant on Civil and Political Rights ('ICCPR').[161] Article 14(3) of the ICCPR provides that there should be legal assistance 'in any case where the interests of justice so require'.[162] While Australia has yet to implement this covenant domestically,[163] Dietrich held that the common law should be held to the standard provided by the ICCPR.[164] The court

[154] *Dietrich v R* [1992] HCA 57; *R v Chaouk* (2013) 40 VR 356; *MK v Victoria Legal Aid [2013] VSC 49.*
[155] Walsh and Douglas (n 142) 644.
[156] Kift (n 152).
[157] Ibid.
[158] Ibid.
[159] *Dietrich* (n 154) 37.
[160] Kift (n 152).
[161] Dietrich (n 154) 17-20.
[162] Ibid.
[163] Ibid.
[164] Ibid.

found that this was a legislative issue and that they were being asked 'to declare that a right which has hitherto never been recognised should now be taken to exist.' [165]

The priority afforded to state-funded legal representation in criminal matters comprises two parts. The first is that of equality, fairness and justice, seeking to redress a power imbalance when the state is the other party.[166] It is worth emphasising that this imbalance is not limited to conditions in criminal prosecutions; it is also often likely to be present in child protection matters.[167]

The second justification is the seriousness of consequences faced by the litigant; ie, long-term imprisonment.[168] Again, it is worth emphasising that child protection matters also have serious consequences, ie termination of one's parental rights.[169] The right to 'the companionship, care, custody, and management of his or her children' is an important parental interest that demands respect and admiration, absent a powerful need for child protection.[170] Once the state becomes vested in the child's welfare, it is meant to share the parents' interest in finding an accurate and just outcome.[171] This is best served when both parties are legally represented.[172] Without this consideration, the risk is that the parent may lose their child due to lack of legal representation.[173]

Not unlike *Dietrich,*[174] the Queensland case of *BWD v Department of Communities (Child Safety) ('BWD')* also addresses the question of whether the appellant father had been disadvantaged in not being aware of his legal rights and whether the primary hearing should have been adjourned to allow him to

[165] Ibid 20.
[166] Kift (n 152) 231.
[167] Ibid.
[168] Ibid.
[169] Ibid.
[170] Ibid.
[171] Ibid.
[172] Ibid.
[173] Ibid.
[174] *Dietrich v R*; *R v Chaouk*; *MK v Victoria Legal Aid* (n 154).

obtain new legal representation.[175] Like *Dietrich*,[176] the father's appeal was based on his not being legally represented and that, without a new hearing, the process would not have satisfied principles of natural justice or procedural fairness.[177] The Children's Court, in its appellate jurisdiction, agreed and found that the father had been disadvantaged, both at the hearing and in conducting the appeal, by not being legally represented and being incarcerated.[178]

However, in distinguishing *Dietrich*,[179] it was held that the magistrate had taken great care to explain the process, procedures and relevant provisions of the Act.[180] There is no evidence that the father had used any form of co-production, and he had not provided coherent and relevant evidence and submissions prior to the original decision being made.[181] Ultimately, this formed the basis of his appeal which, despite the disadvantages he had suffered, was dismissed.[182] It is clear that litigating in court can be a stressful experience for self-represented litigants, especially when emotions run high and objectivity is potentially lost.[183] However, the mere provision of information on court processes and procedures will not benefit some litigants, no matter how simple or accessible.[184]

The question that remains is whether due process was observed equally in both *Dietrich*[185] and *BWD*.[186] The cases seem, at first glance, to be similar. However, the overarching difference being that one is a criminal matter (thus guaranteed federal funding based on the Commonwealth/State divide[187] principle), whereas the other is a civil matter (dependent on state-funding and more stringent Legal Aid tests).

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[175] *BWD v Department of Communities (Child Safety)* [2013] QChC 2.
[176] *Dietrich v R* (n 154).
[177] *BWD v Department of Communities* (*Child Safety*) (n 175).
[178] Ibid.
[179] *Dietrich v R*; *R v Chaouk*; *MK v Victoria Legal Aid* (n 154).
[180] *Child Protection Act 1999* (Qld).
[181] *BWD v Department of Communities (Child Safety)* (n 175).
[182] Ibid.
[183] New Zealand Law Commission, *Dispute Resolution in the Family Court* (Report No 82, 1985).
[184] Ibid.
[185] *Dietrich v R*; *R v Chaouk*; *MK v Victoria Legal Aid* (n 154).
[186] *BWD v Department of Communities (Child Safety)* (n 177).
[187] See page 15.

As discussed below, *Dietrich*[188] also relied on both US and Canadian precedents to form a successful argument for state-funded legal representation. These are the same authorities that give the judiciary a discretion in determining legal aid eligibility for indigent, disadvantaged and marginalised litigants in non-criminal matters. These cases have provided fundamental fairness in that they consider the right to legal representation only when there may be a deprivation of physical liberty.[189] Everything else in the decision-making process is measured against this presumption.[190]

2 *Canada*

Not unlike the position in Australia, in Canadian child protection courts it is common to find parents trying to self-represent owing to an inability to pay for legal representation. In contrast, however, there is a right to state-funded legal representation in child protection matters where it is necessary to ensure a fair hearing, as recognised under section 7 of the *Canada Act 1982* (UK)[191] ('*Charter*'). The litigant must establish that the proceedings may have a detrimental impact on their life, liberty, or personal security; indigency; and a lack of legal representation would violate fundamental justice.[192]

These qualities are comparative to those established in both *Dietrich*[193] and *BWD*[194] and are reflective of the Canadian decision of *R v Rowbotham.*[195] *Rowbotham* involved a criminal matter whereby the appellant, had made an application for state-funded legal representation but was unsuccessful - having failed the Legal Aid means test.[196] She appealed against the decision on the basis that she had no legal

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[188] *Dietrich v R* (n 154).
[189] Legal Information Institute, '*Lassiter v Department of Social Services*', *Cornell Law School* (Case Citation, 2019) <https://www.law.cornell.edu/supremecourt/text/452/18#ZD1-452_US_18ast>.
[190] Ibid.
[191] *Canada Act 1982 (UK)* c 7, sch B pt I ('*Canadian Charter of Rights and Freedoms'*).
[192] K Kehoe and D Wiseman, 'Reclaiming a Contextualized Approach to the Right to State-Funded Counsel in Child Protection Cases', (2012) 63 *University of New Brunswick Law Journal* 180.
[193] *Dietrich v R*; *R v Chaouk*; *MK v Victoria Legal Aid* (n 154).
[194] *BWD v Department of Communities (Child Safety)* (n 175)
[195] *R v Rowbotham* 1988 CanLII 147 (ON CA).
[196] Kehoe and Wiseman (n 10).

representation for trial, which was expected to last for four months. It lasted approximately one year.[197] The issue at the time was whether the *Charter*[198] permitted the appointment of state-funded legal representation for indigent litigants.[199] However, it did provide that if the Legal Aid decision was 'perverse' due to litigant's financial situation, complexity and length of trial, as well as the potential for imprisonment, then there would be sufficient power to permit such an appointment.[200] In dismissing her application, the court held that these conditions were not satisfied and that she could have made other arrangements to obtain legal representation.[201] The Ontario Court of Appeal, in asserting its authority in determining the right to representation, found that there could not have had a fair trial without legal representation, and that she was not in a position to fund a 12 month trial.[202] It was found to be an exceptional case whereby Legal Aid was refused, but representation was crucial to ensure a fair trial.[203]

This case resonates with that of the 2013 Australian (criminal) case of *R v Chaouk*[204] whereby Legal Aid funding had initially been provided for the trial (approximately two weeks).[205] However, owing to Legal Aid policy changes, funding was substantially reduced (only two half days).[206] The court adjourned the trial until such time as a solicitor could be obtained for the duration of the trial.[207] The Victorian Court of Appeal upheld this position.[208]

Both Canadian and Australian cases are similar in fact, consideration, and Legal Aid funding issues. There was substantial analysis of the importance of having legal representation provided by Legal Aid in matters

[197] Ibid.
[198] *Canada Act 1982 (UK)* c 7, sch B pt I ('*Canadian Charter of Rights and Freedoms'*).
[199] Kehoe and Wiseman (n 10) 181.
[200] Ibid.
[201] Ibid.
[202] Kehoe and Wiseman (n 10) 181.
[203] Ibid.
[204] *R v Chaouk* (2013) 40 VR 356; *MK v Victoria Legal Aid* [2013] VSC 49.
[205] Ibid.
[206] Ibid.
[207] Ibid.
[208] *R v Chaouk* [2013] VSCA 99.

of complexity and potential deprivation of liberty. Self-represented litigants in Australia, however, are disadvantaged in that they do not have the same constitutional rights afforded in Canada. There litigants have the power to apply for a stay of proceedings to obtain legal representation under section 24(1) of the *Charter*. This provides remedies when those rights to legal representation are violated.[209]

3 *United States*

To some extent, the Australian decision in *Dietrich*[210] relied on the principles outlined in adjudication on rights recognised in the US Constitution. In particular, the Sixth Amendment provides that 'in all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defence'.[211] Not unlike the position in Australia, this does not necessarily guarantee a right to state-funded legal representation.[212] The High Court of Australia unanimously held that there is no common law right to state-funded legal assistance, despite the appellant's being indigent and on trial for serious criminal offences.[213] Regardless, Dietrich did have a common law right to receive a fair trial.[214] The Court held that, as an indigent person, facing serious criminal charges, as well as having been denied legal assistance, he would have lost 'a real chance of acquittal' as his trial will have been deemed unfair.[215] Ironically, this position is similar to that of many child protection litigants (indigent, facing serious outcomes, being denied legal assistance and having lost a real chance as trial would be deemed unfair).

The US case of *Mathews v Eldridge*[216] (a civil matter) is important as it developed a three part test ('*Eldridge* test')[217] to determine whether a litigant had received due process under the US Constitution.[218]

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[209] *Canada Act 1982 (UK)* c 24 ('*Canadian Charter of Rights and Freedoms'*).
[210] *Dietrich v R* (n 154)
[211] *United States Constitution* art VI.
[212] Kehoe and Wiseman (n 10) 181.
[213] Ibid 212-213.
[214] Ibid.
[215] Ibid.
[216] *Mathews v Eldridge* 424 US 319 (1976).
[217] Brett V Beaubien, 'A Matter of Balance: Mathews v Eldridge Provides the Procedural Fairness Rhode Island's Judiciary Desperately Needs' (2016) 21(2) *Roger Williams University Law Review* 356.
[218] Ibid.

This test considered the interests at stake; any deprivation to those interests due to procedures used, and any additional safeguards required; and the government's interest.[219] In this case, the plaintiff believed his constitutional right to due process had been violated as he was not afforded an evidentiary hearing.[220] It was held that this satisfied the first part of the test, as it was 'an important private interest'.[221]

The second part of the test required an assessment of any risk that might deprive Eldridge of his personal interests because of the need for additional safeguards.[222] If the risk is considered minimal, then the need for additional safeguards is low.[223] However, if the risk is considered too high, then additional measures would be deemed warranted.[224] In this case, *Eldridge*,[225] the plaintiff had failed to utilise any of the safeguard provided to him.[226] Accordingly, his constitutional due process rights were not violated and, in the circumstances, there was minimal risk.[227]

The final test of 'government interest' was that, in addition to interests held, there needed to be a review of potential administrative burdens.[228] If additional procedures were required that would outweigh potential benefits, then the government should not be expected to provide additional resources.[229] In this case, the plaintiff's due process rights were not violated.[230]

Eldridge[231] provides that consideration must be had to both private and government interests, as well as a risk of procedures leading to erroneous decisions.[232] Obtaining justice in cases of parental status

[219] Ibid.
[220] *Mathews v Eldridge* (n 216) 324-325.
[221] Ibid 335, 349.
[222] Ibid 321-323.
[223] Beaubien (n 217).
[224] Ibid 357.
[225] *Mathews v Eldridge* (n 216).
[226] Beaubien (n 217) 357.
[227] Ibid.
[228] *Mathews v Eldridge* (n 216) 321-323.
[229] Ibid.
[230] Ibid.
[231] *Mathews v Eldridge* (n 216).
[232] Legal Information Institute (n 189).

termination is an interest shared with the state,[233] and the impact of complex proceedings, coupled with self-representation, would be enough to make the risk of mistakenly removing parental rights quite substantial.[234] Essentially, both parties have a vested interest in a proper decision being made.[235] This shared interest is illuminated in the case of *In re CM*[236] where the New Hampshire Supreme Court analysed the rights of parents in child protection proceedings under the due process clause by using *Eldridge*.[237] In this case, the parents had been denied court-appointed counsel for their appeal against an unfavourable child protection hearing.[238] While the parents' appeal was pending, legislation had been amended to abolish the statutory right to counsel for indigent parents who were alleged to have abused or neglected their children.[239] The parents appealed to the superior court alleging that such representation was a constitutional right.[240] With regard to the private interest, the court provided that 'the right to raise and care for one's children is a fundamental liberty interest' protected by the US Constitution as a fundamental right.[241] With risk of deprivation, the court considered whether the absence of parental legal representation would increase the risk of an incorrect outcome. The court analysed legislation covering child protection and dependency proceedings, with the State[242] arguing that judges are to consider all the relevant evidence. Therefore, according to the Supreme Court, self-represented parents did not have to present cases in accordance with complicated rules of evidence.[243] The parents, therefore, argued that by relaxing the rules of evidence, hearsay could be used to support the State's allegations.[244] They concluded

[233] Ibid.
[234] Ibid.
[235] Ibid.
[236] *In re C.M.* 2012 WL 2479619 (N.H.)
[237] *Mathews v Eldridge* (n 216).
[238] *In re C.M.* (n 236).
[239] Ibid.
[240] Ibid.
[241] American Bar Association, 'Counsel for Indigent Parents Must be Determined Case-by-Case', *American Bar Association* (Bar Association website, August 2012) <https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol_31/august_2012/right_to_appointedcounselforindigentparentsmustbedeterminedonaca/>.
[242] Referring to New Hampshire, United States.
[243] American Bar Association (n 241).
[244] Ibid.

that any risk was reduced overall given that the court could determine what evidence was materially relevant.[245]

Finally, the court considered the State's interest. This usually coincides with the interest of the parents, it often being in the best interests of the child for the child to remain with their family. In acknowledging that the State held economic interests that were not afforded to indigent families, the court held that the 'fundamental nature of the parents' interest favours 'an appointment of counsel', but this was not a requirement for every child protection case.[246]

Gideon v Wainwright[247] was the preeminent US case (albeit a criminal case) regarding an indigent's right to state-funded legal representation on the basis that they may lose their physical liberty if litigation is unsuccessful.[248] In this case, the defendant requested state-funded legal representation be provided on the basis of his indigence and his Constitutional rights (in particular, the Sixth[249] and Fourteenth[250] Amendments). The court declined and he was forced to self-represent. However, the US Supreme Court found that the litigant's Fourteenth Amendment right had been violated.[251] It was held that no defendant, regardless of their competence or education, could be expected to provide an adequate defence against the state and there was a Constitutional right to state-funded legal representation for those charged with felonies.[252]

[245] Ibid.
[246] Ibid.
[247] *Gideon v Wainwright*, 372 US 335 (1963).
[248] Ibid.
[249] Guarantees the rights of criminal defendant, including right to public trial (without delay), a lawyer, an impartial jury, and to know who the accuser is and the nature of the charges and evidence against them.
[250] Guarantees all citizens equal protection of the law.
[251] Ibid.
[252] Ibid.

While this case provides that courts are to ensure that legal representation is provided and due process protection for criminal defendants facing imprisonment is to be given,[253] it does not necessarily recognise the same right in civil matters.[254] Supporters of 'Civil Gideon'[255] argue that high stakes matters, including child protection, risk the same fundamental challenges of criminal defendants such as 'life' and 'liberty', and so should trigger the due process right to legal representation.[256]

In the case of *Lassiter,*[257] the North Carolina State Court of Appeals found Lassiter's infant son to be in need of protection, and custody of the boy was transferred to the Department of Social Services ('DSS').[258] Lassiter was self-represented and the court held that she had enough time and opportunity to engage legal representation, but failed to do so.[259] At no time did she represent that she was indigent nor was she provided with state-funded legal representation.[260] She appealed, stating that she was indigent and that her Fourteenth Amendment[261] Due Process rights had been violated as the State failed to provide her with legal representation.[262] The court was in a position to ensure that parents received basic protections and legal representation in cases where parental rights were at risk of being terminated.[263] However, the US Supreme Court, while declining to follow through on this measure, recognised the role that legal representation played in the termination of parental rights.[264] The trial courts were ultimately given

[253] New York State Senate, 'Expanding Gideon: The Right to Indigent Civil Representation', *The New York State Senate* (Government, 15 December 2009) <https://www.nysenate.gov/newsroom/articles/expanding-gideon-right-indigent-civil-representation>.
[254] Ibid.
[255] This term refers to a national movement to develop and explore strategies to provide legal representation as a matter of right, from the public purse, to indigent persons in civil proceedings where basic human needs are at stake. Philadelphia Bar Association, 'Civil Gideon Corner', *Philadelphia Bar Association* (Legal webpage, 2020) < http://www.philadelphiabar.org/page/CivilGideon>.
[256] New York State Senate (n 253).
[257] *Lassiter v Department of Social Services*, 452 US 18 (1981).
[258] Legal Information Institute (n 189). One year later, Lassiter was convicted of 2nd degree murder, and began a 25-40-year prison sentence (unrelated to the child protection matter).
[259] Ibid.
[260] Ibid.
[261] Guarantees the rights of criminal defendant, including right to public trial (without delay), a lawyer, an impartial jury, and to know who the accuser is and the nature of the charges and evidence against them.
[262] Legal Information Institute (n 189).
[263] Vivek S Sankaran, 'Moving Beyond Lassiter: The Need for a Federal statutory Right to Counsel for Parents in Child Welfare Cases' (2017) 44(1) *University of Michigan Law School Scholarship Repository* 6.
[264] Ibid.

discretion to determine, on a case-by-case basis, whether the Constitution required the appointment of legal representation.[265]

Anthony Trombley observed '[i]t is curious that the court considers a one-day jail sentence to be more intrusive on liberty than a lifelong revocation of the parental right to the care, custody, and companionship of a child.'[266] He observed that *Lassiter*[267] failed to provide assistance to state courts whereby ad hoc determinations would lead to inconsistent protection on procedural due process rights. Similarly, Douglas Besharov warned that *Lassiter*:[268]

> may lead state legislatures and state courts to conclude that indigent parents do not need – or do not deserve – legal representation.[269] *Lassiter*, for all practical purposes stands for the proposition that a drunken driver's night in the cooler is a greater deprivation of liberty than a parent's permanent loss of rights in a child.[270]

The approach in *Lassiter*[271] has been used to provide litigants with a right to legal representation in some civil cases,[272] including child protection matters. The US Supreme Court held that Constitutional due

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[265] Ibid. Since this decision, in 40 states (and the District of Columbia), parents have an absolute right to legal representation after the state brings proceedings for child protection matters. All US states with the exception of those with "qualified" rights, those left to the judge's discretion, or have no provision for the right to counsel (Wyoming). Another four states provide the right, albeit qualified (California, Kentucky, Texas and Minnesota), while five states (Delaware, Minnesota, Nevada, Oregon and Vermont) allow the judge to use their discretion. Vivek Sankaran and John Pollock, 'A National Survey on a Parent's Right to Counsel in state-Initiated Dependency and termination of Parental Rights Cases', *National Coalition for a Civil Right to Counsel* (Webpage, 27 October 2016) 1 <http://civilrighttocounsel.org/uploaded_files/219/Table_of_parents__RTC_in_dependency_and_TPR_cases_FINAL.pdf>.
[266] Anthony Trombley, 'Alone Against the State: Lassiter v Department of Social Services' (1982) 15 *U.C. Davis Law Review* 1123, 1136-1137 cited in Vivek S. Sankaran, 'Moving Beyond Lassiter: The Need for a Federal statutory Right to Counsel for Parents in Child Welfare Cases' (2017) 44(1) *University of Michigan Law School Scholarship Repository* 6.
[267] *Lassiter v Department of Social Services* (n 257).
[268] Ibid.
[269] Douglas Besharov, 'Terminating Parental Rights: The Indigent Parent's Right to Counsel after Lassiter v North Carolina' (1982) 15 *Family Law Quarterly* 205, 219 cited in Vivek S. Sankaran, 'Moving Beyond Lassiter: The Need for a Federal statutory Right to Counsel for Parents in Child Welfare Cases' (2017) 44(1) *University of Michigan Law School Scholarship Repository* 6.
[270] Ibid.
[271] *Lassiter v Department of Social Services* (n 257).
[272] Buhai (n 124) 986.

process does not create a right to legal representation, even when parental rights are at stake.[273] However, some US states have partly accepted the premise and, in some cases, enacted legislation providing limited rights to civil legal representation.[274] Some require legal representation by appointment before courts can remove a child from their parent; others wait until such time as parental rights are sought to be terminated. This may be many years after the child has been placed into care.[275]

In states where the right to legal representation is not automatically guaranteed legislatively, advocates have attempted to litigate the issue, asking courts to recognise the due process right throughout all stages of child protection matters. Those efforts have been largely unsuccessful owing to *Lassiter*[276] and its refusal to consider that the Constitution does afford indigent parents the right to legal representation. At least five US states[277] have seen appellate courts rely on *Lassiter*[278] in denying legal right to representation. For example, in *In re NDO*,[279] the Nevada Supreme Court provided that 'after *Lassiter*, no absolute right to counsel exists under the United States Constitution's Fourteenth Amendment in parental rights termination proceedings'.[280] This was similarly cited in the Mississippi Supreme Court case of *KDGLBP v Hinds County Department of Human Services*,[281] where it was found that 'appointment of counsel in termination proceedings, while wise, is not mandatory and therefore should be determined by state courts on a case-by case basis'.[282] Further, in *In re CC v Natrona City Department of Family Services*,[283] the Wyoming Supreme Court noted that, because a 'parent's physical personal liberty is not in jeopardy in a parental termination proceeding, appointment of counsel is not required in all instances'.[284]

[273] Legal Information Institute (n 189).
[274] New York State Senate (n 253).
[275] Ibid.
[276] *Lassiter v Department of Social Services* (n 257).
[277] Nevada, Mississippi, Delaware, Montana and Wyoming.
[278] *Lassiter v Department of Social Services* (n 257).
[279] *In re NDO*, 115 P.3d 223
[280] Ibid 226.
[281] *KDGLBP v Hinds County Department of Human Services*, 771 So 2nd 907 (Miss 2000).
[282] Ibid.
[283] *In re CC v Natrona County Department of Family Services*, 102 P 3d 890, 895 (Wyo 2004).
[284] Ibid.

Efforts at persuading courts to recognise the right to legal representation in early stages of child protection proceedings have also been unsuccessful. Courts in at least five US states[285] have refused to find that the Constitution requires parental legal representation be provided once the child is removed from the home.[286]

Since *Dietrich*,[287] there has been little movement within Australia for the same right to state-funded legal representation in civil law matters. Despite this, in Canada and the US there has been some movement in the recognition of a right to state-funded legal representation in civil matters.

The above cases do not provide any insight into whether self-represented litigants do not engage lawyers because of a mistrust of lawyers. However, these cases do provide reasons and motivations behind their self-representation. They demonstrate that, in Australia, even more so than Canada and the US, there is not a significantly funded right to legal representation in child protection matters. That being so, self-representation will inevitably be an important ingredient in the co-production of legal services that secure access to justice.

VI POTENTIAL FOR INJUSTICE

In the previous section, the cases that set out and contextualise the conditions and criteria for granting legal representation in Australia, Canada and the United States were considered. However, the factual

[285] See *In re Welfare of Children of S-LC*, No. A07-586, 2007 Minn App Unpub LEXIS 1083 (Minn Ct App Nov 6 2007); *In re AF-C*, 37 P 3d 724 (Mont 2001); *In re RR*, 475 NW 2d 518 (Neb 1991); *In re CM*, 48 A 3d 942 (NH 2012); *Anderson v Texas Dep't of Protective & Regulatory Servs*., No. 14-97-00985-CV, 1999 Tex App LEXIS 4664 (Tex Ct App June 24 1999).
[286] Sankaran (n 263).
[287] *Dietrich v R* (n 154).

circumstances of those cases also reveal some reasons why litigants might become self-represented. This perspective from those cases will be explored further in this section.

Self-representation, in any legal context, can be quite confronting for a parent, especially if they are faced with losing a child. Putting aside the emotional, familial and social disparity between the State and the self-represented litigant, there are also issues of competency, indigency, and substantial power imbalance to be addressed. Where a party is self-represented in child protection proceedings, not only is there a potential prejudice to the parent, but there may also be a potential injustice in the administration of procedural fairness.

1 *Indigence*

According to Kehoe and Wiseman, there are, in Canada, two divergent approaches in identifying indigence and financial need.[288] The first is the *Malik*[289] approach where litigants must exhaust all options for obtaining funds for legal expenses, have funding applications refused, and even, unintentionally, demonstrate prudence in managing finances over an extended pre-trial period.[290] In contrast, the less restrictive *Rushlow*[291] approach focuses only on the litigant's present financial circumstances.[292] This approach does not rely on financial prudence except where it is evident that the litigant has deliberately depleted their assets to avoid paying for legal representation.[293]

In Malik,[294] the question was whether the defendant was able to pay or contribute to his legal defence.[295] Despite claiming to have significant assets (requiring liquidation), he also claimed that he was insolvent

[288] Ibid 186-187.
[289] *R v Malik and Bagri*, 2005 BCSC 350.
[290] Kehoe and Wiseman (n 10).
[291] *R v Rushlow* (2009) ONCA CanLII.
[292] Kehoe and Wiseman (n 10) 186-187.
[293] Ibid.
[294] *R v Malik and Bagri* (n 289).
[295] Ibid.

due to unsecured creditors to whom he was indebted - all family members.[296] He needed to provide proof of his financial position and any efforts made to obtain legal representation; obtain or engage in additional employment; look for legal representatives willing to work at Legal Aid rates; and exhaust all efforts to use assets owned to raise funds.[297] There is no evidence as to whether he sought assistance by way of co-production. The court held that 'an applicant who claims to be indigent is not entitled to state sponsored funding where they have made themselves indigent'.[298]

In contrast, in *Rushlow,*[299] the litigant was denied legal aid but was yet prepared to proceed unrepresented[300] (although there is no evidence of any attempt at securing co-production). Not unlike the position in Australia's *Dietrich*,[301] concern was raised about the case complexity and the matter was adjourned to allow a further approach to Legal Aid.[302] It was held that, despite not having legal representation, Rushlow would not have been deprived access to a fair trial (thus not meeting the first branch of the *Rowbotham*[303] test.[304] On appeal,[305] the Ontario Court of Appeal held that the test was imposed too strictly and that 'unique challenges' are not requisite as they set the bar too high.[306] This case was sufficiently complex and Rushlow was not equipped to run the trial without representation.[307] Unlike *Malik*, attempts were made to obtain a lawyer, but he could not afford one, thus the Court of Appeal held that his Charter rights had been violated.[308]

[296] Kehoe and Wiseman (n 10) 183.
[297] Ibid.
[298] Ibid.
[299] *R v Rushlow* (2009) ONCA CanLII.
[300] Kehoe and Wiseman (n 10) 184.
[301] *Dietrich v R* (n 154).
[302] Kehoe and Wiseman (n 10) 184.
[303] *R v Rowbotham* (n 311).
[304] Kehoe and Wiseman (n 10) 185. Rowbotham applications require 'unique challenges above and beyond those that would ordinarily be expected in a criminal trial'. Otherwise, there would be a disproportionately high number of self-represented litigants deemed entitled to government or provincial funded representation, thus causing serious intrusion to the administration of Legal Aid.
[305] Ibid.
[306] Kehoe and Wiseman (n 10).
[307] Ibid 185-186.
[308] Ibid.

This approach is furthered in the Canadian child protection case of *New Brunswick v G(J)*[309] *('GJ')* where the mother had applied for Legal Aid and was refused as her indigency status was in question.[310] In citing *Rowbotham,*[311] specific reference was made to the need for fundamental justice on a case-by-case basis, as a litigant's capacity may be compromised by limited education, especially in a courtroom environment.[312] Further, it held that, for a claim for provincial-funded representation to succeed, it must be based on section 7 of the *Charter*.[313] Further, and perhaps most importantly, the court held that the litigant's personal security is jeopardised by child protection proceedings, as their relationship with the child is restricted during the proceedings.[314] The impact of not providing provincial-funded legal representation to litigants in child protection matters far outweighed any potential benefits for the government's fiscal position.[315]

Canadian legislation puts the onus onto the government to determine eligibility for provincial-funded legal representation. In *Huron-Perth CAS v JJ*,[316] the father sought provincial-funded legal representation to contest a child protection application. [317] Up to the beginning of trial, the father had legal representation. This was, no doubt, a factor in denying his eligibility for provincial-funded legal representation.[318] The judge applied the factors relevant to determining his eligibility based on a criminal standard, yet it was held to be unsatisfactory.[319] It was held that granting the order would mean any parent in this type of case would be entitled to provincial-funded representation, regardless of Legal Aid eligibility criteria.[320] Had the case been successful, it would have set a precedent for parents in similar circumstances, entitling them

[309] *New Brunswick (Minister of Health and Community Services) v G(J)*. [1999] 3 SCR 46 [G(J)].
[310] Ibid.
[311] *R v Rowbotham* (n 195).
[312] Ibid.
[313] *Canada Act 1982 (UK)* c 7, sch B pt I ('*Canadian Charter of Rights and Freedoms'*).
[314] Kehoe and Wiseman (n 10) 167.
[315] Ibid 170.
[316] *Huron-Perth CAS v JJ*, [2006] OJ No 5372.
[317] Kehoe and Wiseman (n 10) 174.
[318] Ibid.
[319] Ibid.
[320] *Huron-Perth* (n 316) *supra* note 25 at para 38.

provincial-funded legal representation under a less restrictive approach to indigency.[321] Kehoe and Wiseman suggest that the government should bear the onus of proof to demonstrate that this would be an overwhelming burden on their resources.[322] They consider that this effectively allows for indigency to be defined by government standards rather than applicant affordability, which does not provide a reliable measurement.[323] They add that it does not make sense for a failure to qualify for Legal Aid to be both a pre-requisite and a disqualification at the same time.[324]

In applying the more restrictive *Rushlow*[325] approach to Queensland child protection matters, the majority of parents involved in child protection matters do not have the financial security to pay for legal representation.[326] Thus, the impact of limiting legal aid funding (and more specifically access to government-funded legal representation) in an effort to not overburden Legal Aid budgets[327] cannot be maintained without causing injustice to the litigant. However, the less restrictive *Malik*[328] approach provides that these budgetary constraints are not a valid reason for denying legal representation where warranted.[329] The problem in applying this approach is that there is no constitutional safeguard (unlike Canada's *Charter*) to support the violation of litigants' rights in accessing government-funded legal representation.

2 *Mistrust*

[321] Kehoe and Wiseman (n 10) 174-175.
[322] Ibid.
[323] Ibid.
[324] Ibid.
[325] *R v Rushlow* (n 291).
[326] Based on the number of Legal Aid Queensland funding applications submitted annually.
[327] Kehoe and Wiseman (n 10) 183.
[328] *R v Malik and Bagri* (n 289).
[329] Ibid.

Government entities have substantial bargaining power because of their vast legal experience, knowledge and resources.[330] This allows for serious power imbalances between the litigants in child protection.[331] In most child protection matters, the Department has removed, or is seeking to remove, a child due to a perceived risk of harm or need for protection.[332] Parents may become distressed and, in many cases, will contest the intervention.[333] Other parents may want to contest this intervention but have no idea how, or will feel disenfranchised.[334] Both parents and children may be placed in a position where they are forced to engage against a highly resourced, emotionally detached State department.[335] It is extremely difficult to argue, given complex legislation and the seriousness of consequences for families, that there is no role for legal representation for all parties.[336]

In both the US and Canada, those who are not eligible for Legal Aid may be successful for other state-funded legal representation because the custody of the child is being challenged by the government, as this is considered a violation of their federal or state Constitutions.[337] Litigants in Australia are not afforded such constitutional rights to representation. Many approaches have been provided and used by litigants to reduce the cost of engaging legal representation, demanding a legal right to representation and seeking to improve the community's legal knowledge[338] (however no information is provided as to opportunities presented by co-production). A noticeable feature of many of these foreign jurisdictions is the recognition of the potential for severe injustice that may occur if there is a denial of access to justice.[339]

[330] Australian Government Productivity Commission, *Access to Justice Arrangements* (Productivity Commission Draft Report Overview, April 2014) 20.
[331] Walsh and Douglas (n 142) 622.
[332] Ibid.
[333] Ibid.
[334] Ibid.
[335] Ibid 623.
[336] Ibid 624.
[337] *Canadian Charter of Rights and Freedoms*, s7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[338] Buhai (n 124) 1008.
[339] Ibid 1009.

3 *Emotional Attachments*

There is no empirical evidence or precedent available on whether litigants self-represent because of their emotional attachments to their case (RQ3). However, self-representation is not solely based on a lack of legal expertise, advocacy, or support services. It is also based on a lack of impartiality and emotional distance.[340] Many self-represented litigants may not be able to address the merits of their case without being emotionally attached, resulting in a greater disadvantage than those who are legally represented.[341] Accordingly, where there are insufficient resources available, the most effective and efficient option would be for the case to be presented by a qualified person.[342] This not only preserves (and possibly improves) the efficiency of the conduct of the proceedings, but provides effective and speedy resolution for all parties.[343]

4 *Competence*

It is not suggested that all Queensland child protection matters should be funded without merit. In the Queensland case of *AF & MJ v Department of Communities, Child Safety and Disability Services & Ors,*[344] the appellants challenged a long-term guardianship order on the ground that they did not understand the type of order being sought. The appeal was allowed and the case remitted back to the Queensland Children's Court.[345] The matter proceeded to final hearing and the appellants appeared as self-represented litigants (and there is no information provided regarding use of co-production).[346] The application was allowed and a long-term guardianship order made.[347] An appeal was made based on a combination of factual errors, including lack of procedural fairness.[348] The Appellate Division of the

[340] Australian Institute of Judicial Administration, 'Litigants in Person Management Plans: Issues for Courts and Tribunals' (2001) 29 *Australian Institute of Judicial Administration Incorporated* 4.
[341] Ibid.
[342] Ibid.
[343] Ibid.
[344] *AF & MJ v Department of Communities, Child Safety and Disability Services & Ors* [2016] QChC 7.
[345] Ibid [6].
[346] Ibid [7].
[347] Ibid [8].
[348] Ibid [18].

Queensland Children's Court found that the appellants understood the nature, purpose and legal consequences of the proceedings, and the orders and rulings made throughout the management and hearing of the appeal - and had ample opportunity to obtain legal representation for the appeal, which they declined to take.[349] Again, if we compare the standard set by *Rowbotham,*[350] the need for fundamental justice should be established on a case-by-case basis.[351] A litigant's personal security cannot be safeguarded if they self-sabotage, and then seek redress.

Conversely, in the Queensland appellate case of *KE & SW v Department of Communities (Child Safety Services)*,[352] various magistrates attempted to obtain legal representation for parents, but were unable to do so and the parents were forced to self-represent.[353] Both parents were significantly disadvantaged because of ill health and intellectual and developmental delays.[354] Despite the magistrate's efforts to explain processes and procedures to them, they were not capable of preparing any real defence in the hearing. Consequently, there was very little the parents could offer by way of resistance to the application.[355] The magistrate held that:

> it was a sad indictment on our justice system that representation is not available to people with an intellectual disability of the type that KE and SW appear to have. This is particularly so in proceedings of such serious moment as this where the Department is seeking long-term guardianship of an only child.[356]

The Queensland Children's Court (Appellate Jurisdiction) court allowed the appeal finding that it was not in the child's best interest to be on a long-term guardianship order. There was evidence of improved

[349] Ibid [24].
[350] *R v Rowbotham* (n 195).
[351] Ibid.
[352] *KE & SW v Department of Communities (Child Safety Services)* [2011] QChC 2.
[353] Ibid [2].
[354] Ibid [4]. The mother suffered from PTSD. had past suicidal ideations and was assessed as having intellectual capacity at the bottom two per cent of the population. The father was also assessed as having developmental delays and an extremely low level of intelligence.
[355] Ibid [6].
[356] Ibid [7].

relations between the child and the parents and that with increased contact that could well continue to improve as the child matured. Further, the court was not convinced that the mother was not able to learn how to interact and care for the child within the foreseeable future.[357]

VII CONCLUSION

Access to justice does not just mean equality and fairness for an individual's rights within the Australian judicial system. It has implications beyond court processes, procedures and lawyers, as it is meant to provide individuals with appropriate avenues to obtain legal assistance, regardless of their means or capacity to engage these services privately.

As it is designed to assist litigants in accessing justice, co-production is used as a collaborative approach whereby lawyers and litigants can work together in the provision of service delivery. However, in both Canada and the US litigants are in a much stronger position than they are Australia in this regard. The enhanced use of co-production arrangements, which is driven by client need and financial circumstances, may see an undue reliance on self-representation.

Although the legal systems in Australia, Canada and the US are uniformly rooted in the English common law, the Australian system does not provide a constitutional or legislative right to state-funded legal representation in civil child protection matters. Canada, by way of its *Charter*, provides judicial discretion in the appointment of legal representation to those who satisfy specific criteria, while the US courts opted to use discretion for these appointments on a case-by-case basis. Regardless of these substantial

[357] Ibid [40].

differences, a common thread remains in that there is often a need for the appointment of legal representatives, and opportunities arise for co-production services in child protection proceedings.

Access to justice,[358] co-production theory and the right to legal representation are important elements of due process and natural justice. While there is no constitutional standard for state-funded legal representation[359] there continues to be a focus on maintaining a standard of procedural fairness.[360] However, questions of power, influence and control over decision making may continue to yield trouble.[361]

It is not enough that self-represented litigants have a recognised right to access the court.[362] There must also be access to the fundamental rights provided within the judicial system. These rights and freedoms remain out of reach if limitations continue to affect access to justice for self-represented litigants.[363]

[358] MA Anxhelina Zhidro, Dr Sokol Mengjesi and Dr Klodjan Skenderaj, 'Access to the Court, as a basic principle of due process' (2018) 8(2) *Iliria International Review* 111.
[359] Will Bateman, 'Procedural Due Process under the Australian Constitution' (2009) 31 *Sydney Law Review* 415.
[360] Ibid (n 359).
[361] Ibid.
[362] Zhidro, Mengjesi and Skendera (n 358) 112.
[363] Ibid.

CHAPTER 6 – RESEARCH METHODOLOGY

I INTRODUCTION

This chapter provides a greater understanding of the methodology used to capture participant information and perspectives in relating to the research questions on decisions about child protection litigation and, in particular, how access to justice, or compromised access to justice, has an impact on decisions regarding self-representation. It details the research design and methodology, including the sample size, method of data collection, and the development of semi-structured interviews, protocols, and processes to maximise content validity. The qualitative methodology used for the research and the methodological approach provides an outline of the benefits of using reliable and valid data collection and analysis whereby trust and credibility was built with the participants. Finally, the chapter provides the research limitations and key assumptions underpinning the research.

II RESEARCH QUESTION AND RESEARCH ISSUES

A *Research Question*

The research question examined is 'Why do litigants self-represent in Queensland child protection courts?' The main goal of this research is to assess access to justice, focusing on co-production theory and drawing on experiences of those at the forefront of child protection to determine why litigants self-represent in Queensland child protection courts. This assumes and understanding of access to justice as requiring that the litigant be able to present a legally and evidentially informed case.[1] Perspectives on the range of available legal service options used by litigants attempting to navigate the child protection

[1] I.e. in accordance with the understanding of access to justice as set out in the text at Chapter 5 n 2.

process are explored.

B *The Research Issues*

The following research issues inform the research question:

RQ (1) Are self-represented litigants distrustful of the legal profession?

RQ (2) Are the effects of limited access to funding significant contributing factors to self-representation?

RQ (3) Do self-represented litigants hold emotional attachments to their case (eg 'no one can know my family better than I')?

III RESEARCH DESIGN

The research design was developed to gain information about why litigants self-represent in Queensland child protection courts. Research design is more than a selection of techniques used in the collection of data; it refers to how the research is conceptualised, and ultimately, the type of contributions to be made in the development of knowledge in the research area.[2] In this study, the research design used is a form of the phenomenological paradigm through semi-structured interviews. The research utilised a phenomenological approach[3] in the form of open-ended interviews and surveys with 22 participants in Toowoomba, Ipswich, and Brisbane (Queensland). The phenomenological paradigm is concerned with understanding reality as a projection of human understanding, ie from the participant's own perspective.[4] The research was exploratory and descriptive in its design as there has been limited information that exists

[2] Charles Kivunja and Ahmed Bawa Kuyini, 'Understanding and Applying Research Paradigms in Educational Contexts' (2017) 6(5) *International Journal of Higher Education* 26.
[3] Jill Hussey and Roger Hussey, *Business research: a practical guide for undergraduate and postgraduate students* (MacMillan Press, 1997) 174.
[4] Ibid.

in relation to the research area of a self-represented litigant's efforts to find access to justice in Queensland child protection courts. Owing to the limited information available prior to the research being undertaken on the research topic, a descriptive design was used to employ qualitative and quantitative methodologies to determine, describe or identify the research through surveys and in-depth interviews with participants.[5] The aim was to identify issues through a process of data collection and to depict the experiences as accurately and factually as possible.

Based on the lack of research available on self-represented litigants in Queensland child protection courts, the research was conducted using a flexible design process ('emergent design') that is organic in nature, but implies that choices are purposeful and carefully considered before, during and after implementation.[6] While the previous chapters have provided background into existing theoretical perspectives, it is the emergent design process that enables thematic analysis and understanding as to why litigants self-represent in Queensland child protection courts.

IV RESEARCH METHODOLOGY

The research methodology comprised 22 semi-structured interviews. Case studies, by definition, are research methodologies that involve detailed and intensive analysis of single or multiple cases.[7] Sturman follows this premise providing that a case study "is a general term for the exploration of an individual,

[5] Ibid 109.
[6] Hazel Wright, 'Using an 'emergent design' to study adult education' (December 2009) Special Issue *Educate* 62.
[7] Alan Bryman, 'Why do researchers integrate/combine/mesh/blend/mix/merge/fuse quantitative and qualitative research' (2008) *Advances in mixed methods research 87*.

group or phenomenon".[8] Thus, qualitative research may be useful as a case-oriented approach where the research focuses on specific situations involving a specific individual or group.[9]

The use of semi-structured interviews, based on 22 participants consisting of lawyers, magistrates and Legal Aid Queensland officers, was consistent with other comparable studies. For example, McPhail and DiNitto's 2005 study investigated the familiarity of Texas prosecutors with gender-based hate crime laws.[10] The objective was to gain an understanding of what prompts the decision to charge an offence as hate-motivated and their professional opinions on gender as a protected status.[11] By conducting 16 structured interviews, they were able to gain useful and reliable data concerning whether gender hate crime was evident among prosecutors.[12] Furthermore, a combination of quantitative and qualitative methodology was used in this study.[13] Perhaps the most advantageous reason for using a combination of methodologies is that the study validity is enhanced when the data is collected and analysed using different methods.[14]

The quantitative data in this study comprised semi-structured interview questions that related to information specific to why litigants self-represent in Queensland child protection courts. The question variables related to the participant's connection to the Queensland child protection court, self-represented litigants, and the community. A copy of the completed interview questions is attached as Appendix 3.

[8] A Sturman, *Case study methods.* In JP Keeves, *Educational research methodology and measurement: an international handbook* (Oxford: Pergamon, 2nd ed, 1997) 61 cited in A Starman, 'The case study as a type of qualitative research' 1 (2013) *Journal of Contemporary Educational Studies* 31.
[9] Kenneth A. Kavale and Lucinda S. Spaulding, 'Is response to intervention good policy for specific learning disability?' (2008) 23(4) *Learning Disabilities Research & Practice* 169, and U Sekaran and R Bougie, *Research methods for business: A skill building approach* (Wiley, 2010) 30.
[10] BA McPhail and DM DiNitto, 'Prosecutorial Perspectives on Gender-Bias Hate Crimes' (2005) 11(9) *Violence Against Women* 1165.
[11] Ibid.
[12] Ibid.
[13] Ibid.
[14] Hussey and Hussey (n 22).

The qualitative component of the interviews comprised an in-depth discussion about these issues through follow up questioning with the view to building up ideas,[15] and allowing the participant to engage with open-ended discussions.

A *Unit of Analysis and Sampling*

Research was undertaken using a purposeful sampling approach, which is broadly used in qualitative research for identifying and selecting information for the most effective use of limited resources.[16] This method involves identifying and selecting individuals or groups that hold particular knowledge or experience within the research area. Further, having willing and available participants who have the capacity to communicate their experiences is imperative.[17] Random sampling, by contrast, is used for more generalised findings by minimalising potential selection bias and to control the potential for influence.[18]

There are no specific procedures when conducting purposeful sampling, especially when the research is aligned in more than one area. Further, there is no ideal form that purposeful sampling should undertake in relation to both quantitative and qualitative research methods.[19] There must be a considered approach to each methodological objective and the potential impact of using one particular strategy over another to achieve the appropriate outcome sought.[20]

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[15] P Ghauri, K Grunhaug and I Kristianslund, 'Qualitative Methods: Research Methods in Business Studies: a Practical Guide' in Human Resource Practice Selected Readings, Distance Education Centre, USQ, Toowoomba, Queensland.
[16] Michael Quinn Patton, *Qualitative research and evaluation methods* (Alta Mira Press, 3rd edition, 2002) cited in LA Palinkas, SM Horwitz, CA Green, JP Wisdom, N Duan, and K Hoagwood, 'Purposeful sampling for qualitative data collection and analysis in mixed method implementation research', *Administration and Policy in Mental Health* (US National Library of Medicine National Institute of Health, 2015) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4012002/>.
[17] H Russell Bernard, *Research Methods in Anthropology* (Sage Publications, 3rd edition, 2002) cited in LA Palinkas, SM Horwitz, CA Green, JP Wisdom, N Duan, and K Hoagwood, 'Purposeful sampling for qualitative data collection and analysis in mixed method implementation research', *Administration and Policy in Mental Health* (US National Library of Medicine National Institute of Health, 2015) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4012002/>.
[18] LA Palinkas, SM Horwitz, CA Green, JP Wisdom, N Duan, and K Hoagwood, 'Purposeful sampling for qualitative data collection and analysis in mixed method implementation research', *Administration and Policy in Mental Health* (US National Library of Medicine National Institute of Health, 2015).
[19] Ibid.
[20] Ibid.

B *Methods of Contacting Interview Participants*

The principal method of seeking participation was through direct contact with professionals working in Queensland child protection courts. For this research, the recruitment criteria were developed to identify professionals working in child protection courts with the specific aim of examining why litigants self-represent in Queensland child protection courts; examining the effects of limited access to funding; and identifying the impediments that these self-represented litigants may face in obtaining timely and affordable justice. Further, a convenience strategy was employed to recruit and collect information from participants who were easily accessible. Overall, a total of 74 participants identified as having experience in a range of child protection services, including lawyers, magistrates and Legal Aid officers. These research participants were contacted via email, as well sourcing from advertising with the Queensland Law Society.[21]

C *Negative Response to Participate*

From the 86 emails to potential participants (solicitors, magistrates, Legal Aid Queensland, and the Department of Child Safety, Youth and Women ('DCSYW') officers, limited information was obtained as to why some chose not to participate.

Of the 42 solicitors contacted, three advised they no longer worked in the child protection jurisdiction; 20 did not respond to emails; and six agreed to participate, but on follow-up, did not respond. Of the 26 Queensland magistrates contacted, 15 did not respond, and three declined to be interviewed. With regard to Legal Aid Queensland, an email was sent to the Chief Executive Officer, Mr Anthony Reilly, seeking

[21] Kathy Reeves, 'Interviews needed – why litigants self-represent in Queensland Child Protection Courts', *Queensland Law Society* (Legal, 16 August 2018) <https://www.qls.com.au/About_QLS/News_media/News/Interviews_needed_–_why_litigants_self-represent_in_Queensland_Child_Protection_Courts>

interviews with Managers and Grants Officers within Legal Aid Queensland offices in Brisbane, Toowoomba and Ipswich. Responses were received from Brisbane and Ipswich. The only Grants Officer response was from Brisbane. The DCSYW was contacted for interviews (with a request to the DCSYW to be gatekeeper for self-represented litigants) through the Director General, Michael Hogan. All requests were denied.

V DATA COLLECTION – INTERVIEW METHODOLOGY

A *The Interview Protocol Development*

The main objective of using semi-structured interviews is to collect both quantitative and qualitative data. Accordingly, the interview protocol consisted of a combination of limited choice responses (closed questions) and open-ended questions which allowed participants to expand and provide justifications for their responses.[22] The interview protocol, based on the literature review, developed an open relationship with the participants so that questions could be discussed openly, yet confidentially and securely. The interview questions were based on each participant's role in in child protection matters and used criteria including: the role within child protection proceedings; the length of time involved with child protection; and geographical location (Brisbane, Ipswich, or Toowoomba).

B *Participant Selection Process*

Participants were selected on the basis that they have experience in child protection matters. As there is generally only one child protection court operating in each region, participants were selected solely from those areas. Practitioners were required to have more than five years' experience on the Legal Aid Queensland ('LAQ') practitioner panel for child protection matters. Government participants included

[22] JJ Shaughnessy and EB Zechmeister, *Research methods in psychology* (New York, McGraw-Hill, 1994).

at least one member of LAQ from each region with more than two years' experience in their field.[23] Judicial and government participants who satisfied this criterion were personally contacted about the research project and requests for interviews made.

The research project was explained to all participants in detail, with full disclosure as to the reason the data was being collected. I read and reviewed with the participants the consent form (including a confidentiality clause to maintain integrity) allowing for recording and collection of data.

The interview began with participants being provided with a closed-ended survey which listed carefully structured questions (appropriate to the category of participant)[24] used with a view to eliciting reliable responses.[25] The survey questions included: age, background, location, and employment. This data was designed to measure the construct validity of the research and to determine whether the information provided (semi-structured interviews) reflected the true nature of the theoretical position (literature review).

Both face-to-face and telephone interviews were undertaken, averaging approximately 90 minutes in length. Interviews with self-represented litigants required assistance from 'gatekeepers' (government participants) to assist in identifying self-represented litigants and to act as intermediaries to provide information about the research and gauge their interest. This information sharing was to be undertaken by providing gatekeepers with information pamphlets about the research (including information about the research and approved confidentiality/ethics documents) as well as my contact details, allowing the self-represented litigants to have control over their participation without feeling pressure from other participants. I made several attempts to undertaking interviews with these self-represented litigants whose

[23] It was anticipated that at least one representative from the Department of Child Safety, Youth and Women would also be involved, however, they declined to participate.
[24] As described in approved Ethics Application - Appendix 4.
[25] Hussey and Hussey (n 22) 161.

child protection matters were current at the trial stage. However, the DCSYW eventually refused to participate, or act as a gatekeeper and access to these litigants could not be obtained.

At the end of the interviews, data was collected, de-identified, and transcribed for analysis. Content analysis was be conducted on data collected and secondary data obtained throughout the survey (through observations and field notes). Quantitative research methods were used to describe and measure the level of incidences based on statistical data analysis and calculations.[26] Descriptive data analysis was used to examine the data or evidence collected in the research process, which provides a simple, yet manageable, summary that measures information to compare or contrast information provided in the semi-structured interviews and surveys.[27]

A data management plan was used whereby key data was securely stored.[28] The information collected was processed on computer hardware (software licence compliant), with password protection through network communication security. Further, the University of Southern Queensland ('USQ') provided me with free access to data, large data file transfer, and research project management,[29] all of which was used for this thesis. Finally, data collected, although archived for a three-year period to enable research completion, has been earmarked for destruction at the end of the project through confidential removal services.

C *The Interview Process*

[26] A Bryman and E Bell, *Business Research Methods* (Oxford, 4th ed, 2015) p. 160.
[27] Cheryl Thompson, 'Descriptive Data Analysis' (2009) 28(2) *Air Medical Journal* 56.
[28] This includes ownership, data processing, storage and backup, retention and disposal, as well as secure access.
[29] The University of Southern Queensland is a member of the Queensland Cyber Infrastructure Foundation.

Once appropriate consents were obtained, participants were contacted for a date, time and venue for their interviews. These appointments were confirmed in writing, along with a fully executed copy of the consents for their records.

All interviews followed a semi-structured format to maintain a comfortable environment whereby the participants could speak freely and adapt their responses to their own personal experiences. Further, a chronological approach was used to allow the participants to recall a past incident to assist in recollection of events. All interviews were recorded to ensure that their information was accurately recorded and to avoid any disruption by note-taking during the process. Each participant was specifically asked for permission for the interview to be recorded, and there was no refusal. Further, each participant was offered a copy of the recording and only one lawyer took up this request. A copy was sent to that participant on compact disk within 24 hours of the interview, through Australia Post. All participants were given the opportunity to obtain a copy of the interview transcripts. However, no participants took up this offer. All interview recordings were designated a code and no information can be identified to the participant.

Of the overall 74 participants contacted, only 22 agreed to participate in the research project. The interviewed participants were from three specific Queensland regions (Brisbane, Ipswich, and Toowoomba) as classified in Table 6.A below.

Participant[30]	**Brisbane (31)**		**Ipswich (18)**		**Toowoomba (24)**	
Self-Represented Litigant	0		0		0	
Judicial (5 years' experience)	4	Magistrate (2) Lawyer (2)	2	Magistrate (0) Lawyer (2)	11	Magistrate (4) Lawyer (7)
Government (2 years' experience)	3	LAQ (3) DCSYW (0)	1	LAQ (1) DCSYW (0)	1	LAQ (1) DCSYW (0)

Table 6.A: Participant classification

[30] This indicates the number of participants contact for participation in the research project.

The interviews were conducted with parties from 3 August 2018 (being the date of the initial correspondence requesting an interview to each potential participant) to 29 May 2019 (being the last correspondence from the Minister for Department of Child Safety Youth and Women.)

A range of professionals within the Queensland child protection courts contributed to the research by reflecting and commenting on the major themes emerging from the research questions. This enabled their perspectives (and perceptions) to be matched against other participants. Further, these professional participants were able to express their views on the nature of Queensland child protection and their role with respect to the system.

After obtaining ethics approval, a list of potential participants was drawn up with regard to the various participants to be impacted on any research undertaken. I drew from my own knowledge of experienced professionals (lawyers, magistrates, Legal Aid and DCSYW officers) based on my previous working relationships. This followed with the correspondences mentioned above, and advertising through the Queensland Law Society to obtain participants who were outside my network. All participants that responded were positive, regardless of whether they were able to participate. One participant was quite keen stating 'No problem, let's get to it! ☺', while another provided 'Thanks for the letter. It is a very worthy area of research. However, I have not done this sort of work …. for a few years.'

1 *Lawyers*

Of the 42 legal practitioners contacted, 31 (74 per cent) did not participate in interviews. Sixty-eight percent (68 per cent) did not respond; 16 per cent were interested but, on follow up, did not respond; and a further 16 per cent advised that they were no longer working in the field of Queensland child protection.

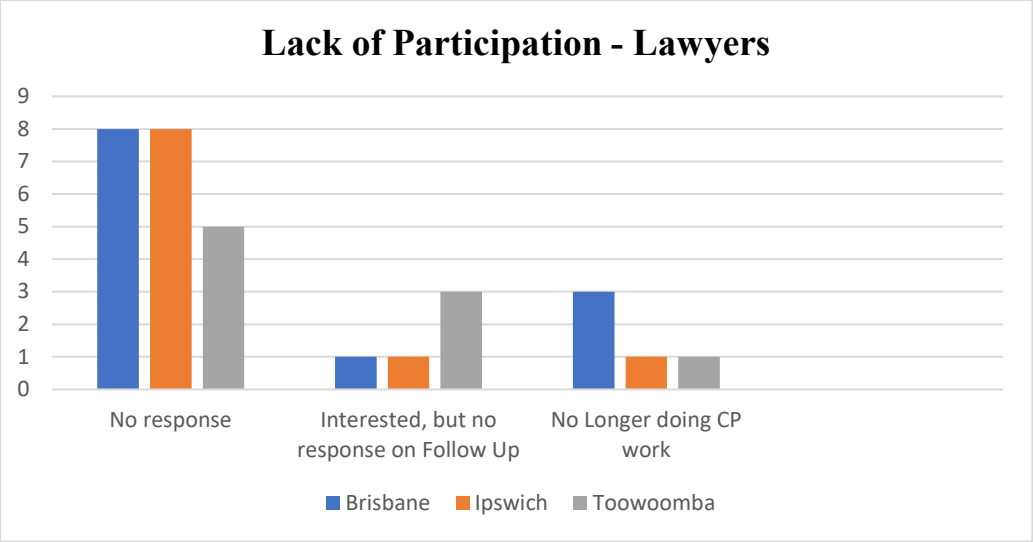

Figure 6.A: Lack of Participation - Lawyers

2 *Legal Aid*

A total of six Legal Aid officers were contacted for participation in the research project, with a total of five interviews being conducted. This represents 83 per cent of officers willing to participate in the study. It is noted that, of the six Legal Aid officers contacted, one region provided three officers to be interviewed as a group for the open-ended questions part of the research. However, the survey questions were individually undertaken.

Legal Aid Queensland has regional offices in the research areas. Prior to undertaking interviews, permission was sought through correspondence to the Legal Aid Queensland Chief Executive Officer ('LAQ CEO') (dated 1 August 2018) to interview officers within these departments. While correspondence was not received directly from the LAQ CEO, email advices were received from each participant stating that they had been given permission to be interviewed for this research project. Accordingly, based on the limited number of Legal Aid Queensland offices in the region, participants from each region were able to be interviewed.

3 *Magistrates*

A total of 25 magistrates were contacted for participation in the research project, with a total of six interviews being conducted. This represents 24 per cent of magistrates willing to participate in the study.[31] The lack of participation resonates with those of the lawyer participants in that many did not respond, and those that did, but could not participate, provided support, including 'Unfortunately I will not be able to assist you with your research. It does look to be very interesting and I wish you all the very best with your endeavour.' A breakdown is provided in Figure 6.B below.

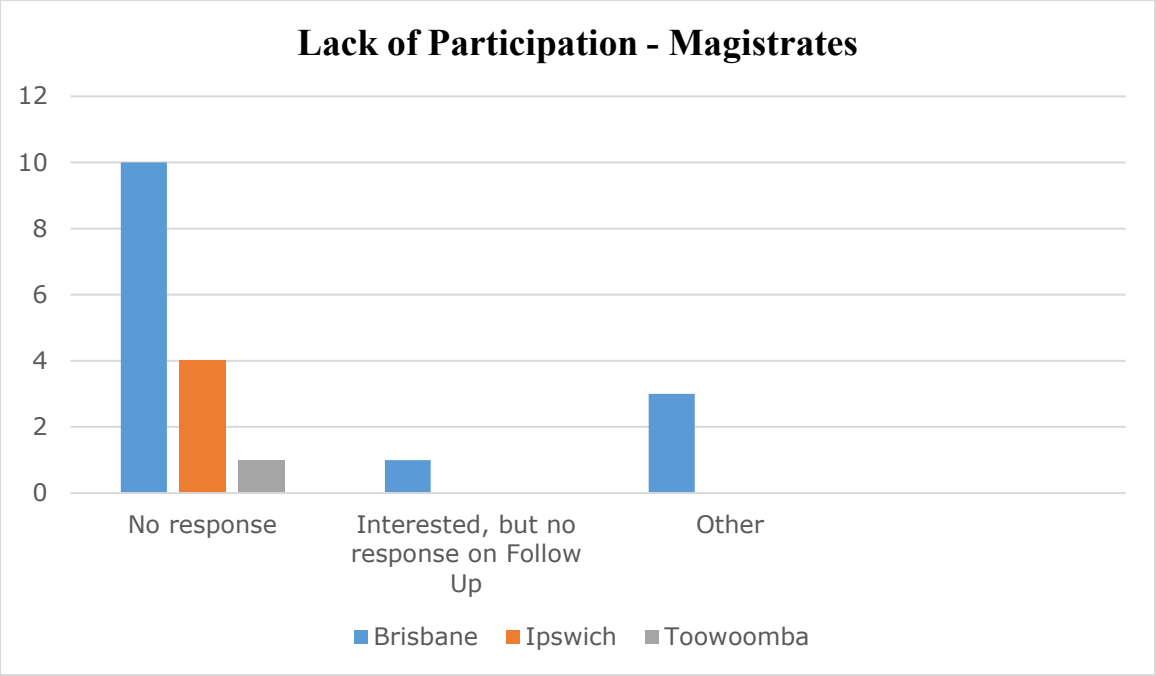

Figure 6.B: Lack of Participation - Magistrates

4 *Department of Child Safety Youth and Women and Self-Represented Litigants*

On 1 August 2018, permission was sought (through email and subsequent Australia Post) from Mr Michael Hogan, Director General of the DCSYW to undertake interviews (by telephone or face-to face) on why litigants self-represent in Queensland child protection courts. Permission was sought to speak

[31] Robert Yin, *Case Study Research: Design and Methods* (Sage Publications, 4th ed, 2009) 58. The number of cases deemed necessary or sufficient for the study is not relevant because it is not applying sampling logic.

with DCSYW Child Safety Officers ("CSOs") in the Toowoomba, Ipswich and Brisbane regions. Further, access was sought to discuss using DCSYW services in their capacity as 'gatekeepers' to organise a voluntary session with self-represented litigants in these regions to discuss this research. The goal was to obtain contact with self-represented individuals in the hope of obtaining interviews with those who are currently considering (or are in the process of) child protection hearings. This was thought to benefit the research as, from literature reviewed, no studies have canvassed these individuals to obtain their views.

A response was received from the Acting-Director General's office on 27 August 2018 (by email and subsequent Australia Post) advising that a member of the Research Projects and Partnerships team would be in contact to provide a copy of the Department's Research Application form for completion. This was received and the ethics application was completed and submitted back (by email) to DCSYW on 30 August 2018. A copy of the completed Ethics Application is attached as Appendix 4.

On 23 November 2018, a telephone call was received (and subsequent email) from DCSYW advising that they had received my application and that it was 'an interesting research topic' and looked forward to working to get it up and running. However, there were some questions raised by the cultural committee regarding non-representation of Aboriginal and Torres Strait Islander self-represented litigants. A copy of my PhD Confirmation document was provided for clarity and, in particular, noted that the research would not include an exploration of Aboriginal and Torres Strait Islander Legal Service ('ATSILS') providers as it has been widely acknowledged that they are the preferred and most culturally appropriate providers of legal services to Indigenous Australians. Thus, this aspect would not be dealt with due to high volume of information available, and thesis limitations.

On 6 February 2019, communication was received from DCSYW advising that Ipswich, Springfield, and Moreton (Strathpine) regions had endorsed my project, but that, unfortunately, Toowoomba and Brisbane

had not engaged. Suggestion was made, to avoid further delays in progressing the ethics application, to submit it with the supported regions in the hope of speeding up the approval process. The intention was that while the application was being reviewed up the line, that work would continue toward making contact with Toowoomba and Brisbane. I was satisfied with this approach and, as such, was asked to amend the application to reflect the location change. This application change was made and submitted on the same day.

On 12 February 2019, feedback was received from DCSYW that there was a concern around the feasibility of the recruitment strategy (ie the likelihood of eligible clients attending information evenings being quite low). The DCSYW asked me to consider the following:

1. Child Safety Officer (CSO) identifies eligible clients;
2. CSO will provide brochure/flyer promoting project, then:
    a. **Option 1:** CSO will obtain 'consent to contact' – this was the recommended option
    b. **Option 2:** Eligible client can contact researcher from details on brochure
3. I contact client to discuss project and arrange consent (if option 1 available)
4. Arrange one-hour interview by phone or in person with client.

I was advised that this would avoid the issue of room availability for an information evening (as promoted by me) and the requirement of CSOs' in-kind support to assist with the evening. On the suggestion of the DCSYW representative, I agreed to Option 1.

On 19 February 2019, email correspondence was again received from DCSYW advising that my ethics application had been approved by the Director and progressed to the Executive Director for review and progression to the Deputy-Director General for final review.

On 6 March 2019, further email correspondence was received from DCSYW about concerns received from the Executive Director regarding the following (my responses are added for consistency and clarity):

1. **Are CSOs necessary?**
    a. Yes, they have to be interviewed in any study, and based on the historical nature of their appearance in court, and now working with the Office of the Child and Family Official Solicitor ('OFCOS') and the Director of Child Protection Litigation ('DCPL'), their input is important.

2. **How does this project align with DCSYW objectives (part 4 of their ethics application)?**
    a. I reviewed the application and advised that it did not align with their DCSYW objectives. While advised that there needed to be some alignment, I stated that as it was in line with self-represented litigants and why they self-represent, it would not necessarily align. The parties went through the strategic document together and found objectives that correlated and incorporated these into the application. I reiterated the purpose of the research was not an objective that would necessarily align with DCSYW, but it certainly would not be disadvantageous.

3. **Concern about gaining SRLs through CSOs and privacy issues.**
    a. The DCSYW representative advised that she was happy to make contact with self-represented litigants on my behalf as she had already made a list available. I advised I was happy with this course of action. Further concern was raised that the research was only seeking four self-represented litigants from each region. I advised that the project was solely based on some regions of Queensland, and was not state-wide. It was further stated

that, if I secured four from each region, she would be "stoked" - as it was anticipated it would be difficult to get them.

4. **Would I consider doing CSO interviews by phone?**
    a. Absolutely.

The DCSYW advised that an amended application with associated tracked changes would be forthcoming for approval. This was approved and resubmitted to the DCSYW on 7 March 2019.

On 12 March 2019, I received a telephone call from the DCSYW advising that the application was not successful. The reasons provided were that the DCSYW did not believe that my research aligned with its objectives. I explained that this was an issue with another government organisation and reiterated that the project was not intended to 'bring down' the DCSYW, but to investigate why litigants are self-representing and that this could benefit the DCSYW.

I was advised that the Executive Director was concerned that parents do not like CSOs or the DCSYW. I stated that the ethics application had been changed, with the assistance of the DCSYW to reflect this, and that the objective was to obtain information from these litigants as no one had spoken to them directly when undertaking research on self-representation. It was further reiterated that the Executive Director was concerned that the project did not align with the DCSYW objectives. I advised, again, that it was not meant to, but rather to align with the objectives of the thesis. Apologies were provided by the DCSYW representative as she had worked closely with me to complete the application. I then sought further permission to make contact with CSOs and was advised that the application would have to change again and that this would still not guarantee that the areas sought in the application would be successful. I sought, and received, a follow up email confirming the reasons why the application was not approved. The email received was generic in nature and did not provide substantive reasons for the refusal other than

'it does not align strongly enough with current departmental priorities'. Further, the DCSYW provided an alternate source for recruiting self-represented litigants through engagement with the Family Inclusion Network. (Contact was made with this organisation, however, this agency advised that they did not believe that they could assist me as they comprised two individuals working in Brisbane who can only provide information through social media. They did not believe that they could assist.)

On 13 February 2019, a follow up email was sent to DCSYW seeking a more detailed response to provide assistance in moving forward. An excerpt from the response is provided below:

> I understand your surprise and frustration, there are quite a number of stakeholders that we require endorsement from in order to progress an application, and while you have satisfied most concerns, there remains an issue regarding recruitment of litigants by the Department. Such that, asking Child Safety Officers to recruit litigants may not be appropriate – consider an example of when the department has removed a child from a family due to safety concerns and they have had to attend court, but the Department then approaches them to participate in research, the likelihood of consent is low, and the potential for hostility high. However, if they were approached from a third party (such as Family Inclusion Network), independent to child safety, it may increase your chances of participation, and can avoid a situation where departmental staff are at the receiving end of a hostile client. Further, the proposal does not align strongly enough with the current departmental priorities (refer Section 4 of the application).

On 18 March 2019, an email was sent to the DCSYW seeking further clarity, with my asking whether there was still an ability to interview the DCSYW CSOs in Toowoomba, Ipswich, and Brisbane regions. A response was received on 22 March 2019 advising that there was no approval for engaging litigants or staff. Further, a new submission would be required with a focus on the Toowoomba region.

On 17 April 2019, correspondence (through Australia Post) was sent to the Honourable Diane Farmer, Minister for the Department of Child Safety, Youth and Women, seeking a reconsideration of the position

to refuse access to the DCSYW. A response was received from the Senior Policy Advisor from the Minister's Office on 29 May 2019. It provided that 'The proposed research project is an interesting topic, however the recruitment methodology is not within the scope of the services provided by the department.' However, there was no response regarding the request for contact with DCSYW and CSOs. A copy of the initial correspondences seeking interview, as well as consent documents are attached as Appendix 5.

VI METHOD OF ANALYSIS

The research involved a qualitative study undertaken with lawyers, magistrates, and legal aid officers (lawyers and non-professional staff) from Southern Queensland, in particular from Brisbane, Ipswich and Toowoomba. Requests for interviews were declined by the DCSYW.

A two-pronged interview approach was used (survey and open-ended question) with participants to ascertain their perspectives on their interactions with self-represented litigants in Queensland child protection courts.

The research methodology employed an interpretive approach using a mix of qualitative and quantitative methodologies. The use of these two different (yet collaborative) methodologies provided a data triangulation where data collected from each of the participant groups[32] provided a comprehensive view of different phenomenological views and issues surrounding access to justice in child protection courts. The qualitative methodology used semi-structured interviews and questionnaires to examine, reflect and describe participant perceptions, and to gain an understanding of their reactions and experiences rather than quantitative statistical data.[33] Semi-structured interviews complemented the phenomenological

[32] Hussey and Hussey (n 22).
[33] H Arksey and P Knight, *Interviewing for social scientists: an introductory resource with examples* (Sage Publications, Ltd, 1999) cited in Z Austin and J Sutton, 'Qualitative Research: Getting Started' (2014) 67(6) *The Canadian Journal of Hospital Pharmacy* 438.

approach as the data collection method will involve open-ended questions designed to probe for in-depth information[34] and provide insight into participant experiences in working with self-represented litigants in child protection matters.

Qualitative research highlights the qualities that are not examined or measured in terms of quantity.[35] It stresses the social nature of reality, the relationship of the researcher and the study, and any constraints that may shape the results.[36] Researchers seek to answer those questions by addressing how social experiences are created and the meaning surrounding them.[37] This is in contrast to quantitative studies that highlight the measuring and analytical relationships between the variables, as opposed to the process.[38]

This qualitative research involved analysing differing perspectives, including the researcher's thoughts and position on the research, as part of the epistemological approach used.[39] It allowed the observer to be put in the shoes of the participants, in a real world environment involving demonstrative and material practices that made their reality more visible.[40] It effectively turned the participants' world into a series of depictions based on field notes, interviews, conversations, surveys and recordings.[41] This required a naturalistic approach, meaning that qualitative research examined what was in their natural environment and making sense of the phenomena that they brought to them.[42]

[34] Greg Guest, Emily E Namey and Marilyn Mitchell, *Collecting qualitative data* (Sage Publications, Ltd, London) 120.
[35] Norman Denzin and Yvonne Lincoln, *The SAGE Handbook of Qualitative Research* (Sage Publications, 4th edition, 2011) 8.
[36] Ibid.
[37] Ibid.
[38] Ibid.
[39] Uwe Flick, *An Introduction to Qualitative Research* (Sage Publications, 5th edition, 2014) 14-15.
[40] Denzin and Lincoln (n 35) 3.
[41] Ibid.
[42] Ibid 3-4.

The overall goal was to obtain a holistic overview, using the transcendental phenomenological approach, of the participants' real lives by explaining how they came to understand and manage their day to day lives.[43] Routine and problem areas were explored with research endeavouring to capture the participants' perspectives 'from the inside' so that the meanings they attached to real world experiences were within the context of their particular environments.[44]

This research relied heavily on an in-depth examination of how particular participants viewed events and how they agreed (or disagreed) in their views. Participants' contributions, were organised into meaningful context leading to a deeper, more refined understanding of participant interaction and phenomena.[45] The study involved the use and collection of a combination of empirical materials including professional experiences, interviews along with and observations from participants'.[46] The use of wide-ranging interconnected, yet revealing, practices allowed for qualitative research to gain a better understanding of the subject matter.[47]

I collected data for information and analysis and undertook the requisite interviews and fieldwork myself.[48] Accordingly, it was especially important that the research values were explicitly stated at the beginning of the study to alleviate any perceived bias.[49] As I interviewed and observed participants, a trusting relationship often developed.[50] This became heightened in several interviews, and conversations began with participants beginning to feel comfortable enough to initiate and ask questions as well as

[43] Nicola J. Taylor, 'Care of Children: Families, Dispute Resolution and the Family Court' (PhD Thesis, University of Otago, Dunedin, New Zealand, 2005) 233-234.
[44] Ibid 234.
[45] MM Gergen and KJ Gergen, *Qualitative enquiry: Tensions and transformations* cited in Norman Denzin and Yvonne Lincoln, *The SAGE Handbook of Qualitative Research* (Sage Publications, 2nd edition) 1025-1046 cited in Nicola J. Taylor, 'Care of Children: Families, Dispute Resolution and the Family Court' (PhD Thesis, University of Otago, Dunedin, New Zealand, 2005) 234.
[46] Denzin and Lincoln (n 35) 3-4.
[47] Ibid.
[48] Taylor (n 43) 234.
[49] Ibid.
[50] Ibid.

respond to my line of enquiry.[51] This is a preferred method as interviews were intended to be as open-ended and unstructured as possible, allowing participants to readily open up about their professional experiences and provide structure to them.[52]

A *Quantitative Data Analysis*

1 *Preparing the Data, Data Screening and Transformation*

Each question was numbered and provided a unique identification code. Further, each participant (and their responses) was provided an identifier to secure anonymity. Each participant's responses to the structured interview were able to be uploaded into an Excel spreadsheet for statistical analysis. Given the small sample size, and the high number of open-ended responses, the information was not uploaded into the *Statistical Package for Social Sciences* (SPSS).

2 *Limitations on the Use of the Quantitative Data*

Due to the limited data available regarding self-represented litigants in Queensland child protection courts, the lack of response from DCSYW, as well as the small sample size, there are constraints to the quantitative analysis. Further, the results, while useful in identifying links between variables, cannot be represented as being widespread.

B *Qualitative Data Analysis*

All interviews were digitally recorded, written in field notes and transcribed solely by me in anticipation of commencing data analysis.

[51] Creswell (n 48).
[52] Taylor (n 43).

Thematic analysis is a useful strategy of data analysis that is regularly used in qualitative designs and forms the substance of analysis for the methodology review. [53] It is regularly used in research and labelled as 'qualitative research' without providing information about how the analysis put the associated data into appropriate themes and results.[54] It identifies, analyses and reports themes found within the data,[55] and is commonly used where the scope of research questions and the subject matter that can be addressed.[56]

The information collected for this research was obtained by survey, recorded interview and field notes. All materials were kept safely and confidentially stored until they were required for transcription and analysis. The identity of each participant was coded prior to interview. The recordings were confidentially transcribed solely by me. On completion of the transcription, I checked each word-for-word against the original tape, filled in any gaps and amended any errors. My role in the interviews and knowledge of the terminology used within the Queensland child protection court, and the use of field notes, meant that the tapes could be read easily. The field notes that were used were invaluable in identifying which particular participant was speaking when more than one person was being interviewed.

Each participant's story was written based on their own perspectives. This provided the ability to develop an account of the differing perspectives to ascertain their position with regard to the research questions. At times, different participant groups shared similar perspectives but, on the other hand, there were also some disparate views. Writing these accounts was an ideal way of becoming familiar with the interview material, as well as understanding the participants' professional and social views. I developed Microsoft Excel spreadsheets to summarise each participant's survey responses (eg age, education, role, etc.) to assist in identifying which transcript data was relevant to certain results.

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[53] Ashley Castleberry and Amanda Nolen, 'Thematic analysis of qualitative research data: Is it as easy as it sounds?' *ScienceDirect* (Webpage, 2018) <https://www.sciencedirect.com/science/article/pii/S1877129717300606>.
[54] Ibid.
[55] V Braun and V Clark, 'Using thematic analysis in psychology' (2006) (3)2 77-101 cited in Ashley Castleberry and Amanda Nolen, 'Thematic analysis of qualitative research data: Is it as easy as it sounds?' (2018) 10(6) *ScienceDirect* 808.
[56] Ibid.

Coding categories were developed on the research questions and the topics covered in the surveys and interviews. I coded each transcript through the use of NVivo Qualitative Analysis ('*NVivo*') software according to relevant categorising. Once this process was undertaken, computer files were created, with relevant participant information provided into the relevant file. This provided ease of access when needed. On completion, themes and sub-themes were created within these files to enable the transition from coding to writing the result findings[57].

1 *Qualitative Analysis Using NVivo*

The qualitative data analysis software program, *NVivo*, was used to conduct content analysis on the data collected. This was undertaken for data analysis on the interviews to identify and interpret common themes.[58] Further, it involved data coding and categorisation, as well as identification of themes and sub-themes.[59] The interviews were transcribed in MSWord format and any secondary data were drawn into *NVivo.* The interview data was then coded and a themed analysis was provided and placed into groups: themes, sub-themes and patterns.

Once the thematic analysis was concluded, the themes, sub-themes and examples provided were placed into a MS Excel table for thesis presentation.

Whilst the quantitative data was limited in how it could be used for the thesis, the depth of the semi-structured interviews provided information on a range of topics that, at times, went beyond the scope of the interview. The research question (with associated research issues) was exploratory and required a range of

[57] Owing to the low number of participants available for interview, the use of nVivo was limited. Further, evidence of inter-rater reliability was such that the themes could easily be obtained by any person who had reviewed the transcripts.
[58] Marilyn Healy and Chad Perry, 'Comprehensive criteria to judge validity and reliability of qualitative research within the realism paradigm' (2000) 3(3) *Qualitative Market Research: An International Journal* 118; Yoland Wadsworth, *Everyday evaluation on the run* (1997).
[59] Robert Yin, *Case Study Research: Design and Methods* (Sage Publications, 4th ed, 2009) 101.

questions and depth that would not have been possible from the sole use of a survey instrument. Further, it is unlikely that any prospective participants would have completed a survey that covered the range of topics, without a supportive interview environment.

C *Validity and Reliability*

In qualitative research, there are many diverse paradigms and methodologies available, that definitions of validity and reliability are constantly challenged.[60] Broadly speaking, the question of validity concerns whether the researcher sees what they think they see.[61] It refers to the suitability of the tools and mechanisms used.[62] For example, whether the research question is suitable for the outcome sought; the methodological choice used being appropriate for answering the specific question; the validity of the design methodology; whether the data analysis is appropriate; and conclusions being specific to the context of the research.[63] The true challenge in assessing validity lies in the concept of the participant being seen differently in philosophical perspectives.[64]

A test is seen as being "reliable" in regard to the amount of error that exists when obtaining variable measurement, eg when it can be utilised by different researchers under similar conditions, with constant results.[65] This reflects consistency and replicability, and is seen as the point where the test is free from measurable errors, eg the more measurement error happens the less reliable the test.[66] Of course, no measure is perfect and all contain some degree of error, either owing to the individual (skills, attributes,

[60] Leung, 'Validity, reliability, and generalizability in qualitative research' (July 2015) 4(3) *Journal of Family Medicine and Primary Care* 326.
[61] Flick (n 39) 483.
[62] Ibid 325.
[63] Ibid.
[64] Ibid.
[65] JH McMillan and S Schumacher, *Research in education, A Conceptual Introduction* (Scott, Foresman and Company, 2nd edition, 1998) 167.
[66] Ibid 168.

attitudes, motivation or lack thereof) or because of the way the mechanism has been designed or controlled.[67] Reliability forms the assessments estimate of error. [68]

The level of reproduction that can be expected under similar studies undertaken refers to the study's external reliability, while internal reliability refers to the extent that the study's value, outcomes and rankings, internal to the research being conducted, are agreed upon or reproduced between the researchers.[69] Both are important in terms of reliability,[70] however, the reliability of the results will depend on the likely recurrence of particular aspects of the initial data, as well as the way it is construed.[71]

Reliability is used to determine the degree of measure that is free from error and if there are no errors, the data is considered reliable.[72] A margin of result may be tolerated in qualitative research provided the logistics (both methodology and epistemological) steadily yield similar data although they may differ in character within similar proportions.[73]

VII DELIMITATIONS

The framework used in this thesis was developed from the literature review in Chapters 2 to 5. However, some practical delimitations are imposed on the research. In particular, the thesis is limited by participation[74] and travel constraints. The thesis was limited to three Queensland cities that not only have high child protection visibility,[75] but also provide ease of researcher access.

[67]Ibid 168-169.
[68] Ibid 169.
[69] Ibid 168.
[70] Ibid.
[71] Ibid.
[72] Ibid 172.
[73] Leung (n 60) 326.
[74] Further information relating to lack of participant involvement is discussed further in-depth on page 12, Table 6.A.
[75] Chapter 3, Part 2C – Queensland Child Protection Region and Research Focus.

The conceptual framework of this thesis was to approach self-represented litigants in Queensland child protection matters as a whole, rather than distinguish between cultural identities. Unfortunately, as previously discussed above, access to self-represented litigants was not possible.[76] Further, there will be no exploration of Aboriginal and Torres Strait Islander Legal Service (ATSILS) providers as it has been widely acknowledged they are the preferred and most culturally appropriate providers of legal services to Indigenous Australians.[77] Therefore, this aspect has not been dealt with because of the quantity of information available, and thesis limitations. However, there is significant information for this to be pursued in further research.

Although the thesis deals with Queensland child protection courts, attention will be focused solely on self-represented litigants (not children) and whereby family support services are not deemed applicable by the DCSYW.[78] Children, while the basis for litigation, are not parties to the proceedings.

Finally, the thesis sought the perceptions of many participants within the Queensland child protection courts[79] with respect to legal funding. Each participant represented their perspectives on legal funding based on their own experiences with LAQ and self-represented litigants. However, the purpose of the thesis is to examine why litigants self-represent in Queensland child protection courts, not to address the appropriate quantum of legal aid funding for individual litigants. Not unlike the cultural delimitations noted (high volume of research available, thesis limitations and scope), there is ample information available for this to be pursued in further research.

[76] Chapter 6, Part 5C(4) – Department of Child safety Youth and Women and Self-Represented Litigants.
[77] Senate Legal and Constitutional Affairs Committee, 'Inquiry into Access to Justice', *Australian Human Rights Commission* (Legal Submission, October 2009) 24 <https://www.humanrights.gov.au/sites/default/files/content/legal/submissions/2009/20091020_access_justice.pdf>.
[78] Chapter 3, Part 2C – Queensland Child Protection Region and Research Focus.
[79] Ibid.

A *Ethical Approval*

The Human Ethics Application (USQ HRE-H18REA121)[80] was submitted on 26 April 2018 and subsequently approved by the University of Southern Queensland on 26 July 2018.

Principles of risk, conflict of interest, informed consent, confidentiality, right to withdraw, and data collection procedures were incorporated into the research methodology. This was undertaken by way of Participation Information Sheet and/or Explanatory Statement, Informed Consent Form, Opt Out Waiver of Consent, and Consent for Interview form being provided to the participants prior to any interviews taking place.

A further issue was ensuring that there would be no risk, discomfort, or harm to participants. The interviewer explained the aim of the research project to all participants in detail, with a full disclosure as to what the information was being used for and that their confidentiality would be ensured. All participants agreed to be recorded, with only one participant group seeking to be recorded as a group.[81] Further, participants were asked to review and execute consent forms allowing for the collection of data for the project prior to the research interview. At the end of the interview, the data was collected and securely stored, both before and after transcription.

The interviewer, who is an experienced lawyer and academic in the field of child protection, is knowledgeable and sensitive to the issues surrounding child protection and solely undertook all interviews in relation to the research. The interviewer was pro-active in ensuring that participants were made aware of the availability of support networks if they appeared traumatised or upset.

[80] Appendix 4.
[81] This approach was satisfied for the open-ended interviews; however, the survey data was addressed per participant.

A central feature of the research was obtaining informed consent from each research participant. Each participant provided informed consent to their own participation, with the exception of the DCSYW, which refused to participate after the interviewer made application, on the advice and assistance of the Acting Manager of Research Projects and Partnerships and Strategy, for ethics approval. The consent protocol used was consistent with the ethical approach adopted for other research studies undertaken with regard to children and family matters.[82]

Precautions were taken to ensure that the data collected was made non-identifiable to protect the identity of the participants. I took special care to ensure that participants were able to speak freely and not be recognised by their contributions to the research. Accordingly, all participants are identified by code which is only accessible by the interviewer.

VIII CONCLUSION

The research methodology identifies how participants have, in the context of navigating access to justice, experienced dealing with self-represented litigants in Queensland child protection courts. The chapter provides the methodology used by way of a conceptualised framework and research paradigm, as well as depicting the data collection and analysis implemented. Further, the research design and methodology contributed to the reliability and validity of the data and the delimitations involved in the interview process.

The inability to obtain interviews with self-represented litigants and the overall response from the DCSYW is disappointing. However, it does not change the phenomenological methodology or framework of the thesis as the perceptions and professional views of those entrenched in child protection matters are

[82] Anne Smith, Nicola Taylor, and Pauline Tapp, 'Rethinking Children's Involvement in Decision-Making after Parental Separation' (2003) 10 *Childhood-a Global Journal of Child Research* 201-216.

able to provide rich contributions into their involvement with self-represented litigants in child protection matters.

In the next chapter, findings associated with this qualitative research will be presented. These results, based on narratives and the perceptions of those who deal with self-represented litigants in Queensland child protection courts, will provide insight into the complexity of issues surrounding access to justice.

CHAPTER 7 – INTERVIEW RESULTS

I INTRODUCTION

The interviews conducted with lawyers, magistrates and Legal Aid officers provided not just thematic data, but also an invaluable opportunity to combine their multiple views on the Queensland Children's Court, self-represented litigants, and access to justice issues. The primary purpose of this chapter is to report on the data obtained from these interviews surrounding why litigants self-represent in Queensland child protection trials. The interview results will be provided in a narrative incorporating data extracted from the participant interviews and associated commentary in Chapter 9.

II INTERVIEW RESULTS AND PERSPECTIVES

The following two chapters provide a description of the demographics of the lawyers, magistrates and Legal Aid officers, including the total number of participants contacted for contribution to the research, their age, and number of years within the legal profession - with a particular focus on child protection.

These chapters will also report on the data in relation to the thesis research question ('Why litigants self-represent in Queensland child protection matters?') by considering the three research questions (RQ1-RQ3) and the relevant information received from the structured interviews, and then present the quantitative and qualitative data obtained. A more detailed discussion will follow in Chapter 9.

A Participant Demographics

1 *Lawyers*

Forty-two lawyers were contacted for participation in the research project,[1] with a total of 11 interviews being conducted. This represents 26.19 per cent of contacted lawyers who participated in the study.

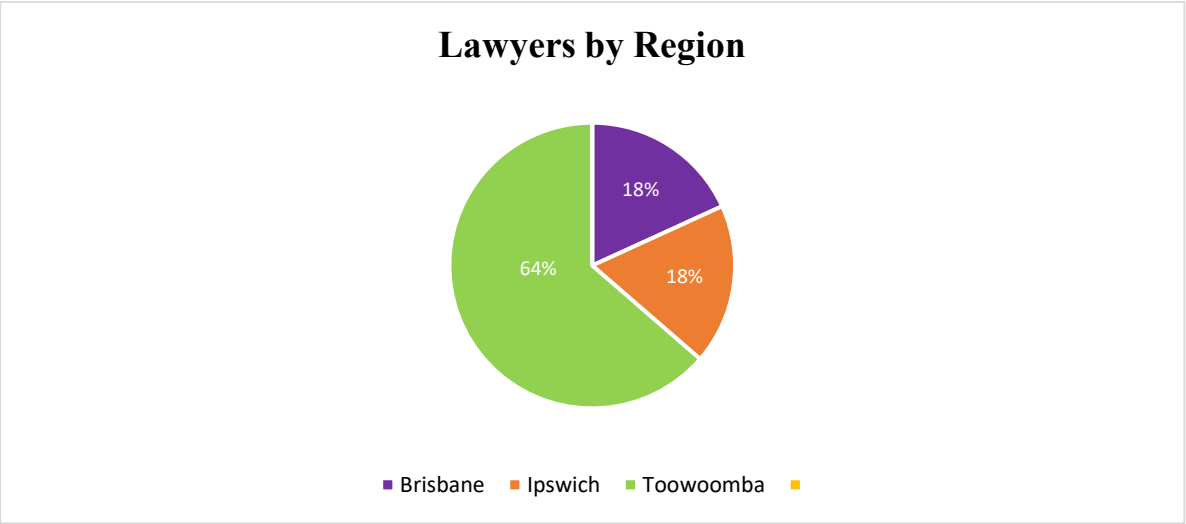

Figure 7.A: Lawyers by Region

Of the lawyers interviewed, five (44 per cent) were female and six (55 per cent) were male, with ages ranging from 20 to 50+ years. The median age was between 40 and 50 years.

[1] This also includes those who made contact through the Queensland Law Society advertisement.

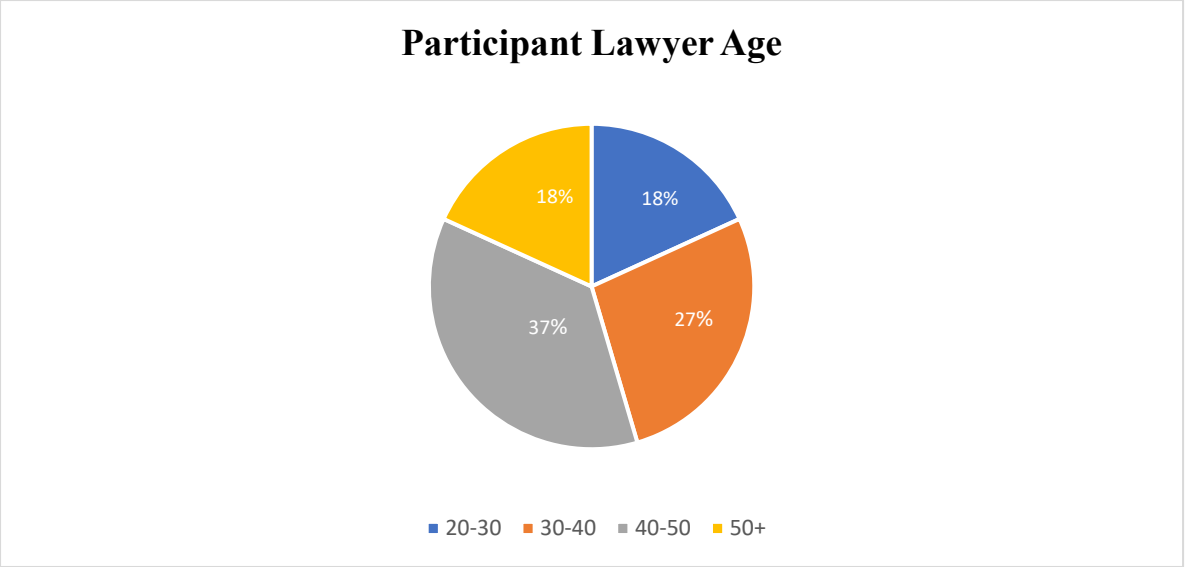

Figure 7.B: Lawyers by Age

All law participants held legal qualifications of either a Bachelor of Laws degree (nine lawyers) or Juris Doctor degree (one lawyer). Five (75 per cent) of those holding Bachelor of Laws degrees also held other qualifications (ie Family Dispute Resolution Practitioner, Bachelor of Arts, Accredited Specialists (Family Law) and Bachelor of Science).

These participants had practice experience in the legal profession ranging from five to 20+ years. The median time in the profession was between 10 and 20 years. Further, their time spent in Queensland child protection matters is within the same range, with a median time between 10 and 20 years.

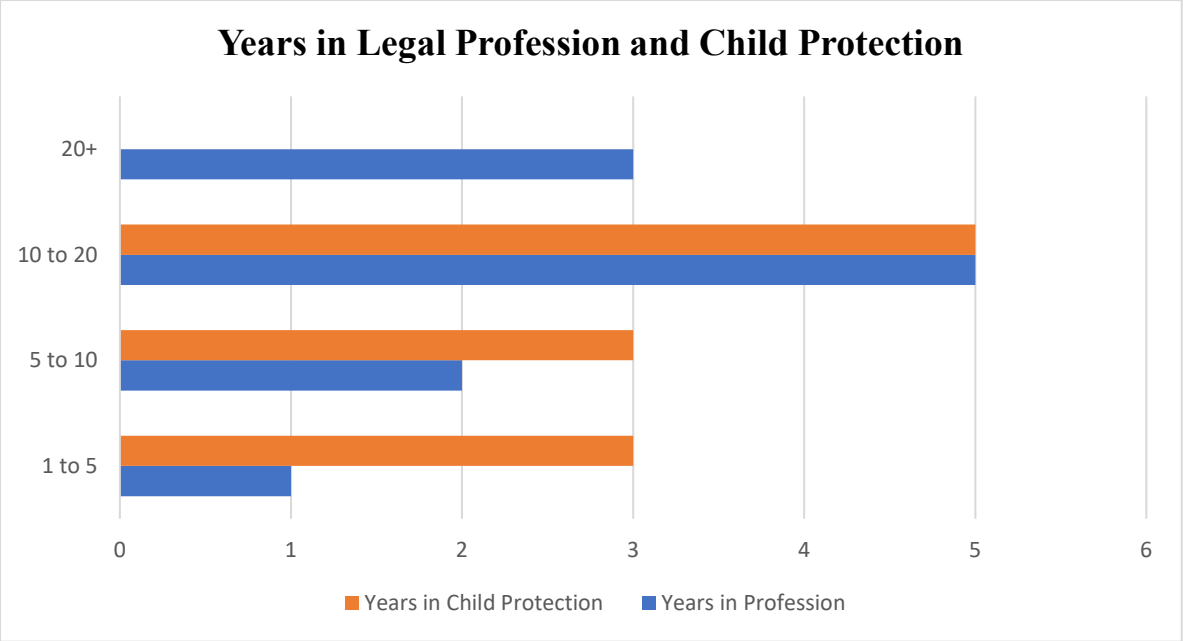

Figure 7.C: Lawyers by Legal Profession and Child Protection

2 *Legal Aid (Queensland)*

Six interviews were conducted with Legal Aid Queensland officers.[2] The representation below provides the breakdown by geographical region.

[2] Chapter 6, Part 7A – Ethical Approval. It is noted that, of the six Legal Aid officers contacted, one region provided three officers to be interviewed as a group for the open-ended questions part of the research. However, the survey questions were individually undertaken. No conclusions should be drawn whereby no answer was provided as a suitable response may have been given by a colleague or no opinion may have been held.

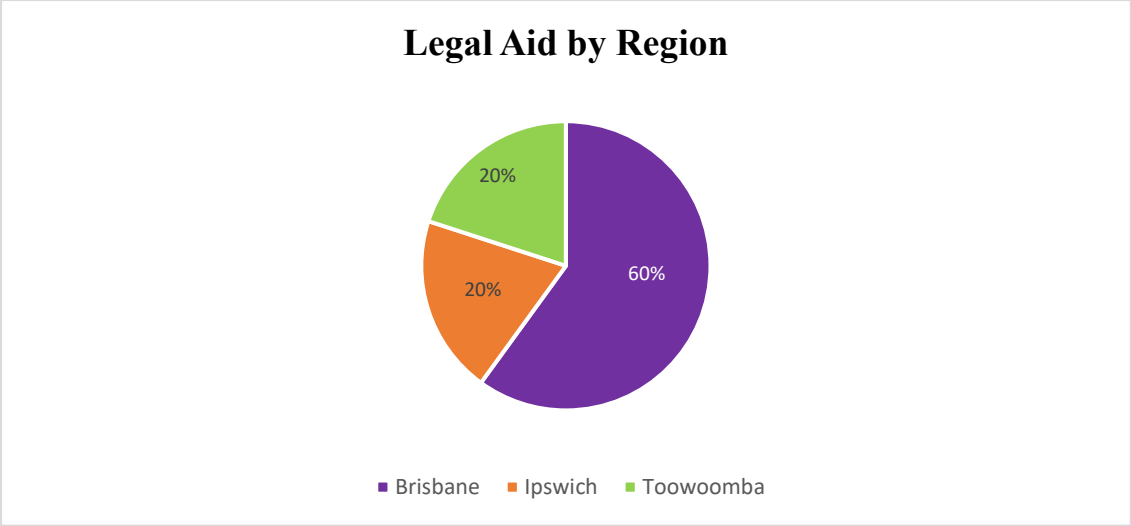

Figure 7.D: Legal Aid by Region

Of the Legal Aid participants interviewed, four (60 per cent) were female and two (40 per cent) were male, with ages ranging from 30 and 50 years.[3] The median age was between 40 and 50 years.

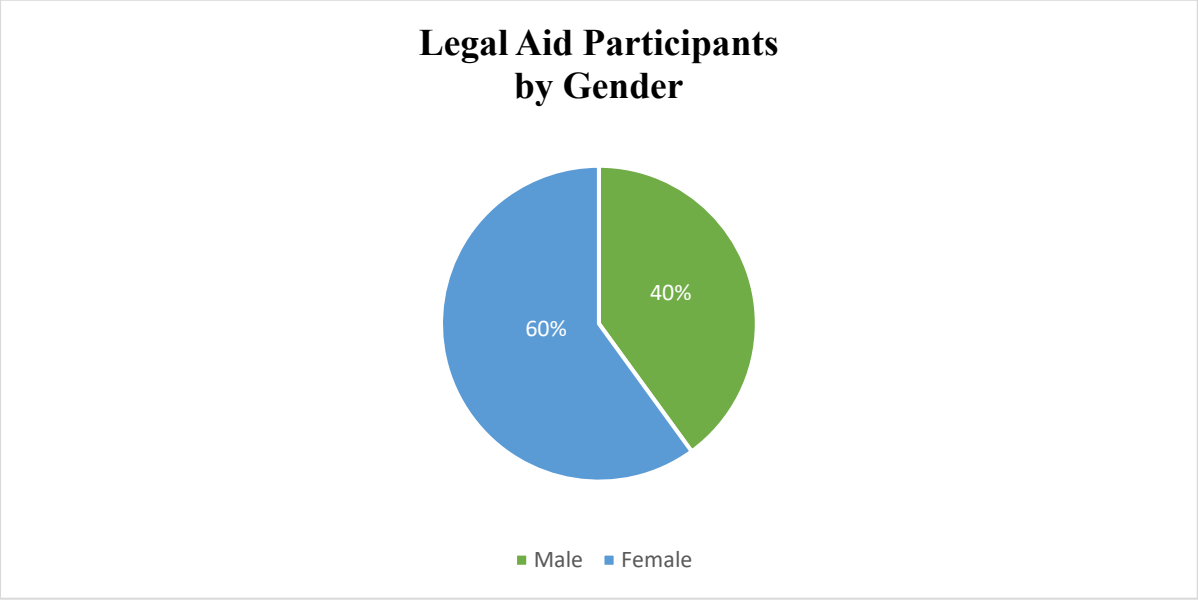

Figure 7.E: Legal Aid by Gender

[3] One Legal Aid participant did not disclose their age.

While there are no mandatory legal qualifications for Legal Aid Senior Grants officers[4] or Grants managers.[5] No Senior Grants Officers or Grants managers were interviewed. All Legal Aid officers interviewed held legal qualifications of a Bachelor of Laws degree, with three (50 per cent) also holding Separate Representative[6] qualifications (with one having further qualifications of Independent Children's Lawyer,[7] accredited mediator, and family dispute resolution practitioner). While these participants had legal experience and qualifications, five (75 per cent) held positions as lawyers, and one (25 per cent) was in a management position.

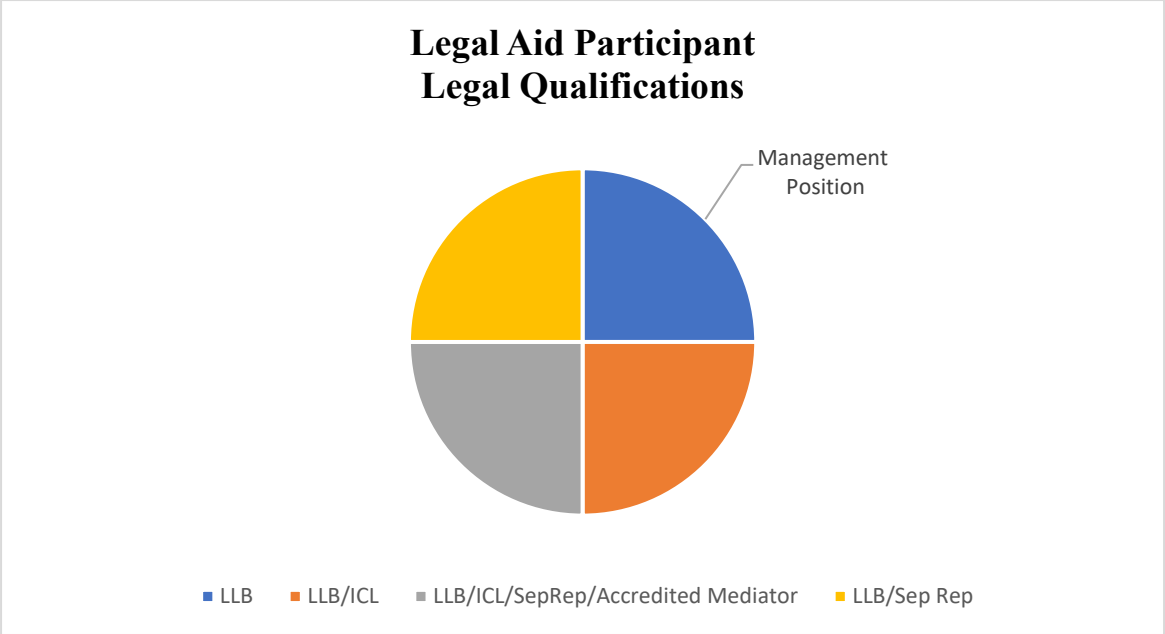

Figure 7.F: Legal Aid by Qualification

As provided in Figure 7.G, these participants had a wealth of time in Legal Aid ranging from seven to 20 years. The median time in the profession was approximately 10 years.

[4] Legal Aid Queensland, *EOI: Senior Grants Officer* (Employment Application, Grants/Grants directorate, 2 August 2019) 3.
[5] Legal Aid Queensland, *EOI: Grants Officer* (Employment Application, Grants/Grants Division, 6 August 2019) 3.
[6] Chapter 3, Part 2F – Separate Representative.
[7] The Independent Children's Lawyer ('ICL') represents the interest of the child in proceedings and appointed by court. They do not take instructions on from the child (although their views may be considered) but are to act impartially and solely in the child's best interest. *Family Law Act 1975* (Cth) s 68L.

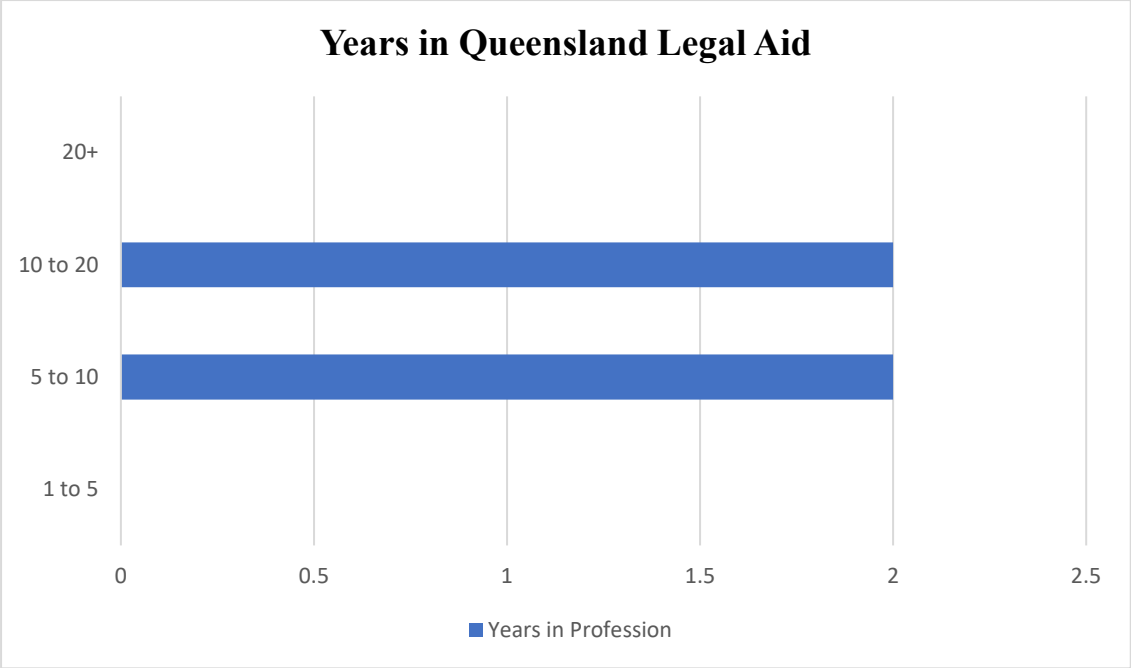

Figure 7.G: Legal Aid Participants – Years in Queensland

3 *Magistrates*

Of the magistrates interviewed, four (67 per cent) were female and two (33 per cent) were male, with ages ranging from 40 to 50+ years. The median age was 50+ years.

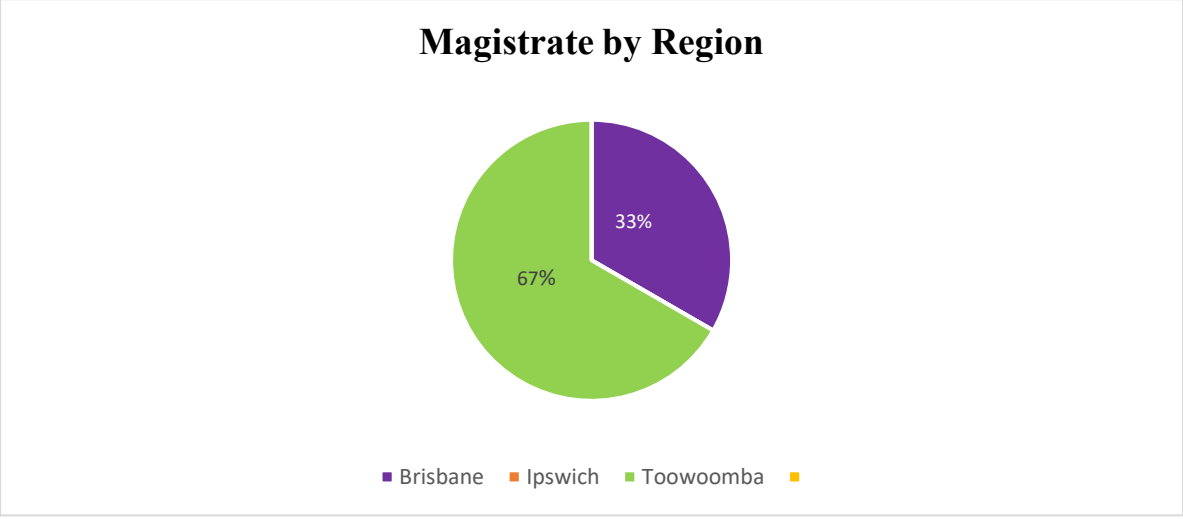

Figure 7.H: Magistrates by Region

Of the six magistrates interviewed, five (83 per cent) held legal qualifications of a Bachelor of Laws, with one (17 per cent) magistrate having no formal qualifications, albeit specialist training in personal injuries law. Of the qualifications held by the five (83 per cent) magistrates interviewed, these include a Master of Laws, Bachelor of Arts, Graduate Certificate in Management, and an Associate Diploma in Business Justice Administration.

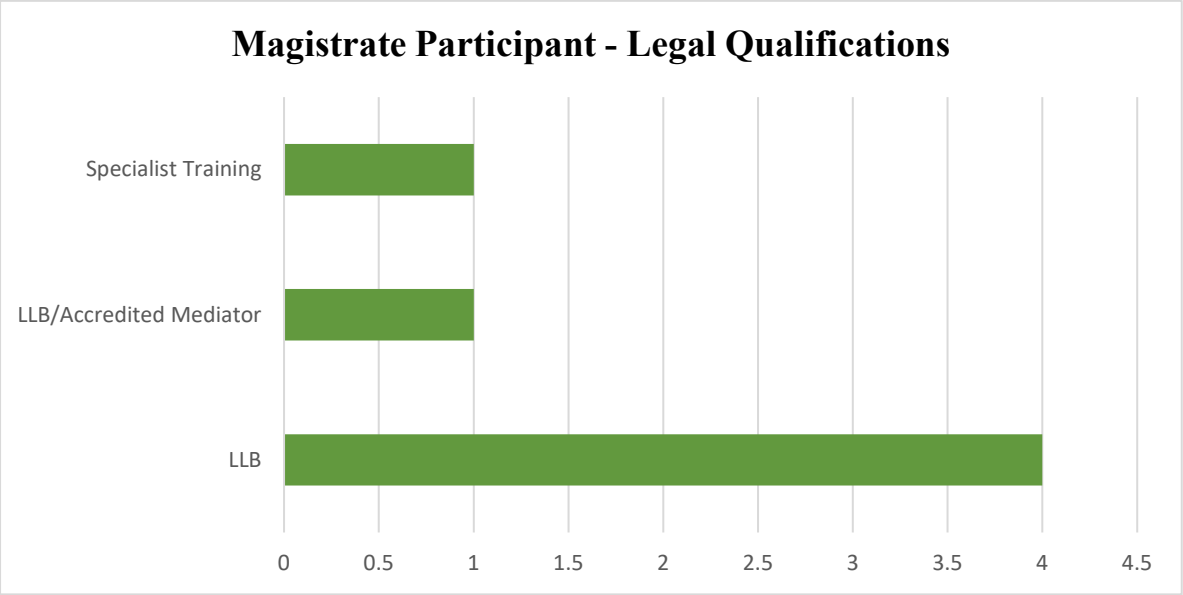

Figure 7.I: Magistrate Qualifications

As set out in Figure 7.J, these participants had over 20+ years in the legal profession. Their time spent in the Queensland child protection courts is within the same range, with a median time of 10 to 20 years.

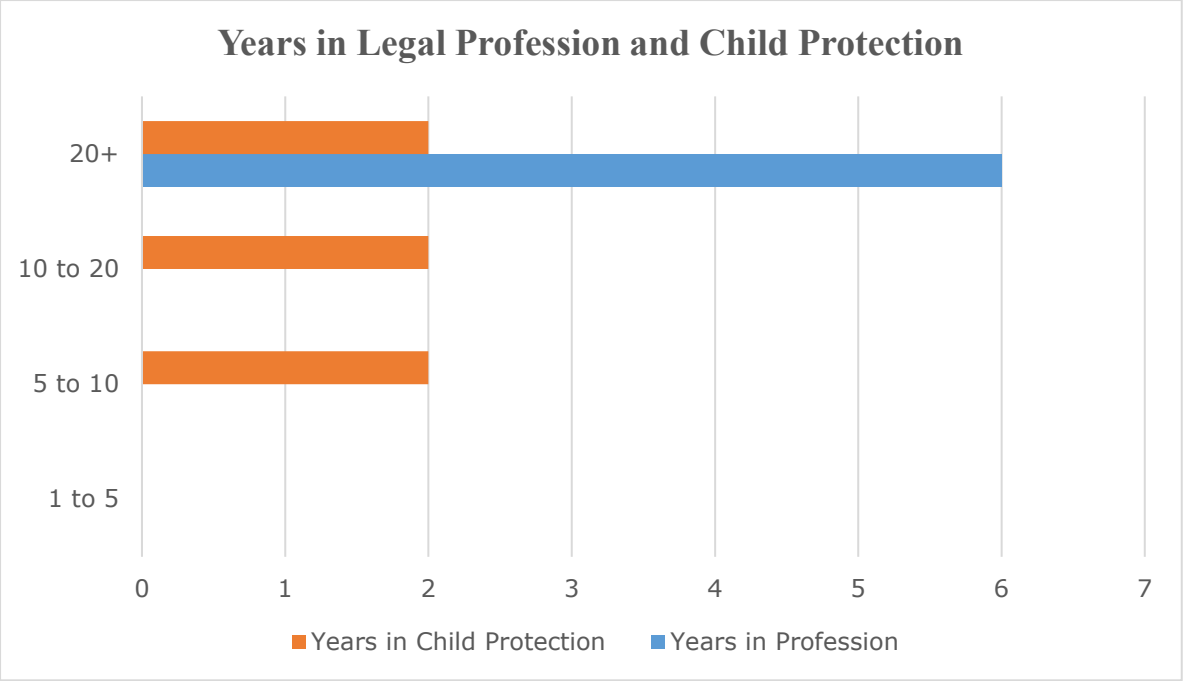

Figure 7.J: Magistrates by Years in Legal Profession and Child Protection

B Child Protection Clients

The purpose of interviewing participants within the Queensland child protection jurisdiction, was to explore why litigants self-represent in Queensland child protection courts (RQ1- RQ3). Owing to the Department of Child Safety Youth and Women ('DCSYW') refusing to participate or act as gatekeepers for facilitating contact with the self-represented litigants, qualitative data was sourced from interviews with contributing lawyers, magistrates, and Legal Aid officers.

1 *Gender of parents seeking assistance*

As provided in Figure 7.K, data collected from both lawyers and Legal Aid Queensland indicated that women were more likely to seek assistance in the Queensland child protection jurisdiction. Of the lawyers interviewed, seven (64 per cent) indicated that there was an equal balance between men and women seeking assistance. All participating Legal Aid officers agreed that women are more likely to seek assistance than men, which is proportional to the remaining four lawyers interviewed.

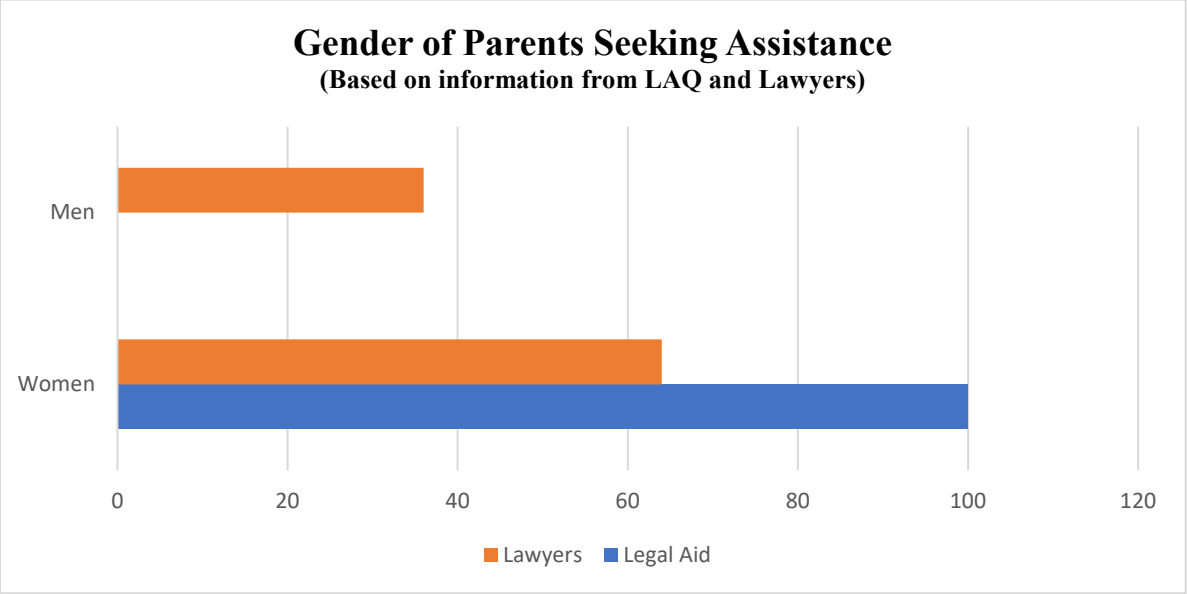

Figure 7.K: Gender of Parents Seeking Assistance (Based on information from LAQ and Lawyers)

2 *Parental representation*

Nine (82 per cent) of the lawyers interviewed advised that they, at the time of their interview, were not currently representing a parent at trial in the Queensland child protection courts.

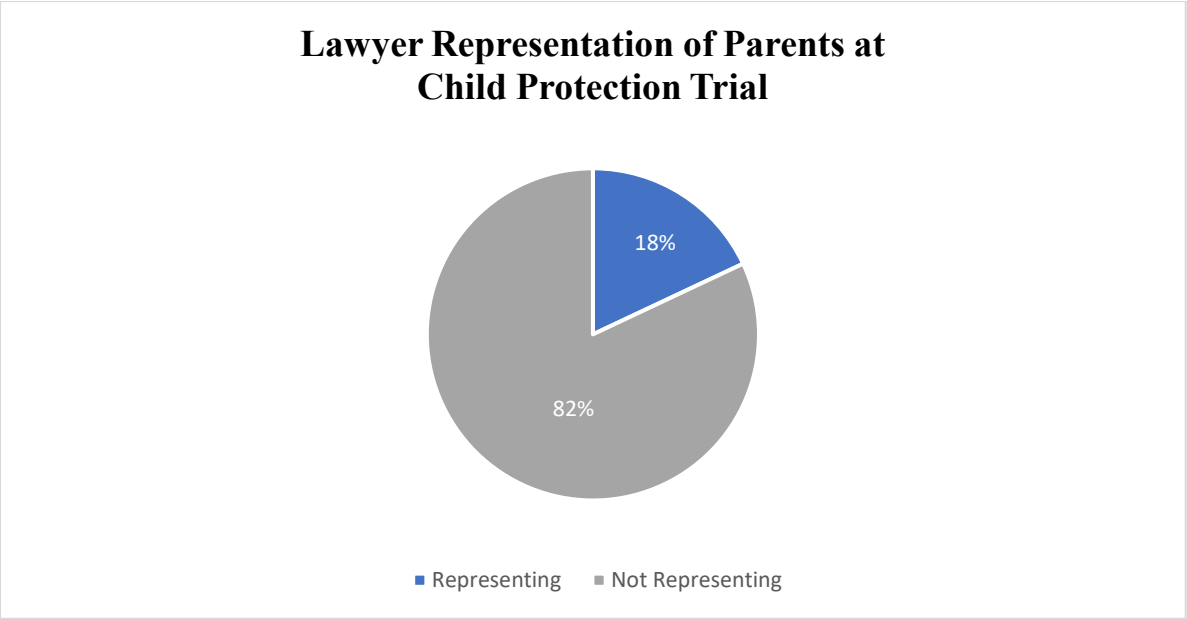

Figure 7.L: Parental Representation at Child Protection Trial

Four lawyers (36 per cent) advised that, on average, they would maintain between one to five child protection matters at any one time. Two lawyers (18 per cent) advised that they maintained between five and 10 matters and a further four (36 per cent) maintained between 10 and 20. One lawyer (10 per cent) was unable to provide information in this regard as they were strictly providing Duty Lawyer services.

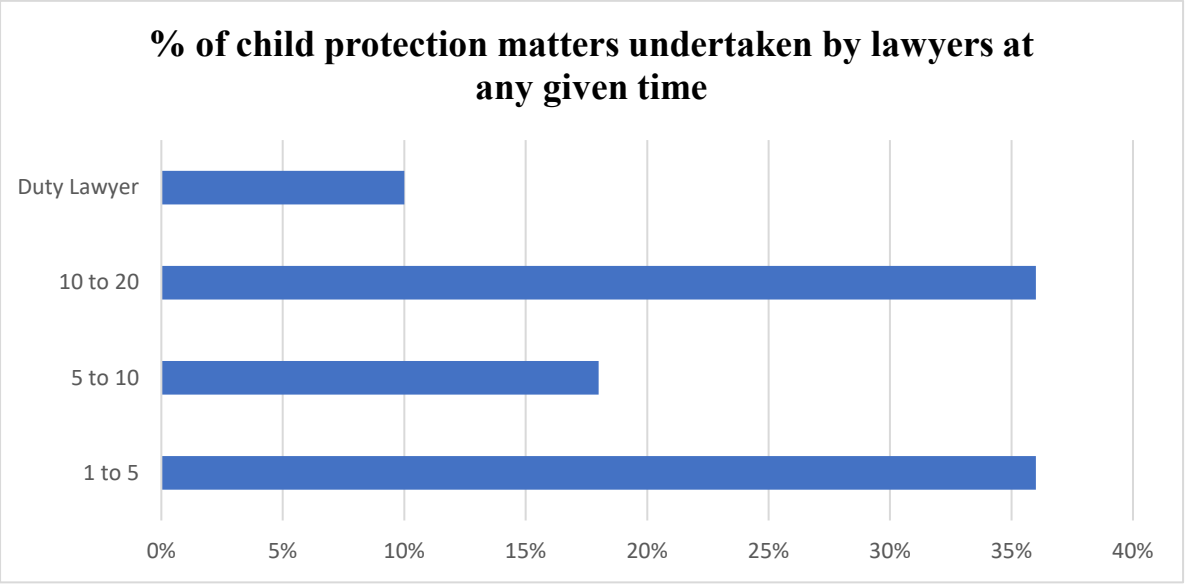

Figure 7.M: Percentage of Child Protection Matters Undertaken by Lawyers at any Given Time

3 *Number of legally aided clients funded for trial*

Both lawyers and Legal Aid officers were asked, based on their experience, how many of their legally aided clients had been funded to proceed to trial. Three (75 per cent) lawyers advised that they had between one and five legally aided clients funded to trial, whereas three (67 per cent) Legal Aid officers had over 20 legally aided clients obtain aid for trial. Only one (33 per cent) Legal Aid officer had between one and five clients obtain funding.

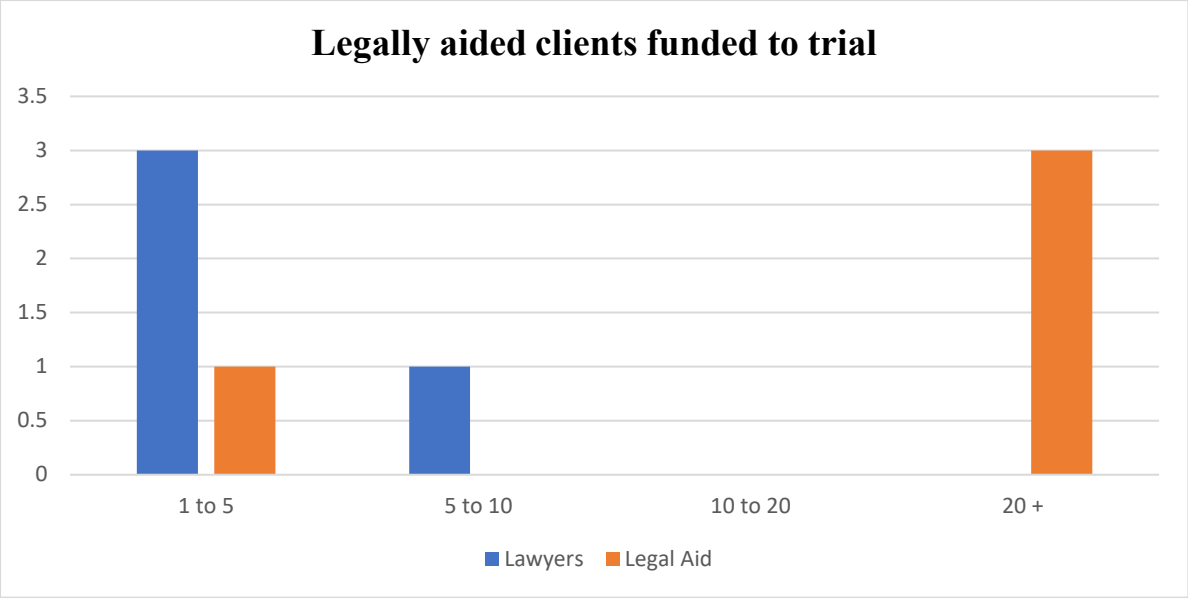

Figure 7.N: Legally aided clients funded to trial

From the small sample, what can be noted is that lawyers are saying that there are not many legally aided clients funded to trial. In contrast, Legal Aid participants note a higher number of legally aided clients funded to trial. The small number of child protection trials did not go unnoticed by participating magistrates.

Theme	Response to lack of child protection trials being held
No funding available for child protection trials (over a substantial period).	In my whole 20 years on the bench, I might have done two and that would include…I mean, that is made even worse when I look at the period when I did actually do a lot of child protection work in the court. So, between 1998 when I was appointed and say 2007, so that sort of narrows the period – two child protection trials. When I was in (inaudible) which was over a 14-year period, we just weren't funded so I didn't do any.[8] (*Magistrate*)

Table 7.A: Lack of child protection trials being sought

[8] Interview with BM2 (Kathy Reeves, Telephone Interview, 6 January 2019).

4 *Number of current child protection matters*

Three (27 per cent) lawyers advised they had no current child protection matters before the Queensland Children's Court. Five (45 per cent) stated they had between one and five; one (10 per cent) had between five and 10; and two (18 per cent) had between 10 and 20 current child protection matters.

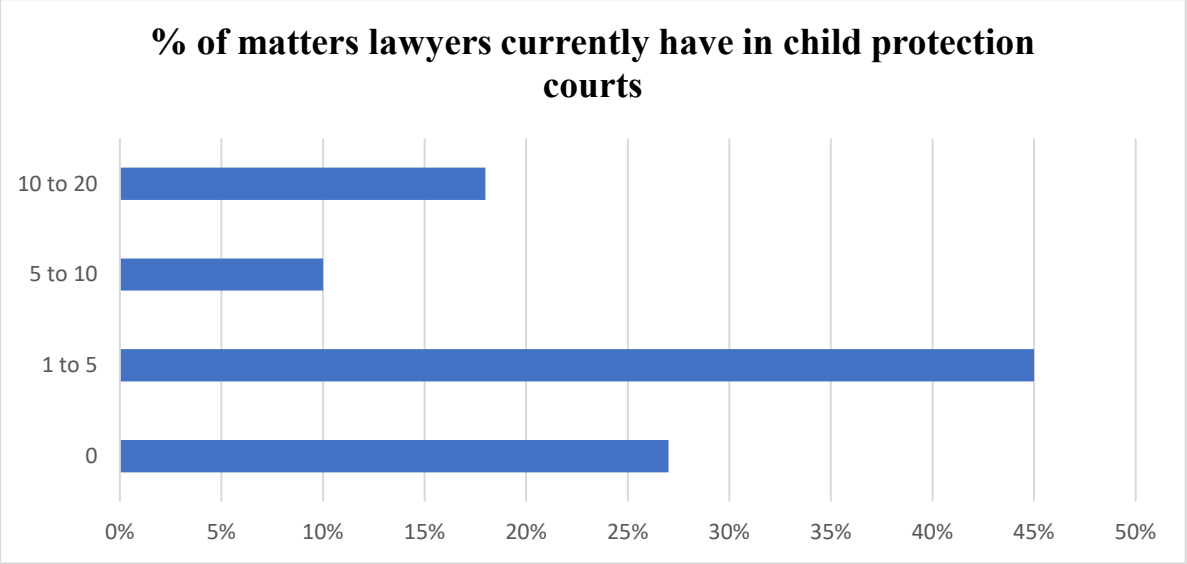

Figure 7.O: Percentage of Matters Lawyers currently have in Child Protection Courts

Magistrates were asked about the number of child protection matters currently before their child protection court.

Theme	Example of responses to child protection procedures
Child protection matters are run at callovers.	….we don't actually have files allocated to a magistrate for them to oversee the whole file. We run them in callovers[9] so whatever magistrate does the child protection callover from week to week is overseeing that file at the callover. Not on an ongoing basis and then probably anything up to five or six of us that might sit in that court in any given week.[10] (*Magistrate*)

Table 7.B: Child protection procedures

[9] Callovers are very short court appearances whereby the participants (lawyers and self-represented parties) advise the court of the progress of their case. Where a matter is set down for hearing, the court provides the parties with trial directions, including filing and review dates. Interview with TM4 (Kathy Reeves, Telephone Interview, 17 March 2021).
[10] Interview with BM8 (Kathy Reeves, Telephone Interview, 7 January 2019).

5 *Child protection trials per annum*

Participating magistrates were asked about the number of child protection matters they ran per annum. Based on their experiences, two (33 per cent) advised they had no child protection trials in the past year, while four (67 per cent) ran between one and five trials per annum.

Theme	Examples of Response to number of child protection trials run per year
Less than five trials in their legal careers.	I think I was involved in two trials in my career.[11] (*Lawyer*)
	Lucky to run one. Probably not even one because mostly Legal Aid ones they won't fund for trial and rarely can people afford to pay privately.[12] (*Lawyer*)
	I don't think I've done a full trial in two years.[13] (*Magistrate*)
	They quite often negotiate to clear them up before we even start a hearing.[14] (*Magistrate*)
	I would say that everyone is doing 1-5. Individually we would be looking at less than 5 per year.[15] (*Legal Aid officer*)
Always gets legal aid funding when required	Right, maybe five. I always get aid. I… If I wanted to be approved, it gets approved.[16] (*Legal Aid officer*)
Between 10 to 15 in legal career	Probably between 10-15…..that actually went to trial. There would have been a lot of others that settled their case by court ordered conferences and whatnot.[17] (*Magistrate*)

Table 7.C: Number of child protection trials run per year

Participant interview results and associated commentary indicate that there are a low number of chid protection trials run per year in the applicable Queensland regions. The qualitative commentary suggests that there are different factors to be considered, including lack of Legal Aid Queensland funding and matters settling before trial.

[11] Interview with IL2 (Kathy Reeves, In-person Interview, 8 November 2018).
[12] Interview with TL4 (Kathy Reeves, In-person Interview, 11 November 2018).
[13] Interview with TM4 (Kathy Reeves, In-person Interview, 28 December 2018).
[14] Interview with TM3 (Kathy Reeves, In-person Interview, 7 November 2018).
[15] Interview with BLA1-2 (Kathy Reeves, In-person Interview, 15 January 2019).
[16] Interview with TLA1 (Kathy Reeves, In-person Interview, 9 January 2019).
[17] Interview with BM8 (Kathy Reeves, In-person Interview, 7 January 2019).

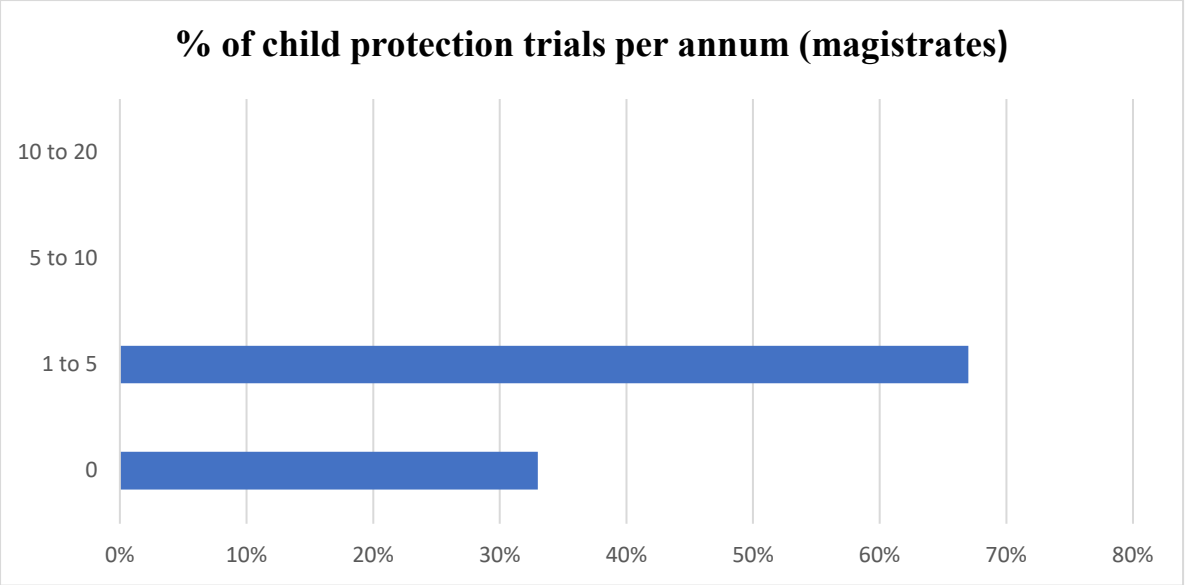

Figure 7.P: Percentage of Child Protection Trials Per Annum (Magistrates)

6 *Proportion of legally aided child protection clients*

Three (27 per cent) of private practice lawyers interviewed advised that they had no legally aided child protection clients, which contrasts with the 100 per cent of those from Legal Aid.

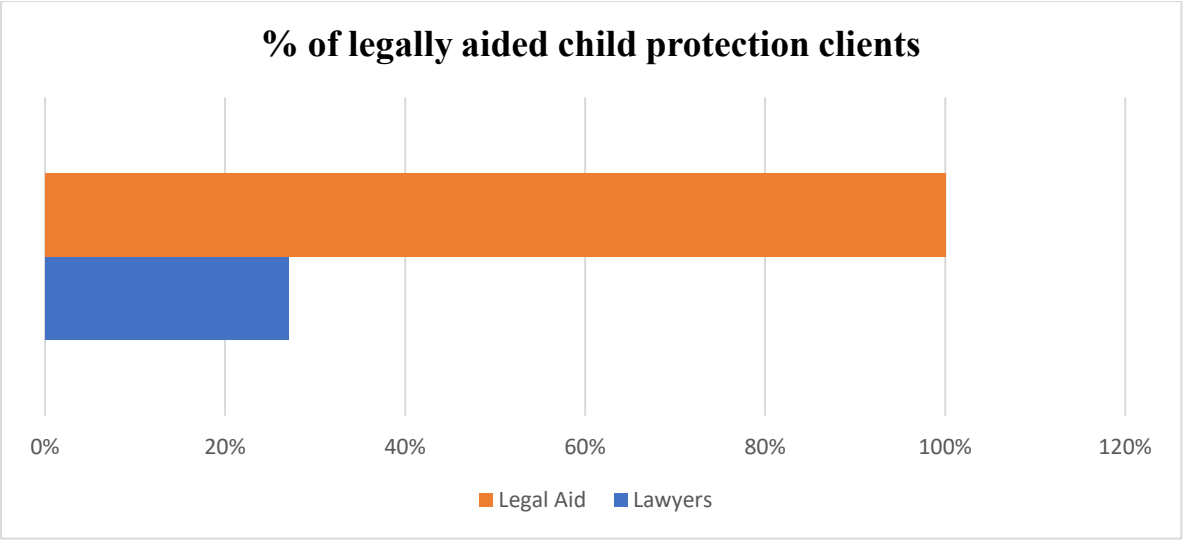

Figure 7.Q: Percentage of Legally Aided Child Protection Clients

Theme	Responses to proportion of clients being legally aided in child protection matters
Advice provided only through Duty Lawyer Service	Well, none now. Look, well the only other thing to say is, look, I am still Duty Lawyer for child protection at this point. So, it is basically giving them advice outside of court, prior to them going into court. So, excluding the Duty Lawyer stuff, I don't have any more legal aid clients anymore because I have left the child protection panel.[18] (*Lawyer*)
Depends on the stage of the process	Sometimes it's difficult because when they come to court, they don't have legal representation and then they'll often go and get some legal advice. Once they get their legal advice and negotiation into their family group meeting and get to a COC they will agree to whatever and they may have had a lawyer doing that. So, I suppose it depends on what stage of the process.[19] (*Magistrate*)

Table 7.D: Proportion of clients being legally aided in child protection matters

The quantitative data reflects a clear imbalance between the proportion of legally aided child protection clients being provided to lawyers, as opposed to in-house Legal Aid Queensland lawyers. The qualitative data provides some insight in terms of why this imbalance occurs, including lawyers not being on the Legal Aid Queensland child protection panel,[20] Duty Lawyer services, and the stage of the child protection matter.

7 *Are Lawyers still on the Legal Aid panel for child protection matters?*

Five (45 per cent) of lawyers interviewed advised that they were still on the legal aid panel for Queensland child protection matters.

[18] Interview with TL3 (Kathy Reeves, Phone Interview, 8 November 2018).
[19] Interview with TM3.
[20] Lawyers on the Legal Aid Queensland child protection panel, also known as the Legal Aid Queensland preferred suppliers, undertake work on behalf of Legal Aid Queensland in child protection matters in accordance with their Commonwealth and State legal aid service priorities. Legal Aid Queensland, 'Becoming a Legal Aid Service Provider', *Legal Aid Queensland* <https://www.legalaid.qld.gov.au/For-lawyers/Become-a-legal-aid-service-provider >

Theme	Responses to issues raised by lawyers on the Legal Aid Queensland child protection panel
Lawyers are leaving Legal Aid Queensland child protection panel due to funding issues.	Because as I understand it, there isn't many on the child protection… I think there is Legal Aid itself, and it might be (redacted firm) or something, but there is hardly anyone on the one in Toowoomba doing child protection legal aid because they just can't cover their costs.[21] (*Lawyer*)
No availability to put evidence before the court by way of hearing.	The difficulty I found was that, in the time that I was on the panel, I was not actually, ever once, funded to run a final hearing.[22] (*Lawyer*)
	Of all the clients I represented, I was never able to put any of their evidence before the court, so effectively, all you are doing is providing them advice about the evidence…so, it is all one sided?[23] (*Lawyer*)
Professional lawyers prepare Department case files causing power imbalance.	So, to me, it just seemed to come down to the guise of legal representation, particularly when you are confronted now with professional lawyers attending, whose sole purpose was to prepare the case on behalf of child safety or the Director of Child Protection Litigation, on the basis of that evidence, in any event, prepare that case. It really is reaching the point of being ludicrous, frankly, and is ludicrous really.[24] (*Lawyer*)

Table 7.E: Issues raised by lawyers on the Legal Aid Queensland child protection panel

The results indicate that there are fewer lawyers on the Legal Aid Queensland child protection panel. Quantitatively, this was perceived to be due to poor Legal Aid funding for professional legal services to clients, especially at the trial phase.

8 *Privately funded child protection clients represented per annum*

Lawyers interviewed provided a range of between approximately one and 25 privately funded clients, with a mean of approximately 10 clients per annum.

[21] Interview with TL4.
[22] Interview with TL3.
[23] Ibid.
[24] Ibid.

Theme	Response to litigants who can afford private representation
Those able to afford private representation are intervening parties rather than parents.	All of mine are grandparents, stepfathers, other family that are trying to intervene in the child protection jurisdiction to get children out of foster care and into family care basically. They are s113[25] non-participants and that means obviously what they can do under the *Child Protection Act* is very limited in a lot of circumstances. So sometimes they will come and see me and will give them some advice, and I may see them once or twice, and that may be all that can be done, there is no sort of, there is really nothing more that we can do for them, but depending on the circumstances, some of them will engage some of them on an ongoing basis and I would say I have about three of those. I would say throughout the year I would have, I might have, if I were going to guess, I would, without trying to work out the figures, I would guess I would have about 17 to 20 come in per year to get some sort of advice privately in child protection matters.[26] (*Lawyer*)

Table 7.F: Litigants who can afford private representation

The results indicate that lawyers did not have many privately funded child protection clients. Those that did contact lawyers were often seeking advice rather than representation.

9 *Initial contact with child protection litigants*

All participants (magistrates, lawyers, and Legal Aid Queensland officers) interviewed were consistent in their responses: Legal Aid referrals were the prominent form of contact between lawyers and child protection litigants. Secondary to this were other practitioners, referrals from the DCSYW child safety officers, return clients (eg from family law matters), and even word of mouth.

[25] Section 113 of the *Child Protection Act* 1999 (Qld) provides that a person who is not a party may, by court order, be allowed to take part in the proceeding by doing all or some of the things that a party is or may be allowed to do.
[26] Interview with TL3.

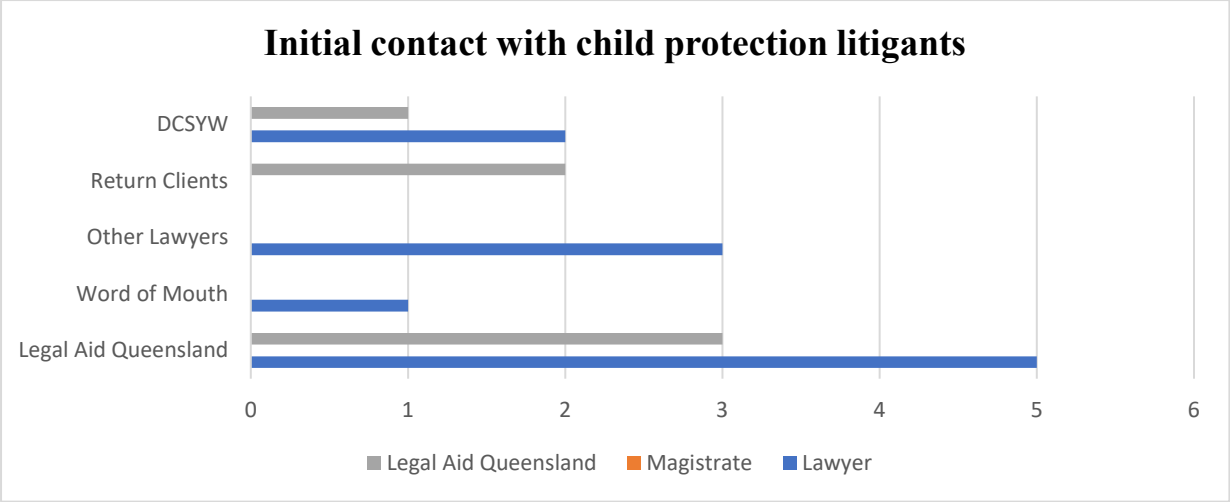

Figure 7.R: Initial Contact with Child Protection Litigants

Information gleaned from all participant interviews indicated that the main source of contact between lawyers and child protection litigants are from Legal Aid Queensland referrals.

10 *Response to instances where legal aid funding was exhausted during a matter*

Of the 11 lawyers interviewed, 10 (91 per cent) responded to this question confirming that they had instances where legal aid funding ran out during a child protection matter.

Theme	Responses to reactions of lawyers after legal aid funding expires
Lack of funding forces 'encouragement' for negotiation between the parties.	I have not had a matter where aid ran out because I have typically advised the client as to, "well look this is where it sits" and a lot of them do consent.[27] (*Lawyer*)
No funding, no representation.	If a matter ran out, we had a policy, the policy at (firm name redacted) was that if they don't get aid, they don't get work.[28] (*Lawyer*)
Lack of funding forces pro bono legal representation.	I stay there and finish the mention.[29] (*Lawyer*)
The amount of work undertaken for legally aided parties is not reflective of what is provided by way of grant funding.	But for us, as an internal lawyer, what they do is they record how many hours you worked on the file against that grant of aid and often, and unfortunately (name redacted) are often seeing double, triple hours are allocated. So… there is no way you can do that in a grant of aid. It is impossible. Can't be done.[30] (*Lawyer*)
	Yeah, we always complete, like you never get as many hours from legal aid as you spend on the matter.[31] (*Lawyer*)

Table 7.G: Reactions of lawyers after legal aid funding expires

The resulting quantitative and qualitative data provides that most lawyers working within Queensland child protection have had instances where funding expired during the matter. However, their reactions and responses as to what they did after the funding expired were different. Some lawyers advised that they ceased to act when funding ran out, whereby others continued working in a pro bono type role.

B Are self-represented litigants distrustful of the legal profession? (RQ1)

1 Are self-represented litigants held to the same court standards as the DCSYW?

All interview participants disagreed that self-represented litigants are held to the same standards as the DCSYW.

[27] Interview with IL12 (Kathy Reeves, In-person Interview, 12 January 2019).
[28] Ibid.
[29] Interview with TL10 (Kathy Reeves, In-person Interview, 14 January 2019).
[30] Interview with TL15 (Kathy Reeves, In-person Interview, 24 November 2018).
[31] Interview with TL4.

Theme	Responses of magistrates and Legal Aid officers to the unlimited resources of DCSYW
Litigants from lower socio economic, poorly educated or dysfunctional backgrounds cannot be expected to self-represent against a legally represented Department.	…. we have got unrepresented people, usually poorly educated, financial strained, and come from fairly dysfunctional family backgrounds. Well, you can't expect self-represented people to have the same level of understanding of the Act as you can the government, expected to be a model litigant. So, you can't expect them to have the same level of knowledge.[32] (*Magistrate*)
Self-represented litigants, up against a legally represented Department, should be provided court assistance.	Because they have got those issues or they have been in children's care themselves, they need to be legally represented. If they can't do that, then it is a matter for the court to provide some assistance itself, which you wouldn't think of giving a legally represented Department.[33] (*Magistrate*)

Table 7.H: Magistrate and Legal Aid officer responses to the unlimited resources of DCSYW

As a government entity, the DCSYW, is subject to 'model litigant' ethical standards.[34] The quantitative data clearly shows that all participants interviewed (lawyers, magistrates and Legal Aid officers) agree that there is a disparity in the standard of representation within the Queensland child protection courts. Magistrates and Legal Aid officers both touched on the fact that the DCSYW have unlimited resources available to them, as opposed to the marginalised and dysfunctional self-represented litigant.

2 *Do litigants self-represent in Queensland child protection matters due to a distrust of lawyers?*

All participants disagreed that litigants self-represent in Queensland child protection matters due to a distrust of lawyers.

[32] Interview with TM4.
[33] Interview with BM13 (Kathy Reeves, Telephone Interview, 6 January 2019).
[34] Due to their very nature, Queensland and its government agencies, including OFCOS and DCPL, are held to a higher litigation standard. They must act fairly and efficiently in defending or maintaining litigation. This includes (but is not limited to): acting honestly and fairly, dealing with matters promptly and consistently, keeping costs to a minimum, and considering alternative dispute resolution where required. However, this does not mean that they are limited in their ability to act firmly to protect its interests. Department of Justice and Attorney-General, 'Model Litigant Principles", *Queensland Government* (Webpage, 1 October 2020) 1-3 <http://www.justice.qld.gov.au/__data/assets/pdf_file/0006/164679/modellitigant-principles.pdf>. Breaches of the model litigant standards are enforceable under s55ZF of the *Judiciary Act 1903* (Cth).

Theme	Response to perceived litigant expectations from their lawyer
Litigants expect that lawyers should be aggressive and adversarial, rather than objective and reasonable.	….. [a litigant] might get frustrated with their lawyer in these proceedings might be if their lawyer is telling them, 'you need to engage with the Department,' because I guess it's when someone employs a lawyer for this, they expect their lawyer to go charging in and say 'this is all lies, my client is innocent.'[35] (*Legal Aid officer*)

Table 7.I: Perceived litigant expectations from their lawyer

The results indicate that litigants may become frustrated with the process, the DCSYW, and even their lawyer. Despite this frustration, all participants agreed that self-represented litigants do not hold a distrust of lawyers. Again, the interview results will be provided in a narrative in Chapter 9.

C Are the effects of limited access to funding a major contributing factor to self-representation? (RQ2)

1 *Is self-representation in Queensland child protection increasing?*

Nine (90 per cent) lawyers and five (83 per cent) magistrates agreed that, in fact, there had been an increase in self-representation, with three (75 per cent) Legal Aid officers disagreeing. In disagreeing, they provided that, owing to changes in the merits test, many other agencies (including DCSYW) are now able to advise litigants that they can get funding. As one officer put it 'Because child safety prefers that people are represented'.[36]

[35] Interview with BLA1-1 (Kathy Reeves, In-person Interview, 15 January 2019).
[36] Interview with BLA1-2.

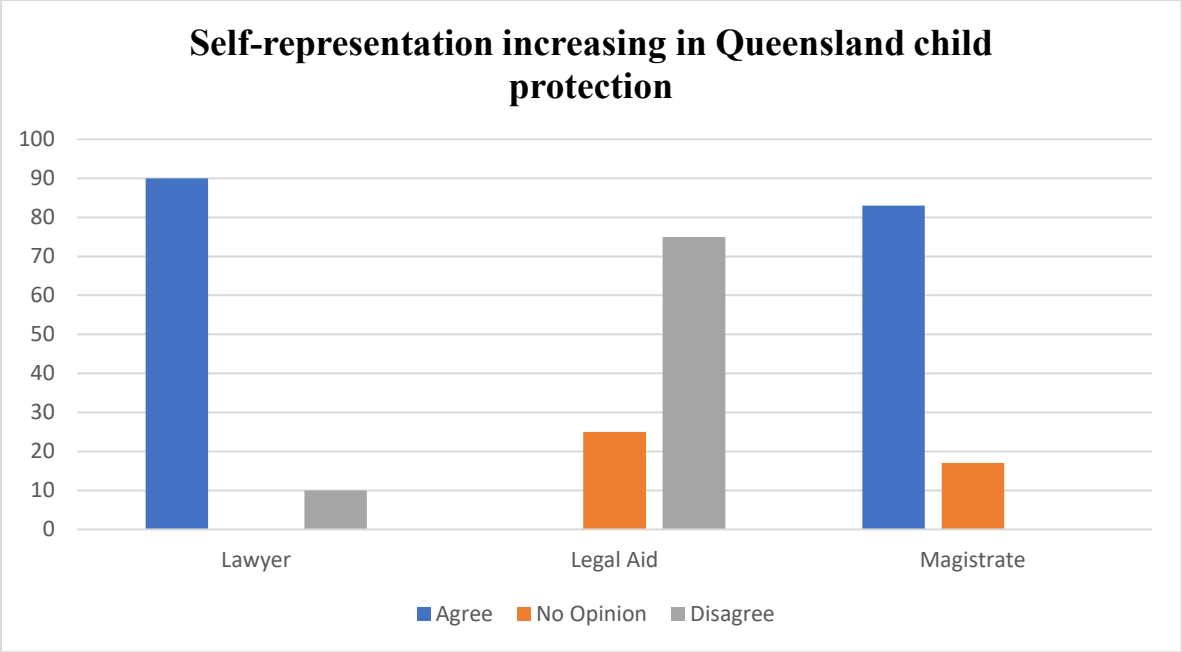

Figure 7.S: Self-representation increasing in Queensland child protection

Theme	Responses to self-represented litigants in Queensland child protection trials
While legal aid funding has improved for family group meetings and court ordered conferences, interim and final hearings are stagnant to declining.	I guess it depends. The answer to your question really depends on what stage you are at. If you are talking at final hearing, I would say it is increasing or at least stagnant at a pretty high rate of non-represented. If you are talking about a lot of those early stage mentions, Legal Aid are often funding for those, so if the clients are putting in an application, I would say, over the last three or four years, particularly with how I have said that they have opened up so that they are automatically given the grants for family group meetings and court ordered conferences. I would say for that stage of the process, Legal Aid representation had increased and improved. But in the case of final hearings, or running interim hearings, I would say it was stagnant to declining.[37] (*Lawyer*)
Legal Aid Queensland does well for funding particular stages of matters, however, less people are being funded for a hearing.	Well, I think that the ability for Legal Aid to fund hearings, more matters are going to hearings, I think, and so there is only the same amount of money to go around each year. I think there is more pressure on Legal Aid for hearing funding. I think they do quite well for funding for particular stages of the matter going through court but if you are looking at hearings, I think that generally, the pressure is on and there is less people being funded for a hearing. There are probably a whole lot of reasons for that, not just financial.[38] *(Magistrate)*

Table 7.J: Child protection litigants in Queensland child protection trials

[37] Interview with TL3.
[38] Interview with BM8.

The quantitative information received from the participants was substantial with both lawyers and magistrates agreeing that there had been an increase in self-representation in the Queensland child protection courts. In contrast, Legal Aid officers believed there was a decrease as litigants were able to obtain funding based on changes to the merits test. Despite the divergence in position, the qualitative data qualified both views. Both lawyers and magistrates agreed that Legal Aid funding had improved with the changes to the merits test, but only up to (not including) funding for trials.

2 *Do litigants self-represent due to funding issues?*

Nine (91 per cent) lawyers and all participating (six) magistrates agreed that, in fact, there had been an increase to self-representation due to funding issues, with three (75 per cent) of Legal Aid officers disagreeing.

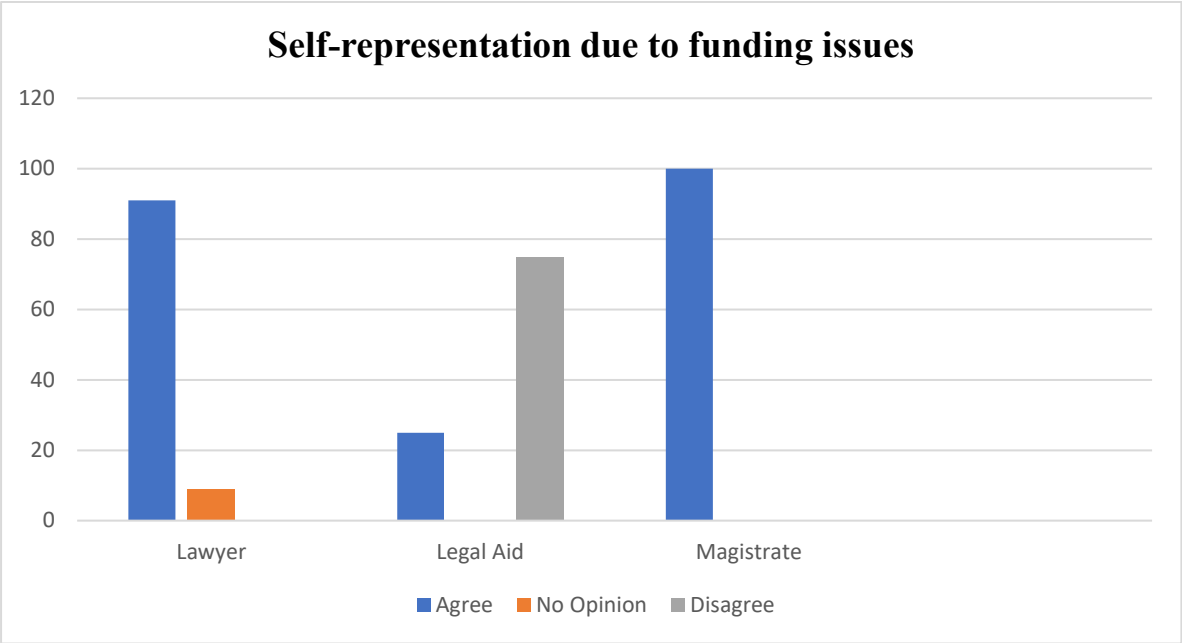

Figure 7.T: Self-representation due to funding issues

Theme	Responses to whether there had been an increase to self-representation due to funding issues
From the beginning, some litigants are prejudiced based on non-funding issues	There are so many other issues going on such as prejudices…in any event, in terms of mental health, their [self-represented litigants] ability to access any funding that might be available to complete the forms for Legal Aid …...[39] (*Lawyer*)
	If they had funding, they would take it. They would have representation.[40] (*Lawyer*)

Table 7.K: Whether there is an increase in self-representation due to lack of funding

Both quantitative and qualitative data reflects that funding remains an issue for litigants in Queensland child protection courts. The issue of Legal Aid funding is discussed in Chapter 9 in relation to RQ2.

3 *Should self-represented litigants be provided with Legal Aid funding for trial?*

Seven (64 per cent) lawyers agreed that self-represented litigants should have a right to Legal Aid funding (one lawyer disagreed, with three (27 per cent) providing no opinion). Of the participating Legal Aid officers, two (50 per cent) held no opinion, while one (25 per cent) agreed and one (25 per cent) disagreed. Three (50 per cent) magistrates disagreed (two agreed and one had no opinion).

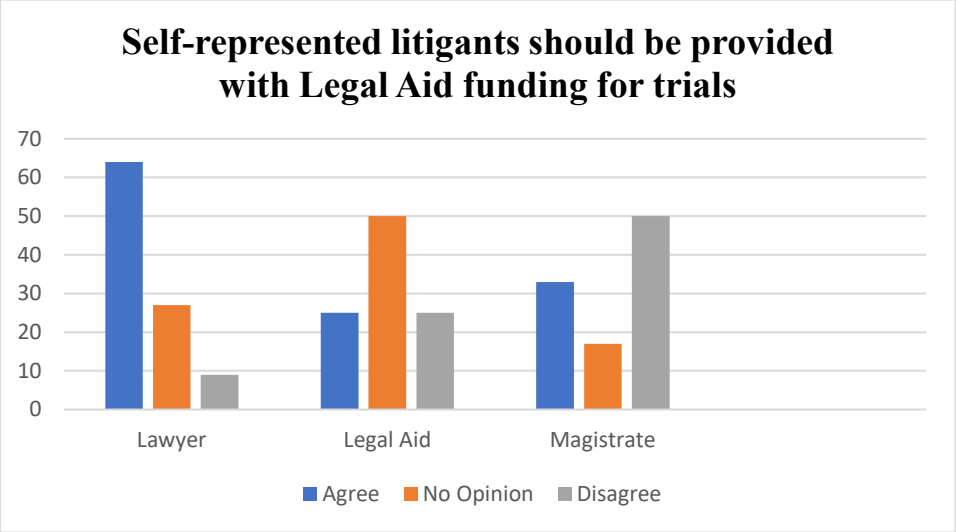

Figure 7.U: Self-represented litigants should be provided with Legal Aid funding for trials

[39] Interview with TL10.
[40] Interview with TL5 (Kathy Reeves, In-Person Interview, 8 November 2018).

Theme	Responses to self-represented litigants not receiving funding for child protection trials
Current legal aid funding guidelines limit decision-making.	I think Legal Aid should take a more holistic approach to decision-making about funding for trial rather than simply using the current guidelines that are limiting.[41] (*Lawyer*)
Legal Aid funding is limited and, while it would be better used in assisting those helping children, it is currently not being used to fund any marginalised litigants at trial.	I am caught in two minds about this. My traditional position has been, I mean there are some child protection clients out there who frankly, it might be a complete waste of money at funding them at trial. You have got a limited pot of money, I would ultimately like to see that money, which is taxpayer money, for instance, funded to help other people that are in a better position to assist the children because the parents are really quite clearly unable to care for these children and shouldn't care for these children. But having said that, the fact that they just don't fund any of these clients…Yeah, look, more and more I am leaning toward the view, look, I think they should all be represented.[42] (*Lawyer*)
Merits tests are necessary.	I think that there has always got to be a merits test somewhere or else the courts will be, you know, just overloaded with trials that have no real contestable matters. I think there must be a merits test.[43] (*Magistrate*)
Some people would go to trial without legitimate reason.	I do think that some people are not meritorious and if everybody was funded for trial then there would be people running trial just without any legitimate reason other than they want to and that is not a good use of public money and it would also create havoc in the court because just about every matter would potentially go to trial.[44] (*Magistrate*)
Need funding for trials to cross-examine	Oh, I agree that they should if they are going to trial, it makes it much easier…. And for them because if you say you can cross-examine and they don't agree with what they're saying (inaudible) it is like deer in headlights (inaudible) What do I say, or they will start saying things and it's just like their statement. That is not cross-examination. That is very difficult.[45] (*Magistrate*)
Some cases are worthy of trial funding based on merit.	At the end of the day, legal aid funding is a function of government – yours and mine taxes. Do you spend your money on cases that are doomed to fail? Is that a responsible way of expending public money? On the other hand, there are cases where the Legal Aid office sees merit in defending cases, and they fund them.[46] (*Magistrate*)
It is about the best interest of the children.	Well, we are not here for the SRLs, we are not here for the parents, we are here for the children. It is the best interest of the children. Sometimes people sort of forget that, think we are here to placate the parents-and we are not.[47] (*Magistrate*)

Table 7.L: Self-represented litigants not receiving funding for child protection trials

[41] Interview with BL11 (Kathy Reeves, Telephone Interview, 5 November 2018).
[42] Interview with TL15.
[43] Interview with TM5.
[44] Interview with BM8.
[45] Interview with TM3.
[46] Interview with TM4.
[47] Interview with TM5.

Magistrates universally disagreed, but also believed that there must be a merits test 'somewhere' or else the court would be overloaded with trials that have no contestable matters. Participating lawyers agreed that some applications are without merit and that Legal Aid would not expect, nor should be expected, to fund every litigant simply because they are in a trial. However, it was often thought that there needs to be a greater flexibility in Legal Aid Queensland policy and decision-making.

4 *On the premise of potential detrimental effects to children, should self-represented litigants have a right to legal aid funding for trial?*

All participants agreed that, because of the premise of potential detrimental effects to children, self-represented litigants have a right to legal aid funding.

Theme	Responses to the premise of potential detrimental effects to children that self-represented litigants have a right to legal aid funding
Power imbalance vs misuse of public funds	I think there is an argument that because that course of the power imbalance that every person in a child protection trial should have the right to representation. However, there are cases that could not be seen to be anything other than a misuse of public funds, where public funds are in great demand. I would not want a situation where legal it was put in a position of not being able to fund matters because it had funded a large number of matters that were totally without merit.[48] (*Lawyer*)
	Yeah, well personally, I think that everyone has a right provided they meet the means test and also provided that they meet the merits. My personal view is that you shouldn't just receive taxpayer-funded money if you are not really worthy. If you are not deserving. I know that's a pretty awful thing to say. But if there is no merit, if you are a parent that is not so good, then to take something to trial, perhaps that money could be better spent on parental courses or something. You see both ends of things. It would be easy to say that everyone deserves the money, but you also have to think, well the money has got to come from somewhere. You don't want to give people false hope on prospects as well. Simply going to trial is not going to help.[49] (*Lawyer*)

[48] Interview with BL11.
[49] Interview with TL11 (Kathy Reeves, In-person Interview, 13 January 2019).

Theme	Responses to the premise of potential detrimental effects to children that self-represented litigants have a right to legal aid funding
Legal aid test is satisfactory	I suspect the test is satisfactory, the issue is taken with those who (inaudible) and use their discretion to grant aid.[50] (*Lawyer*)
Grants officers do not have a law background yet make important legal funding decisions	One bugbear that I have always had with Legal Aid is that you have a person, a grants officer, with no law degree, who is effectively judge, jury and executioner of the merits of a legal case. They don't know the law, nor do they know the particular circumstances, yet they just decide whether your case has merit or not. And the review mechanisms are not that good, you have got effectively, people are being funded by Legal Aid so they know what side their bread is buttered on and, rarely, reviews are successful at Legal Aid.[51] (*Lawyer*)
	They certainly do have a right to legal aid funding up to a point where it becomes clear that pursuing the matter to trial is pointless. They should certainly be represented until all the evidence is in. Then at that point there needs to be a decision made as to, you know, what is likely to happen, just like in any other – well in my experience, in most other jurisdictions. You know, where the Legal Aid office makes decisions based on merit and if you are not likely to succeed then they don't get funding to go to trial. I agree [legal aid grants officers should have legal background]. And they used to back in the day when I worked in the Legal Aid office. They were all lawyers.[52] (*Magistrate*)
No right to funding, but a right to access funding	I think I would agree that they would have a right to funding but I don't think it should be automatic. They have a right to access to the funding.[53] (*Magistrate*)
Inexperienced DCSYW officers	So, generally speaking, I think that the Department is right, they may go overboard in some respects, but for the most part, they get it right.[54] (*Magistrate*)
Merits test can be strict, but must be supported to ensure best interest of children.	I think I'm influenced by matters that I am running and I think that there are people who think, it's the best interest jurisdiction and I have, I guess enough experiences with people who, it's not about the children, it is about point scoring so I feel that would just entrench that sort of thing. And I think the merits thing, whilst it can be a bit strict, in my view, I would not support a complete drop off of the merits.[55] (*Legal Aid officer*)

Table 7.M: Potential detrimental effects to children that self-represented litigants have a right to legal aid funding

[50] Interview with BL13 (Kathy Reeves, Telephone Interview, 30 January 2019).
[51] Interview with TL4.
[52] Interview with BM13.
[53] Interview with BM8.
[54] Interview with TM4.
[55] Interview with BLA1-2.

One Legal Aid lawyer advised that if it was an application for a long-term guardianship order, then there should be aid, even if it is hopeless.[56] The reasoning, by way of analogy, was that Legal Aid funds murder trials all the time where the person is clearly guilty, but money is spent on the trial because the person has a right to representation for such a serious charge.

Theme	Responses to perceived funding contradictions between criminal and child protection matters
Criminals facing six months or more in prison get a grant of aid for trial due to loss of liberty, as opposed to child protection litigants who may lose their children.	I think, if I compare it to crime, so if you are facing six months or more in prison, you are given a grant of aid. Compare that to child safety, you have got these families that are going to lose their children for a minimum of two years on a short term custody order or potentially 18 years, depending on the age of the child, obviously you don't know how long that will be… but to tear a family apart, put them in care for years...and they are not entitled – but a criminal, or an alleged criminal, who might face six months of loss of their liberties, six months imprisonment, they get a grant of aid regardless of whether they have a good prospect of success.[57] (*Lawyer*)
There should be no compulsory legal aid funding because it can lead to lawyers 'accumulating matters'.	Legal Aid is not a bottomless pit, as it were, and if hopeless cases are to be funded they ought to be the most serious ones in the courts of criminal law where people's liberties are affected. Of course, I appreciate that the people here, children are pretty important as well, but if we are to remain a civilised country then liberty should be the thing that is most protected. So, I am not in favour of compulsively funding because sometimes it can lead to …… it can perhaps lead to lawyers accumulating files in the same way that doctors use to accumulate patients for fashionable procedures.[58] (*Legal Aid officer*)

Table 7.N: Perceived funding contradictions between criminal and child protection matters

All participants held the view that litigants have a right to access legal representation. The general view was that access to Legal Aid funding should be a right, but not "automatic"[59] due to limited resources.

[56] Interview with ILA1 (Kathy Reeves, Telephone Interview, 8 January 2019).
[57] Interview with TL15.
[58] Interview with TLA1.
[59] Interview with BM8.

5 *Is Legal Aid criteria for funding child protection matters (means and merits test) satisfactory?*

Of those interviewed, nine lawyers (82 per cent) and three (50 per cent) magistrates disagreed that Legal Aid criteria for funding child protection matters was satisfactory. In contrast, three (75 per cent) of the participating Legal Aid officers believed the criteria were satisfactory.

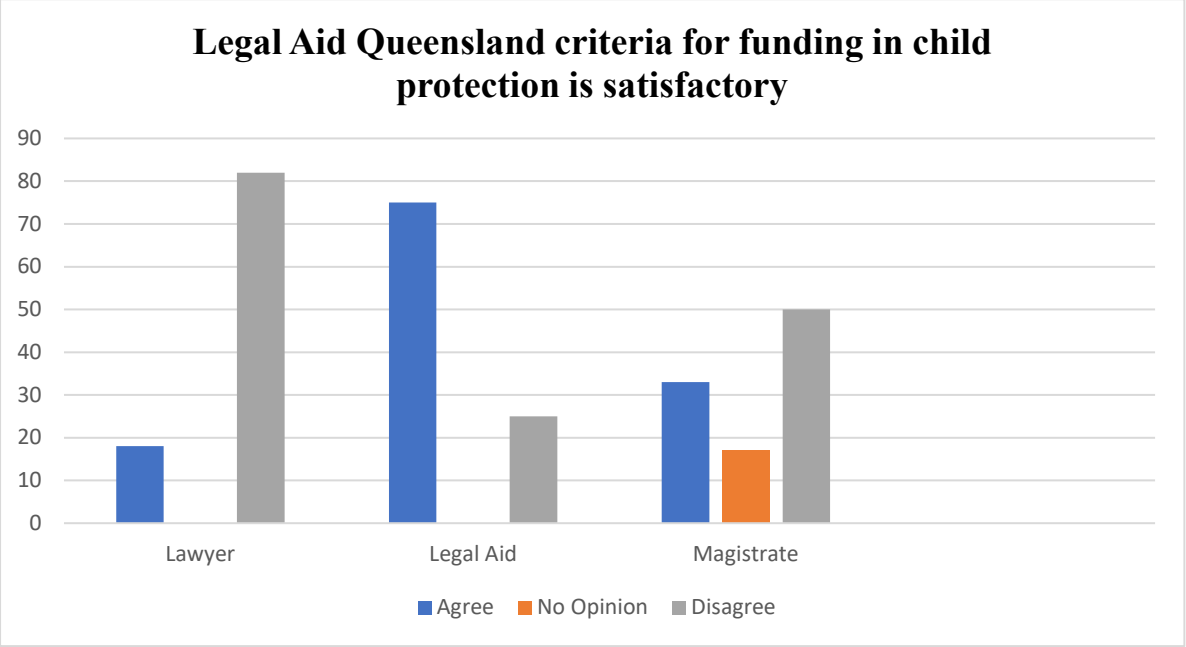

Figure 7.V: Legal Aid Queensland criteria for funding in child protection is satisfactory

Theme	Response to Legal Aid Queensland means/merits tests
The Legal Aid Queensland means/merits tests are a series of 'hurdles' which still leads to funding refusals.	I don't think it is satisfactory. The recent changes a few years ago with respect to funding down into sections was probably a good move in so far as practitioners were concerned, but the problem is that it creates so many hurdles for litigants to be able to keep funding that it becomes easier to refuse them than it was in the past when they were given a blanket grant which could include the trial. Then it was a case of the grant being reviewed as the matter progressed. There was always a risk that the funding could be withdrawn, but you weren't in a situation of having to constantly reapply for funding and meet new criteria. So, it's not satisfactory in in that it comes from, I think, a position of the litigant having to prove their case, rather than having to prove there's prospects of success. And that was an improvement (inaudible) because we were able to get more money from grants and get it claims more quickly because it was done per event.[60] (*Lawyer*)
Child safety are 'judge and jury'.	For child safety, it is ridiculous. It is a joke. People are going to trial, who they may have an ideal case, but there will be a social assessment report against them and that is it. It is judge and jury.[61] (*Lawyer*)
Litigants are not judged on means/merit, but on the amount of money there is.	I agree that it is satisfactory, but the problem is that it is a limited pool of money so it is not just…people are being judged not purely on their means and merit, if there was an unending supply of money, but they are being judged on that within the framework of how much money there is.[62] (*Magistrate*)
Litigants have levels of disadvantage that provide additional challenges	You don't see that many trials. Generally speaking, because they don't get funding they generally fold at the final hurdle. Parties won't turn up, or if they turn up, they resolve on the day. That's why I say, the last trial I did was 18 months ago. They have that level of disadvantage, particularly if they have some deficits, some disadvantage already. You know for person who has no level of disadvantage in terms of intellectual or being a self-represented litigant, in any sort of trial you are up against it. But like the person who is contesting a speeding trial, they have a level of disadvantage but in a child protection matter you have a, you have that level of disadvantage whether it be intellectual or otherwise, it's even worse. With your, say you're speeding trial, there are some pretty smart switched on people that challenge those, you don't generally get that in the child protection arena.[63] (*Magistrate*)
Means/merits tests are satisfactory	Yes. I agree that it is satisfactory.[64] (*Legal Aid Officer*)

Table 7.O: Legal Aid Queensland means/merits tests

[60] Interview with BL11.
[61] Interview with TL15.
[62] Interview with BM8.
[63] Interview with TM5.
[64] Interview with BLA1-3 (Kathy Reeves, In-person Interview, 15 January 2019).

In responding to questions about whether the Legal Aid Queensland 'means and merits test' was satisfactory, lawyers and magistrates indicated that while the test may be satisfactory, its application to litigants is below standard. This was especially so when you consider the intellectual disadvantages faced by many litigants in the child protection system.

D Do self-represented litigants hold emotional attachments to their case? (RQ3)

1 *Do litigants self-represent due to knowing their family better than a lawyer?*

Of the interviewed participants, five lawyers (45 per cent) and two (50 per cent) Legal Aid officers disagreed that litigants self-represent in child protection matters because they know their family better than a lawyer. Magistrates either had no opinion or disagreed (50 per cent respectively).

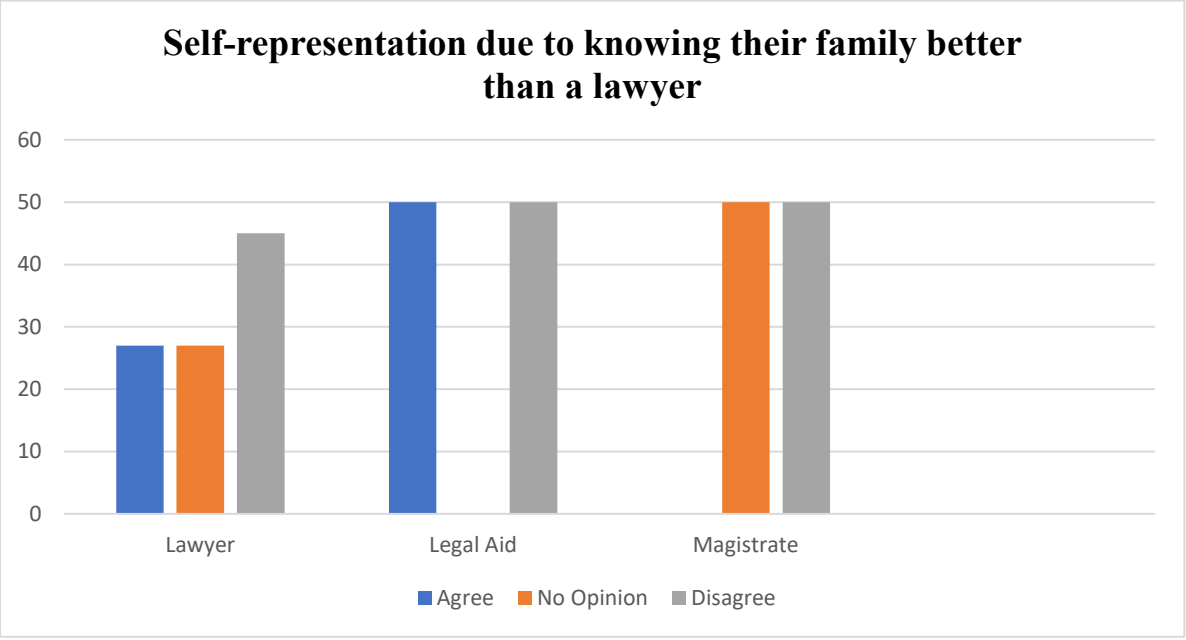

Figure 7.W: Self-representation due to knowing their family better than a lawyer

Theme	Response to whether litigants self-represent due to knowing their family better than anyone else
Some litigants do not understand the reasons for child protection intervention. They want to be heard, but often do not know how and prefer to have legal representation.	I think that sometimes they think that they know their case and that we don't understand their case as well as they might and their circumstances where they hand the child off to someone else, like family. They want to be heard. Although, I can see most of the stuff, most of the time, most of the stuff they say probably isn't all that relevant.[65] (*Lawyer*)
Lawyer is able to convey the point to the court better than a litigant.	It makes no difference (inaudible) their lawyer can convey it effectively in court. That is how it won't be better because a) they know their family better - it is better because the lawyer can convey the simple truths that the court needs to be convinced of, the child, frequently the first thing they get up on the harm or risk of harm. That is always satisfied. … at the trial level …. if you are represented by a lawyer, you are able to convey that a lot better.[66] (*Lawyer*)
They may know their family better, but not necessarily the best interest of child.	At the end of the day, we have to be guided by and apply the paramount principle which is an objective assessment 'what is in the best interest of the child" and merely because a parent is a 'parent' doesn't necessarily – they may know their child better than I do, it doesn't necessarily mean they will make the best decision as to what is in the best interest of the child.[67] (*Magistrate*)
Litigants believe that 'if they can throw enough mud on the Department, they will be successful'.	They have their knowledge but the questions for the court are around evidence and the self-represented litigant, they often think they will get their kid back by saying that the Department is not doing a very good job of looking after their child. That is not the question for the court at all. They think that if they can throw enough mud on the Department then they will be successful in opposing the application and that is not the question for the court.[68] (*Legal Aid officer*)
It is not unheard of that people think that they know best.	It occurs to me that people who represent themselves tend to have a fool for an advocate. That is not unheard of that people think that they know best. Certainly, there are some cases where people do know their case quite differently, that tends to come about in cases that involve some scientific technical evidence, patent cases are one example where sometimes a skilled engineer or someone of that nature can be a good advocate for themselves. But I think, again, I wouldn't rule that out entirely.[69] (*Legal Aid officer*)

Table 7.P: Whether litigants self-represent due to knowing their family better than anyone else

The quantitative results indicated that both lawyers and Legal Aid officers agreed that litigants do not self-represent because they believe that they know their family better than anyone else. It was held that while

[65] Interview with TL15.
[66] Interview with IL12.
[67] Interview with TM4.
[68] Interview with ILA1.
[69] Interview with TLA1.

personal and familial relationships must be regarded, there is also a disdain held by litigants toward the DCSYW. However, it was found that, while litigants may know their family better, having legal representation allows them to take out emotions and convey to the court what is necessary, eg whether there is a parent willing and able to protect the child from harm.

IV Conclusion

This chapter has provided a summary of the demographical information relating to lawyer, magistrate, and Legal Aid officer participants in Queensland child protection. Interviews were conducted in terms of funding, advocacy, power imbalances, and the roles undertaken by the participants. This has provided both a qualitative and quantitative summary of the themes raised in relation to the research questions and associated research issues.

The consensus from all interviewed participants was that litigants do not self-represent in Queensland child protection matters due to a distrust of lawyers (RQ1) or knowing their family better than a lawyer (RQ3). However, when asked about whether the effects of limited access to funding was a major contributing factor to self-representation (RQ2), the results were mixed and varied. However, as stated above, all participants were of the view that there should be access to legal representation, but not necessarily a right to unlimited funding.[70]

Chapter 8 will continue to expand on the issue of access to justice and discuss the application to the research questions and associated research issues.

[70] Chapter 9, Part 3 – Are the Effects of Limited Access to Funding a Major Contributing Factor to Self-Representation.

CHAPTER 8 – INTERVIEW RESULTS ACCESS TO JUSTICE

I INTRODUCTION

Chapter 7 highlighted the importance of providing structured and thematic data obtained from semi-structured interviews with magistrates, lawyers, and Legal Aid officers. This chapter will continue to report on the data obtained from these interviews with a focus on data relating to the self-represented litigant's access to justice.

II INTERVIEW RESULTS AND PERSPECTIVES

This chapter will review the quantitative and qualitative data obtained from semi-structured interviews held with magistrates, lawyers and Legal Aid officers in the Queensland child protection research focus regions.[1] It provides information on access to justice based on data obtained in terms of participant views on the role of the magistrate, court processes and procedures, and application of co-production theory (including Duty Lawyer and unbundling services) in Queensland child protection courts.

III ACCESS TO JUSTICE

A *Is the role of the magistrate more of an arbitrator, referee or moderator?*

Of the participants interviewed, five (45 per cent) lawyers[2] and three (50 per cent) magistrates provided no opinion as to whether they believed that the role of the magistrate was more of an arbitrator, referee,

[1] Chapter 3, Part 2C – Queensland Child Protection Region and Research Focus.
[2] This percentage includes responses from Legal Aid lawyers.

or moderator. However, Magistrates believed that they had a good understanding of their role in Queensland child protection courts.

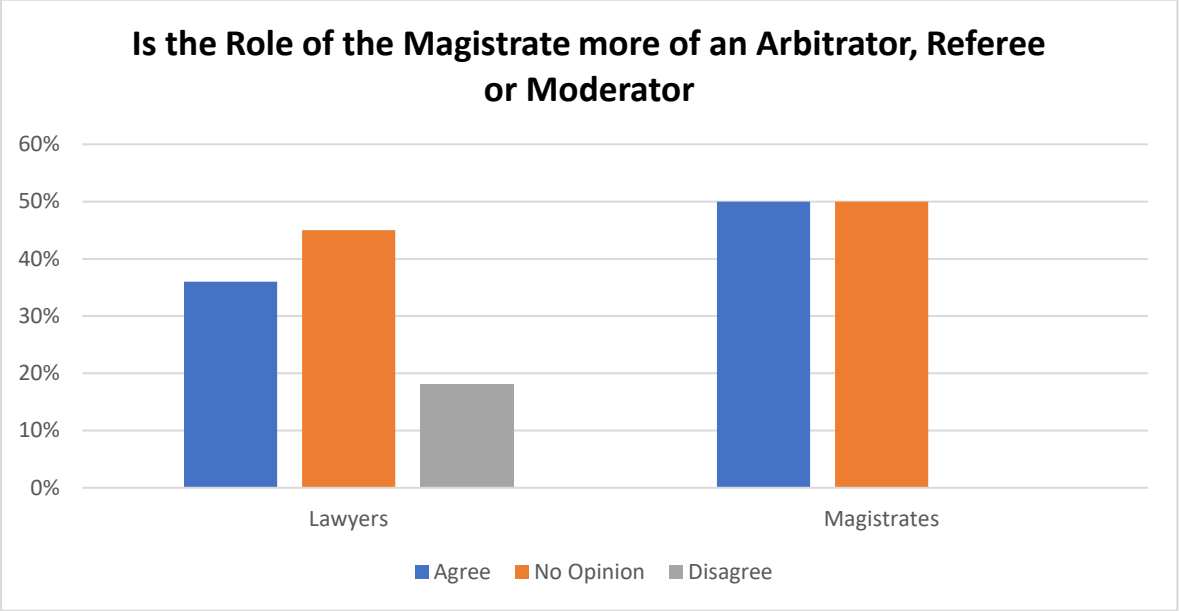

Figure 8.A: Is the role of the magistrate more of an Arbitrator, Referee or Moderator?

Theme	Response to magistrate's position on their roles in Queensland child protection courts
When litigants self-represent, magistrates undertake various roles to ensure that there is procedural fairness.	….the magistrate's role does evolve over the course of the proceedings and that magistrate doesn't make any decision based on anything other than prime facie evidence up to and including when the matter is listed for hearing. They are satisfied on a promise they see basis that there is a child in need of protection on a temporary basis they are inclined to make that order. In those sort of circumstances, that is where they are acting as a moderator and as an arbitrator and managing the proceedings but once it goes to a trial then they are a decision-maker. Because that is when they step into the role of decision-maker. But in my experience, I respect all the magistrates on the bench but in child protection proceedings they make very little determination unless there is an interim hearing run and they make very little determinations on, except to say that there is a prima facie case in the child should be subject to a temporary custody order but once it gets to a trial they then become a decision-maker. That is why I have to be neutral with that.[3] (*Lawyer*)
	I would say, in the early stages, that is exactly what they are doing, they are basically arbitrating, moderating trying to, because there is no evidence provided on the other side, so issues are raised but there is no evidence to run an interim hearing so they really are just trying to moderate and keep the Director of Child Protection Litigation/the Department, with orders they make, doing the case, representing it the best they can and dealing with any issues that might come up. But once they get to the final hearing stage, they obviously have to make findings. I think that, at that stage, they are definitely, you know making a more traditional, judicial role, where they are very much making findings, and making assessments about credibility, and all those sorts of things, but in the early stages, it really is just case management and trying to moderate disputes knowing there isn't going to be an interim hearing and they aren't going to make any findings.[4] (*Lawyer*)
	Well, it feels like being a referee. But I don't agree that I think that is what our role should be. But…if you go to trial, you are a decision maker where you simply have got to make a decision. But when litigants are self-represented, there is that constant, you are playing all those roles in terms of, if you are giving, as I think you should, giving self-represented litigants the opportunity to ask questions you might not otherwise get from a lawyer in cross examination of witnesses etc. You are constantly feeling like you are a referee and disallowing the Department, essentially to object and so that is the difficulty with self-represented litigants. It works the other way around as well because when you have self-represented litigants who see the Department as the enemy …. the evil incarnate.[5] (*Magistrate*)

Table 8.A: Magistrate's position on their roles in Queensland child protection courts

[3] Interview with IL12.
[4] Interview with TL3.
[5] Interview with BM3.

Despite the lack of qualitative and quantitative data received from Legal Aid officers, the quantitative information received from both lawyers and magistrates gives insight into the role of magistrates within the Queensland child protection court. This quantitative data provides that, while magistrates make reasonable accommodations for self-represented litigants within the Queensland child protection courts, they are clear that their role is one of judicial decision-maker.

B *Does informing the self-represented litigant of proper procedures make Magistrates advocates?*

All participants disagree that informing the self-represented litigant of proper procedures makes the magistrate an advocate.

Theme	Responses to whether informing the self-represented litigant of proper procedures makes the magistrate an advocate
Magistrates are not advocates, but 'level the playing field' between the parties'.	It equalises the playing field. It doesn't turn them into an advocate. It doesn't rob the magistrate of their decision-making, what they are required to do, what matters they are required to determine on the evidence based on the legislation and they are required to be satisfied on certain things. The giving of quasi-advice to a self-represented litigant does not change that in my experience. I don't believe that the magistrate giving that direction amounts to advocacy. I think it requires the, it's just the management of the case … That is not advocacy. …these are the goalposts Mr Smith, these are what I need to be satisfied of how you run your case and obviously I'm going to steer you through that but how you establish that is up to you. I think the magistrates are turned into someone who needs to be seen as fair and impartial on the process but also having to level the playing field.[6] (*Lawyer*)
Magistrates provide a 'reality check' to self-represented litigants, especially when they have a 'false sense of righteousness' about their matter.	I think if anything, they reality check them. So, you can advise them about procedure, and there's a delineation, about the processes of the court and how it will progress. But you can't, you have to decide the case, and in the final analysis of the case, you can't prior to hearing the evidence you can't say well, you don't do it in a procedural hearing, you might do it in a domestic violence case, where for instance it's a very small file, and these are the things that are complained about, these are the allegations, these are the things to prove, the court may order.[7] (*Magistrate*)

Table 8.B: Whether informing the self-represented litigant of proper procedures makes the magistrate an advocate

[6] Interview with TM5.
[7] Ibid.

In seeking further clarity as to the magistrate's role in Queensland child protection courts, clarity was sought as to whether magistrates providing procedural assistance to self-represented litigants makes them an advocate. Both qualitative and quantitative data obtained suggests that magistrates, lawyers, and Legal Aid officers do not believe that this is an advocacy role. It is more aligned to procedural fairness to the self-represented litigant who, in adversarial proceedings, is pitted against a well-resourced government department.

C *Should the magistrate explain the processes and procedures for self-represented litigants, even if it would indirectly assist them?*

All participants agreed that the magistrate should explain the processes and procedures for self-represented litigants, even if it would indirectly assist them.

Theme	Responses to whether magistrates should explain the processes and procedures to self-represented litigants, even if it would indirectly assist them
Magistrates provide a realistic approach to explaining the processes and procedures to self-represented litigants.	Most magistrates I know are very pragmatic, that I have appeared before, and they will take the time to explain to a self-represented litigant – look, this is what is happening - I am going to make an order that the child remain in care today but we will come back in four weeks or you will do a family group meeting and you will come back.[8] (*Lawyer*)
Magistrates encourage litigants to obtain legal aid funding so that they can understand what is happening.	Magistrates do all they can to assist self-represented litigants and also encourage them as long as they can to get a lawyer. 'Have you made a legal aid application yet?' No. 'Well then I will adjourn it again.' To just hold things up so that they can get a lawyer to help them to understand, you know, those fundamental questions, you know, is the child a child in need of protection; what's the least intrusive order…[9] (*Legal Aid officer*)
Magistrates don't do enough to explain information to self-represented litigants.	The magistrates don't explain the decision, like what they are required to decide at law, there is very little court craft in this jurisdiction. So hopefully DCPL will…. The legal system, that's a long-term project of lifting the court craft.[10] (*Legal Aid officer*)
	I agree that the magistrates are not doing enough to explain to the self reps.[11] (*Legal Aid officer*)

Table 8.C: Whether magistrates should explain the processes and procedures to self-represented litigants, even if it would indirectly assist them

From both a qualitative and quantitative perspective, both lawyers and magistrates believed everything should be done to assist the self-represented litigants without running their case. In contradiction to their quantitative position, Legal Aid officers expressed that they did not believe magistrates were doing enough to assist self-represented litigants.

D *Does informing the self-represented litigant about court process and procedures turn them into an effective advocate?*

All participants disagreed that informing the self-represented litigant about court processes and procedures turns them into an effective advocate.

[8] Interview with IL12.
[9] Interview with ILA1.
[10] Interview with BLA1-1.
[11] Interview with BLA1-2.

Theme	Responses to whether informing the self-represented litigant about court processes and procedures make them effective advocates
It is not that litigants don't understand, they do not have capacity.	It depends on the level of education and the abilities of the self-represented litigants to absorb and use that information. The case is normally that they get the information but they don't necessarily understand it and they have other obstacles that stops them from practically doing what they need to do, particularly if there are issues like alcohol, substance, or mental health…… it would depend on the capacity of the actual litigant to understand and use that information.[12] (*Lawyer*)
Litigants do not have the capacity to process the child protection information and, therefore, cannot make reasonable submissions on their own behalf.	There is a level of disadvantage to not being familiar which can't be overcome. You can try as much as you can, and as well that, particularly in child protection matters, the parties normally have some sort of deficit, whether it be intellectual, whether it be drug and alcohol, or something else. So, their ability to take in information, process it, and actually make reasonable submissions for reasoned submissions is limited.[13] (*Magistrate*)

Table 8.D: Whether informing the self-represented litigant about court processes and procedures make them effective advocates

From the information obtained from the participant interviews, both qualitative and quantitative analyses indicate that magistrates, lawyers, and Legal Aid officers did not believe that providing self-represented litigants with information about court processes and procedures made them effective advocates. Participants agreed that these self-represented litigants were from marginalised and disadvantaged backgrounds which, despite the amount of information provided, would still hold them out to be deficient in court proceedings.

E *Do magistrates make reasonable accommodations for self-represented litigants?*

Seven lawyers (64 per cent) and all six magistrates (100 per cent) interviewed agreed that magistrates make reasonable accommodations for self-represented litigants, while participating Legal Aid officers were divided with two (50 per cent) agreeing and two (50 per cent) disagreeing.

[12] Interview with BL11.
[13] Interview with TM5.

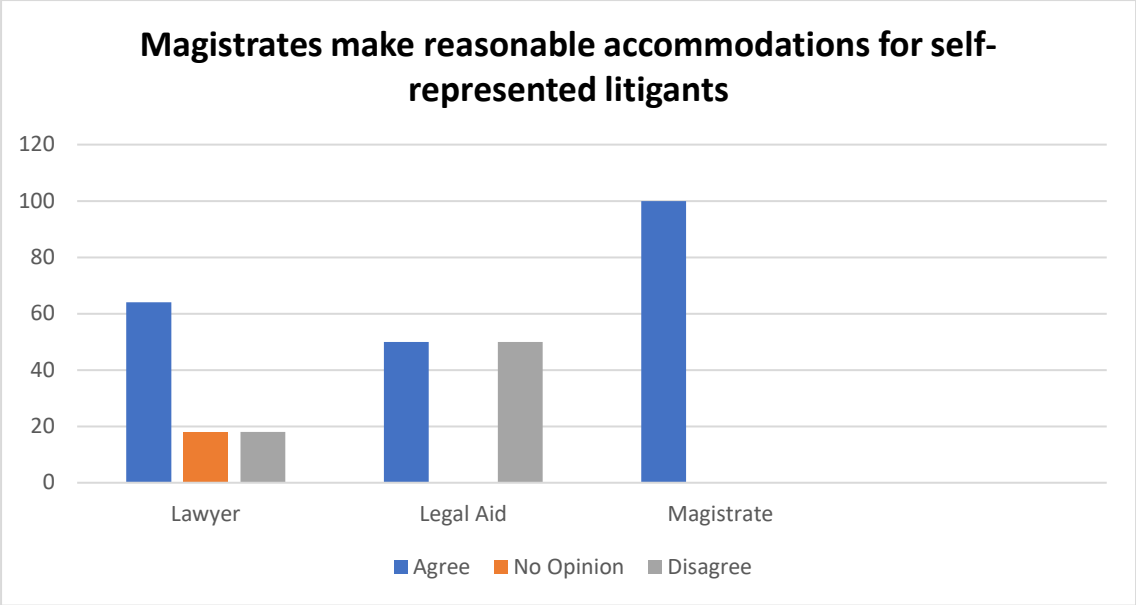

Figure 8.B: Magistrates make reasonable accommodations for self-represented litigants

Theme	Response to whether magistrates make reasonable accommodations for self-represented litigants
Magistrates are generally patient and sympathetic to self-represented litigants with respect to process.	They [magistrates] are very patient generally, and they will allow adjournments when it is required because someone has not been able to do what they were ordered to do on the last occasion. They are generally sympathetic to the self-represented litigants, so far as process.[14] (*Lawyer*)
Magistrates are not explaining or making accommodations that the self-represented litigant would understand.	Only in that they are not explaining things to the self-represented litigant and the sort of accommodations they could be making or explaining so that the self rep understands. Without that, I don't think there is enough accommodations. That is one that they are missing. I'm gonna contradict myself by saying that they make too many accommodations in other ways that are not helpful.[15] (*Legal Aid officer*)

Table 8.E: Whether magistrates make reasonable accommodations for self-represented litigants

Most participants interviewed agreed that magistrates in the Queensland child protection court provide significant process and procedural accommodations to self-represented litigants. In contrast, one-half of Legal Aid officers interviewed expressed concerns that, while numerous accommodations are provided to litigants in proceedings, explanations of court processes and procedures did not meet requisite levels of comprehension.

[14] Interview with BL13.
[15] Interview with BLA1-2.

F *Do court programs such as Duty Lawyer services assist self-represented litigants to have meaningful access to justice?*

All participants agreed that court programs such as the Duty Lawyer service assist self-represented litigants to have meaningful access to justice.

Theme	Response to whether court programs such as Duty Lawyer service assist self-represented litigants have meaningful access to justice
Prior to the Duty Lawyer service, there was no assistance.	A Duty Lawyer is invaluable. I've been operating in this court when there was no Duty Lawyer and it was a disaster for self-represented litigants. They had no assistance.[16] (*Lawyer*)
Duty Lawyers have limited scope to give any advice.	The Duty Lawyer has very limited scope to give any advice and it has to be limited to specifically what is being dealt with on the hearing that day.[17] (*Lawyer*)
	Duty Lawyer definitely assists but it is very limited.[18] (*Lawyer*)
	They [litigants] will certainly be given a legal aid application form at the very least and assistance with whatever's happening for that mention on that day. There's nothing more that we can do as a Duty Lawyer.[19] (*Legal Aid officer*)
Duty Lawyer service provides advice to self-represented litigants.	Yeah, well the Duty Lawyer service is an excellent program. Essentially you just turn up, this is what is happening, the Duty Lawyer can say this is what that means, this is what the Department is asking for, these are your rights these are your options, what do you want to do?[20] (*Lawyer*)
Duty Lawyer service is the only option available.	I mean other than the Duty Lawyer service, what is there? What other program? That's it. And that's only a recent thing.[21] (*Lawyer*)
No consistency in Duty Lawyer availability.	Well, I think because it is usually the one appearance, usually a different Duty Lawyer the next appearance, there is no consistency in the Duty Lawyers who are available, so litigants are having to tell their story again and again to different people which is very stressful and you know, while it is better than nothing, um, you know, it isn't the ideal.[22] (*Magistrate*)

Table 8.F: Whether court programs such as Duty Lawyer service encourage self-represented litigants to have meaningful access to justice.

[16] Interview with BL11.
[17] Interview with IL12.
[18] Interview with TL3.
[19] Interview with ILA1.
[20] Interview with TL11.
[21] Interview with TL15.
[22] Interview with BM13.

All participants considered Duty Lawyer services to be an invaluable resource to self-represented litigants. Prior to the initiation of this service (funded by Legal Aid Queensland), self-represented litigants in Queensland child protection courts were limited in their ability to obtain legal advice on the day of court. While this service provides some guidance to the litigant on the day of a mention, they cannot appear in any court capacity, including trials. The only option available to the Duty Lawyer is to provide the self-represented litigant with an application for Legal Aid funding.

G Do court programs such as Duty Lawyer services encourage self-represented litigants to try cases without legal representation?

All participants disagreed that court programs such as the Duty Lawyer service encourage self-represented litigants to try cases without legal representation.

Theme	Responses to whether court programs such as Duty Lawyer services encourage self-represented litigants to try cases without legal representation
Self-represented litigants generally believe that there is no child protection issue to be addressed.	…the self-represented litigants are basically saying everything is fine at the time and the Department doesn't know what they are doing, you know, the Department has these concerns and what are your response to these concerns. Everything is fine at home. Well you failed your last drug test...[23] (*Lawyer*)
Duty Lawyers cannot represent at hearing.	…a Duty Lawyer would normally be giving advice that they should try to obtain representation separately, especially if they are going to a trial. Because the Duty Lawyer can't represent them at a trial.[24] (*Lawyer*)
	I would agree with that. But I have to put a caveat on that. It is up to the availability of the Duty Lawyer and I think that the Duty Lawyer might, the presence of the Duty Lawyer at court for the interim hearing process or the procedural hearings might lull the parent into a false sense of hope that they will be there for the final trial or be able to assist in the final trial.[25] (*Lawyer*)
If they want to self-represent, they will.	I don't think it encourages them, if somebody is going to self-represent, they are going to continue to self-represent.[26] (*Legal Aid officer*)

Table 8.G: Whether court programs such as Duty Lawyer services encourage self-represented litigants to try cases without legal representation

[23] Interview with TL11.
[24] Interview with TL4.
[25] Interview with IL12.
[26] Interview with BLA1-1.

All participants interviewed agreed that court programs such as the Duty Lawyer service did not encourage self-represented litigants to try cases on their own. The predominant theme reiterated by participants was that, despite child protection concerns raised by DCSYW, many self-represented litigants do not see a problem. The Duty Lawyer service provides advice, not representation. It neither encourages nor discourages self-representation.

H Is there a power imbalance between self-represented litigants and DCSYW in Queensland child protection trials?

All participants agreed that there is a power imbalance between self-represented litigants and the DCSYW in Queensland child protection trials.

Theme	Responses to power imbalances between self-represented litigants and DCSYW in Queensland child protection
There is a power imbalance between a disadvantaged self-represented litigant opposing a well-versed lawyer and Department.	There is a huge imbalance. Well, it has two effects really. It has changed the power imbalance because now there is a legally trained person as opposed to a more junior, less legally trained person if you like at the other end of the bar table. It is more intimidating for them I think, because they feel great they are standing at a bar table and they are the only person that doesn't have the education or law degree and everyone is smarter than them. The other problem that they have is, because they are not lawyers, they are in a position where they are not fully aware of what goes on in the case. The briefing is obviously deficient, they have a situation where the information that the OCFOS or DCPL may not be up-to-date, or even correct. So that makes it more difficult.[27] (*Lawyer*)
	It would be a bit like the Department of Public Prosecution against a self-represented defendant, the weight of the state against an individual, which is why it is so fundamental for self-represented people to have access to persons, or lawyers, that have expertise in this area.[28] (*Lawyer*)
Court provides self-represented litigants with certain liberties to rebalance the imbalance.	The court, in many instances, endeavours to rebalance that imbalance by certain liberties and information provided to the self-represented litigant.[29] (*Lawyer*)

[27] Interview with BL11.
[28] Interview with TL11.
[29] Interview with BL13.

Theme	Responses to power imbalances between self-represented litigants and DCSYW in Queensland child protection
Internal power struggle between DOCS and DCPL agencies.	Oh my God, off the charts! Particularly because of the behaviour of child safety. DCPL, I find a bit to be quite professional, in that they will rewrite applications and so forth, whereas DOCS, they are still playing the same games they played before the changes. I actually feel as though they have become worse because, like in this matter, where they are at logger heads with DCPL they just do what the fuck they want and they will set it up that DCPL have to do what they want.…it makes me think maybe it is something awful where child safety is working towards one end and DCPL have a different view. So, it is like it is a power struggle between the two agencies.[30] (*Lawyer*)
	Its massive. It is worse than what it used to be. Bearing in mind that the DCPL is separate from DOCS, and … a lot of them are very young lawyers, I'd be critical of the background they were selected from, a lot of them come from criminal background, but as they set in, for about two years now, you start to see the same cases coming back and they are starting to see that child safety aren't doing anything. More examples of the DCPL sort of, from lack of a better description, getting in fights with DOCS which is probably a good thing as it is part of their role. But generally, I have got to say, I mean, it is very difficult for them, there is no other evidence filed on the other side, the only evidence they have is the Department's. Ultimately, you know, they do tend to support the Department's position because the only evidence there is. Therefore, again, that they are highly professional, yeah, they just increase the power imbalance.[31] (*Lawyer*)
Departmental capacity and self-represented litigant use of co-production.	So, you got that capacity issue, the capacity of DOCS to prepare the material, or the mechanical stuff like computers and printers and stuff like that, and your self-represented litigants will be people of generally speaking, limited means. So, they won't have the ability to do that. Although, having said that, I have had a couple of instances where self-represented litigants have come along and obviously had material prepared by someone else. It has been great. [32] (*Magistrate*)

Table 8.H: Power imbalances between self-represented litigants and DCSYW in Queensland child protection

All participants believe there is a substantial power imbalance between the self-represented litigant and the DCSYW. The main issue noted by participants was the power imbalance between a well-resourced DCPL (acting on behalf of the DCSYW) against a marginalised, self-represented litigant, who may not have capacity or the ability to afford legal representation for their child protection trial. The court does

[30] Interview with TL15.
[31] Interview with TL3.
[32] Interview with TM5.

endeavour to accommodate these self-represented litigants by way of process and procedures but cannot provide legal advice.

This is further compounded by what some participant lawyers perceived as an internal power struggle between the DCSYW and the DCPL. These agencies are meant to work together to prepare and provide appropriate child protection evidence for the court in child protection matters. The role of the DCPL is to support the position of the DCSYW based on evidence provided to them. However, the DCSYW may disagree with their position and send it back for further review. While not advocating for the self-represented litigant, the DCPL is holding the DCSYW to a higher evidentiary standard. Accordingly, this may cause tension between the agencies.

I Are unbundling legal services beneficial to self-represented litigants at the trial phase?

When interviewed about unbundling legal services, none of the participants were aware of this concept of legal service assistance.

Theme	Responses to whether unbundling legal services is beneficial to self-represented litigants at the trial phase
Any assistance is beneficial.	Any assistance that these people can get, it is extremely important because this is a litigation based on written affidavit evidence so they are at a distinct advantage if their documents are properly prepared. Even if they are not able to have a lawyer with them at trial.[33] (*Lawyer*)
	I think any assistance is going to be beneficial. I think good material gets you a long way.[34] (*Lawyer*)
	It is better than having nothing at all. It is not as good as having it all the way of course, but probably agree.[35] (*Lawyer*)
	Yes, it is beneficial. We had somebody do this just recently… it gave the mother an opportunity to put her side of the argument .. it didn't sway the court to what she wanted. She did get to have her say, so I suppose to some extent it is helpful.[36] (*Magistrate*)
While litigant information is substantial and not always helpful to their case, the introduction of the DCPL has improved this aspect of child safety material.	But one of the problems with the affidavit, with statements the client will give you may not be all that helpful to their case anyway. But in appropriate cases I would make that referral. Oh well look, in some cases an affidavit can be 10 or 20 pages long at maximum. Far too often I see affidavits in fair level matters, it's getting better there, certainly in child safety matters, where they have the thickness of the Hong Kong telephone book. A lot of what is said is, and I think the introduction of the DCPL service has improved this, and again I'm not being critical of individual child safety officers, I think they are being set out in a lot of occasions to a hiding to nothing.[37] (*Legal Aid officer*)

Table 8.I: Whether unbundling legal services is beneficial to self-represented litigants at the trial phase

After explanations and discussions of the concept, participants agreed that they were aware of the process, but not the 'unbundling' terminology. All participants agreed that unbundling legal services would be beneficial to self-represented litigants. Lawyers took the view that it was not beneficial at the trial phase and that their [lawyer's] time was better spent at the tail end of the trial rather than at the initial phase where there are case plans and interim hearings. In other words, it would be more beneficial to save the lawyer for when they are needed, eg at the trial phase.

[33] Interview with BL11.
[34] Interview with BL13.
[35] Interview with TL4.
[36] Interview with TM3.
[37] Interview with TLA1.

J Is the Duty Lawyer service beneficial to self-represented litigants at the trial phase?

Six lawyers (55 per cent) and all participating Legal Aid officers (100 per cent) disagreed that the Duty Lawyer service was beneficial to self-represented litigants at the trial phase, while magistrates were divided with three (50 per cent) agreeing and three (50 per cent) disagreeing.

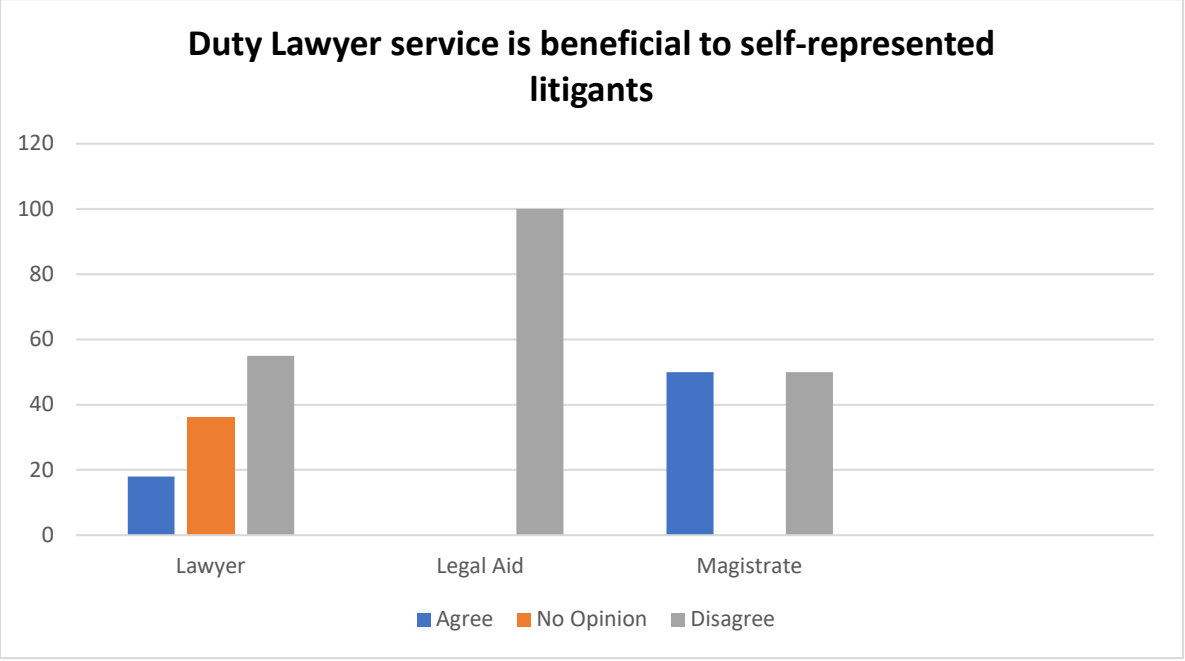

Figure 8.C: Duty Lawyer service is beneficial to self-represented litigants

Theme	Responses to whether the Duty Lawyer service is beneficial to self-represented litigants at the trial phase
There is no aid for trial, thus not beneficial, but reinforces the power imbalance.	I don't believe it's beneficial at all for the trial phase. There are very little things that they can do except potentially negotiate an outcome with the Department knowing that this SRL if he is leaning on the services of a Duty Lawyer to sort of negotiate, how is he going to go in his trial. So, it's the power imbalance.[38] (*Lawyer*)
	I don't know if it's a personal view that Duty Lawyer services are provided because of the lack of funding, it is not very good service provider sometimes…has a flow on effect of not many lawyers get to see a child protection trial run, so how can they assist?[39] (*Lawyer*)
	Well, given the scope of Duty Lawyer funding, we are not able to assist for trial matters. So, if it is simply for trial cannot assist.[40] (*Lawyer*)
	Useless…and that is because of Legal Aid policy. We are not to run anything (inaudible) a contested hearing. So we can't help – we can give advice and assistance, we might be able to come in and give an overview to the Magistrate, but that's it.[41] (*Lawyer*)
	At trial, not at all. No assistance whatsoever, I mean there is no Duty Lawyer service on trial in (retracted). But there is no funding for trial.[42] (*Lawyer*)
	I don't think there is a Duty Lawyer service for trial. The Duty Lawyer wouldn't help them.[43] (*Magistrate*)
	I'm not aware that that goes on. I have not been made aware of that. Well, they don't have Duty Lawyers at the trial. I disagree with that.[44] (*Magistrate*)

[38] Interview with IL12.
[39] Interview with TL10.
[40] Interview with TL11.
[41] Interview with TL15.
[42] Interview with TL3.
[43] Interview with TM1.
[44] Interview with TM4.

Theme	Responses to whether the Duty Lawyer service is beneficial to self-represented litigants at the trial phase
Assistance in providing advice is beneficial.	I strongly agree that it would be beneficial, even if a Duty Lawyer was able to advise a self-represented litigant on the day of the trial and to assist them during the process of the trial with their evidence and to be able to assist with negotiation on settlement. That sort of thing would be hugely beneficial.[45] (*Lawyer*)
	They can't appear in contested matters. I suppose some level it's beneficial because they can get some advice. I don't know how far they go but they may be able to give advice in terms of what they need to do… At least they are talking to someone who is experienced in the area and have qualifications so that they can get some sort of advice as to what sort of things they can do themselves. So, it is limited assistance.[46] (*Magistrate*)
	Yeah, I would agree that its beneficial, from the point of view of the advice that can be given as to what can happen at trial. And maybe their preparation, like their affidavits and understanding what is in the material of the Department, etc.[47] (*Magistrate*)
	Well, I think so, of course if there's anything that needs to be discussed or any of those legal things they are able to give them advice, without representing them.[48] (*Magistrate*)
	Once again, it kind of depends on who the Duty Lawyers are. I know they are starting to do Duty Lawyer child protection here. We haven't been doing it, but we do the Duty Lawyer for domestic violence along with a couple of other firms. I heard the comment that when we are involved, clients are much happier and things are running a lot smoother than say some of the other people that do it. I guess it depends on who the Duty Lawyers are, how knowledgeable and how helpful they are. But I think, once again, it is better than having nothing at all. But they need to have well trained, and probably check on their training, check on how they are, I suppose.[49] (*Lawyer*)
While advice is beneficial, it comes back to merit in funding.	That would help, that would certainly help people. The question is always going to come back to does the matter have merit.[50] (*Legal Aid officer*)

Table 8.J: Whether the Duty Lawyer service is beneficial to self-represented litigants at the trial phase

[45] Interview with BL11.
[46] Interview with BM13.
[47] Interview with BM8.
[48] Interview with TM3.
[49] Interview with TL4.
[50] Interview with ILA1.

Both lawyer and Legal Aid officer participants interviewed held that, while the Duty Lawyer service can be beneficial in providing advice to self-represented litigants, they cannot provide representation in contested Queensland child protection matters. Magistrates, while neither agreeing or disagreeing with this position, indicated that, despite there being no formal Duty Lawyer services in child protection matters, any assistance provided to the self-represented litigant was better than having no information at all.

K *Are self-represented litigants provided with an appropriate measure of access to justice at their child protection trial?*

One (25 per cent) Legal Aid officer agreed that self-represented litigants were provided with an appropriate measure of access to justice at their child protection trial, while ten (91 per cent) lawyers disagreed. Magistrates, however, were split with three (50 per cent) agreeing and three (50 per cent) disagreeing.

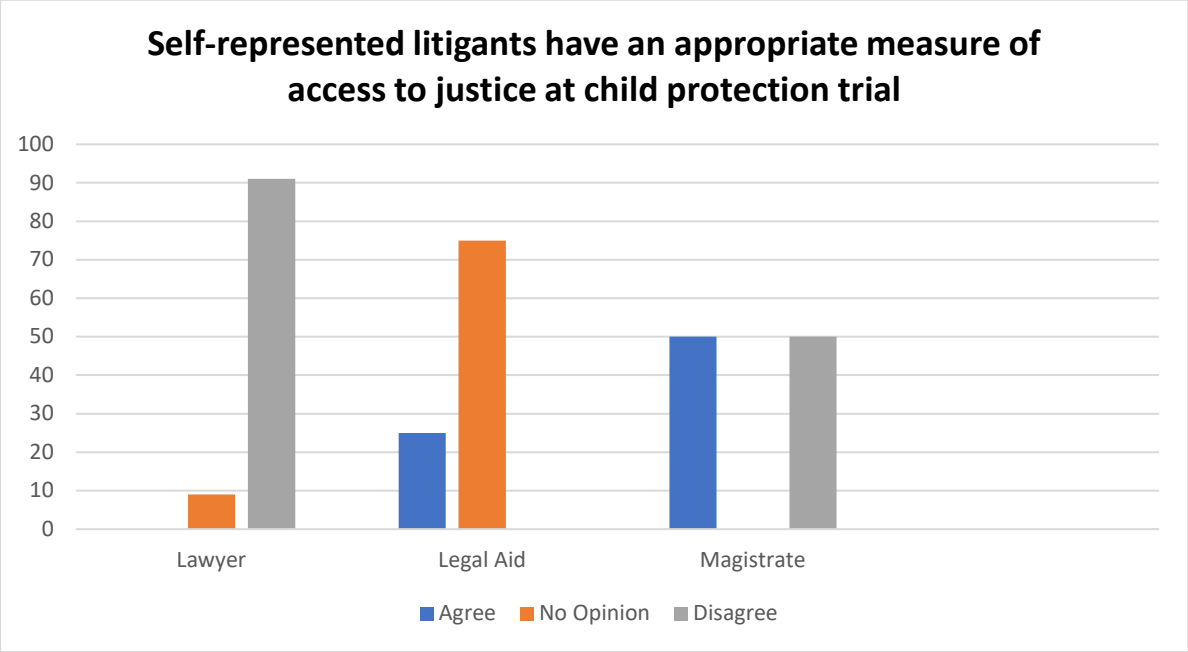

Figure 8.D: Self-represented litigants have an appropriate measure of access to justice at their child protection trial

Theme	Response to whether self-represented litigants have an appropriate measure of access to justice at their child protection trial
Access to justice needs are not being met.	I don't think the access, it has improved because we have Duty Lawyers, but I do not think that it's yet meeting their needs, otherwise we wouldn't be having the number of self-represented litigants go to trial.[51] (*Lawyer*)
Access to justice is difficult unless you pay for it.	As a self-represented litigant, to get access to justice and to get access to advice is very hard in this you're paying for it.[52] (*Lawyer*)
Delays due to process and procedures not being followed.	There are more adjournments because things haven't been done or whatever, or things aren't ready for trial, like a lot of times trials get adjourned because things aren't ready when they turn up, these are self-represented litigants. Material hasn't been filed, stuff hasn't been done. (*Lawyer*)
Access to justice difficult for self-represented litigants	Hmmm…that is a hard one because they got access to, access to legal aid services is different to access to justice. The court is trying to give them the best access to justice they can get but I think they are a bit hamstrung if they are self-represented.[53] (*Magistrate*)
Self-represented litigants lack of engagement limits their access to justice.	I always think that everyone should have an appropriate measure of justice. What that question makes me think of is somebody that is not engaged up until the day of trial and they come see the Duty Lawyer and they say I want you to represent me today. In their view, if you say no, is that your preventing them from having a fair hearing and all that, you know so that's what that question invokes in me. I want people to have access to justice. [54] (*Legal Aid officer)*
Time constraints limit access to justice.	There's only so much we can do, the day of trial, to read every affidavit that's been filed, we can't give them information about the sorts of questions you should be asking because that requires an in-depth knowledge, so I guess it depends on what you consider to be access to justice on the day of trial.[55] (*Legal Aid officer*)
Lack of preparation and emotional investment to the case	One of the problems that I have of course at trial of course is that they are not well prepared for trial and that there very emotionally invested in the outcome of the trial. As you can imagine the emotions run terribly deeply with children it would be an odd set up otherwise. Appropriate measure of access to justice though, look I would agree with that inasmuch as I think that magistrates tend to look carefully at things like case plans. So, I think that the judges will look fairly carefully to evidence and the welfare of the child, of course is the gold standard…[56] (*Legal Aid officer*)

[51] Interview with BL11.
[52] Interview with IL12.
[53] Interview with BM8.
[54] Interview with BLA1-2.
[55] Ibid.
[56] Interview with TLA1.

Theme	Response to whether self-represented litigants have an appropriate measure of access to justice at their child protection trial
Litigants must take responsibility to engage in proceedings.	So, clients have to take responsibility. To get access to justice there has to be some taking of responsibility by the parents. And that would mean engaging in the proceedings at an early stage and then I guess engaging with their lawyer. See a Duty Lawyer just cannot help someone at the time of trial. So really if they haven't engaged to that point then in my view they need to be looking in the mirror.[57] (*Legal Aid officer*)

Table 8.K: Whether self-represented litigants are provided with an appropriate measure of access to justice at their child protection trial

Participating lawyers indicated that the access has improved somewhat with the inclusion of Duty Lawyer services, but that it does not meet the needs of the self-represented litigant at trial. On the other hand, Legal Aid officers reflected on the roles and responsibilities that the self-represented litigants must take on board.

L *Are there often lengthy delays in finalising long-term guardianship orders due to parental self-representation?*

All magistrates interviewed agreed that there are often lengthy delays in finalising long-term guardianship orders because of parental self-representation. Five (45 per cent) lawyers also agreed (with three (27 per cent) having no opinion and three (27 per cent) in disagreement. Legal Aid Officers, however, were split with two (50 per cent) agreeing and two (50 per cent) disagreeing.

[57] Interview with BLA1-1.

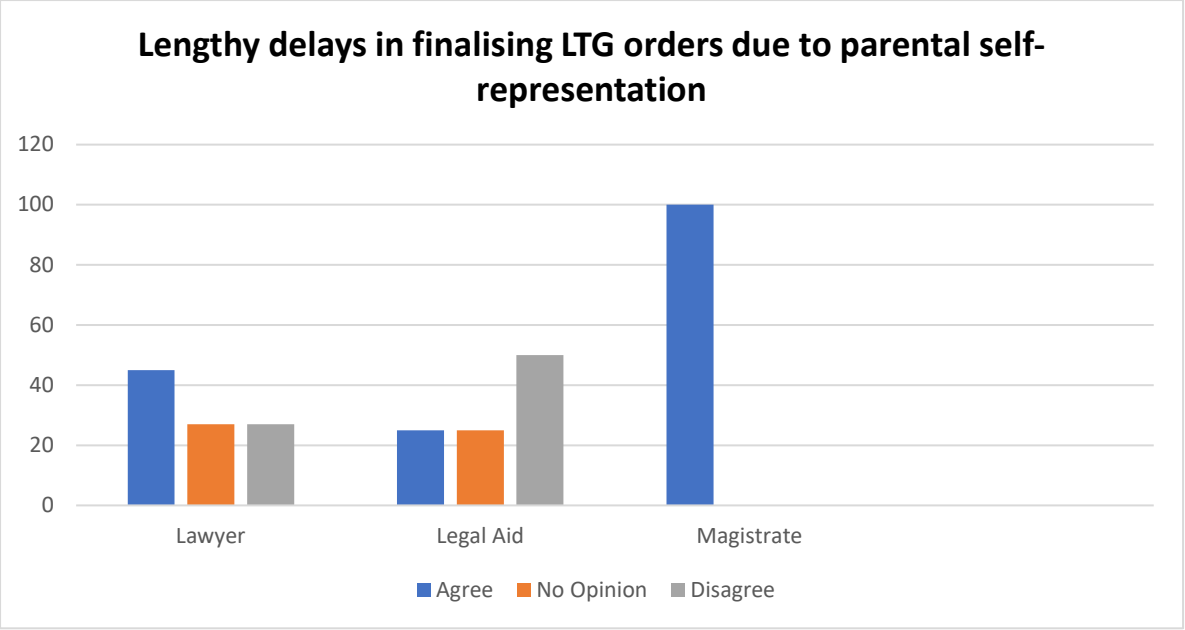

Figure 8.E: Lengthy delays in finalising long-term guardianship orders due to parental self-representation

Theme	Response to whether there are lengthy delays in finalising long-term guardianship orders due to parental self-representation
There is no delay in finalising long-term guardianship orders due to self-representation – it is due to their not wanting to consent.	Typically, long-term guardianship orders are backed up by, there is usually a children's separate representative that is appointed and there is usually a social assessment report or some other report such as a sexual offender risk report or things like that. … I don't see a delay in long-term guardianship being because of the self-represented litigant. It's not the issue.[58] (*Lawyer*)
Processes and procedures often cause delays in long-term guardianship orders.	Absolutely agree. The delays are often caused by, although often more so by the Department taking three months to make (inaudible) it is often caused because participants were litigants who don't participate effectively in court processes and have difficulty attending on things, having difficulty taking or providing steps the Department requires. Most often because what the Department requires is often essentially more than what they are able to do in the first place. They don't have access to things like transport or funds. The Department may require them to do drug and alcohol testing that they cannot afford.[59] (*Lawyer*)
	There are more adjournments because things haven't been done or whatever, or things aren't ready for trial, like a lot of times trials get adjourned because things aren't ready when they turn up, these are self-represented litigants. Material hasn't been filed, stuff hasn't been done.[60] (*Lawyer*)
	My experience is, I would say, it really is a difficult question because they would run a short-term application, for one or two years before they would run their long-term application, so it is not the fault of the parents…they may delay the trial.[61] (*Lawyer*)
Delays, but not due to self-representation	I think there are lengthy delays, but I don't think it's because of parental self-representation to be honest with you.[62] (*Lawyer*)
	I don't think it's because of parental self-representation, I agree with the premise but I don't agree that it's because of parental self-representation. I just think it's because of the way the court system is and I think that's across-the-board.[63] (*Legal Aid officer*)
	I don't think it is confined to LTG, it's all matters.[64] (*Legal Aid officer*)
	There are delays and that's a large part of it, because they don't engage that well. They have missed family group meetings and miss case conferences, they don't turn up for court. Yeah, don't give them accommodations, they won't do any better with it.[65] (*Magistrate*)

[58] Interview with IL12.
[59] Interview with BL11.
[60] Interview with TL4.
[61] Interview with IL2.
[62] Interview with TL3.
[63] Interview with BLA1-1.
[64] Interview with BLA1-2.
[65] Interview with TM5.

Theme	Response to whether there are lengthy delays in finalising long-term guardianship orders due to parental self-representation
Delays are due to non-engagement of parents or a lack of processes that need to be undertaken	Well, yes, I would strongly agree with that because most of the time delays that are occasioned not just in long term guardianship, but in any child protection matter before the court, are usually occasioned by the non-engagement of parents, their non-attendance at court or there is a lack of consistency in attendance or a lack of being able to be contacted by the Department for various processes that need to be gone through during the matter being before the court, like family group meetings, special assessment court interviews, and court ordered conferences, and case plan reviews, and all sorts of things. But most of the time delays beyond that are occasioned by the parents.[66] (*Magistrate*)
	There are delays and that's a large part of it, because they don't engage that well. They have missed family group meetings and miss case conferences, they don't turn up for court. Yeah, don't give them accommodations, they won't do any better with it.[67] (*Magistrate*)

Table 8.L: Whether there are lengthy delays in finalising long-term guardianship orders due to parental self-representation

While all interview participants stated that there are delays because of parental self-representation, they did not believe this to be the sole reason. Other reasons provided include the need for various reports to be undertaken with respect to the family (social assessment reports, family group meetings, case plan reviews), DCSYW delays in filing material, as well as process and procedural delays in the court system.

M Are the quality of statements, affidavits and evidence provided by the court (from each party) not easily understood by self-represented litigants?

All participants agreed that the quality of statements, affidavits and evidence provided by the court (from each party) are not easily understood by self-represented litigants. These documents are those that have been filed with the court by each party (litigant, lawyer, DCPL, DCSYW), and served on each side.

[66] Interview with BM8.
[67] Interview with TM5.

Theme	Responses to whether the quality of statements, affidavits and evidence provided by the court (from each party) is not easily understood by self-represented litigants
The Department gets away with stuff that would not normally happen if the self-represented litigant had legal representation.	Yeah, especially the DOCS material is, a lot of the time, horrendous really. Not only full of hearsay, but second and third hand hearsay. I mean DOCS get away with stuff they wouldn't normally get away with if they are not represented on the other side. Because there would be objections taken to it or, even though the rules of evidence don't apply the same way it does in normal court, still, the weight of the things that are relevant or not relevant, etc.[68] (*Lawyer*)
	Absolutely. In the case of the Department, it is a complete lack of understanding of communication that they need to have with clients, that they fill affidavits with words that they can't understand. They are for people with limited literacy and any of the other problems that they often have. They are very confronting, large documents, that they simply can't face.[69] (*Lawyer*)
	I would agree with that. Sometimes they're not well understood by anyone. Again, I'm not trying to have a nasty chop at people. If there was one rule of evidence applied in a court or tribunal that is not bound by the strict rule of evidence, it is the relevance principal. That the evidence must be relevant. Sometimes that is brought into disrepute by hearsay upon hearsay in some of these affidavits. Now I think this is getting better but I think it could get better still.[70] *(Legal Aid officer*)
	What is on page one is the same as on page 20 and is on page 40. Whoever is writing them, they need to be a lot more succinct in this is it. I don't know if they get points for how many pages they have, but they just say the same thing over and over again in their reports.[71] (*Lawyer*)
Prior to DCPL involvement, the materials provided by the Department would be 'cut and pasted' from other materials not appropriately vetted prior to filing.	I strongly agree with that, particularly when it comes to the (inaudible) affidavits and so forth. They can be very heavy reading and I find that people won't understand whether child safety have screwed up. Just, how does a self-rep know any better of these things, to chase that down and actually hold them accountable. They don't know these things.[72] (*Lawyer*)
	Although, with DCPL being in there now, they are at least trying to reign back the length of the affidavits. They are still doing a lot of cutting and pasting.[73] (*Magistrate*)
Things are getting better.	It's getting better though with the new system, it is getting better.[74] (*Legal Aid officer*)

Table 8.M: Whether the quality of statements, affidavits and evidence provided by the court (from each party) is not easily understood by self-represented litigants

[68] Interview with TL4.
[69] Interview with BL11.
[70] Interview with TLA1.
[71] Interview with TL5.
[72] Interview with TL15.
[73] Interview with TM3.
[74] Interview with BLA1-

The quantitative data provides that all participants agree that the quality of statements, affidavits and evidence provided by the stakeholders are not easily understood by self-represented litigants. This view is supported by the qualitative data, whereby all participants have expressed concerns about the quality and accuracy of material provided to the court by DCSYW. Participants were optimistic as to the DCPL's role in holding the DCSYW to a higher standard of accountability in this regard.

IV Conclusion

This chapter has provided a summary of lawyer, magistrate, and Legal Aid officer participants' perceptions on access to justice for self-represented litigants in Queensland child protection. The interviews were conducted in terms of the magistrates' role in accommodating the self-represented litigant (eg advocacy, processes and procedures), the role of unbundling legal services (eg Duty Lawyer services) as well as advocacy, power imbalances, and the quality of evidentiary material provided to the court - and its potential impact on the self-represented litigant. This has provided both a qualitative and quantitative summary of the themes raised.

Chapter 9 will incorporate the results of the literature review and data obtained from the research to provide contextual results on the research questions and associated research issues.

CHAPTER 9 – INTERVIEW RESULTS AND RESEARCH QUESTIONS

I INTRODUCTION

This chapter discusses the research results based on the quantitative and qualitative data obtained from interviews undertaken and literature reviewed with respect to the research question: 'why do litigants self-represent in Queensland child protection courts?'. It concentrates on the data responding to the research questions (RQ1-RQ3) relating to whether a) self-represented litigants are distrustful of the legal profession; b) the effects of limited access to funding are a major contributing factor to self-representation; and c) self-represented litigants hold emotional attachments to their case and, therefore, self-represent. The discussion has been limited by being actively blocked from making contact with self-represented litigants by the Department of Child Safety, Youth and Women. Conclusions and recommendations formed are based on the research findings and data obtained. However, interviewed participants not only stated that they disagreed with the statement that self-represented litigants knew their case better than lawyers would, but they also all proceeded to, in general, give a view (through open-ended discussions) that this was not a motivation for their self-representation. Figure 7.I above provides an example of such sentiment as expressed by a participating Legal Aid Officer.

II RQ1: ARE SELF-REPRESENTED LITIGANTS DISTRUSTFUL OF THE LEGAL PROFESSION

The literature review does not provide substantial information regarding a distrust of the legal profession by self-represented litigants in child protection courts. However, there has been substantial discussion regarding the continued systemic control that the State wields in child protection matters, while parents continue to struggle. Being a self-represented litigant, in any context, can be quite confronting. However,

in child protection matters, the parents are not only facing the challenge of self-representation, they are also faced with, perhaps, one of the most important matters they will ever confront - losing their child. Self-represented litigants face complex processes and procedures while also dealing with the emotional, familial, and social disparity brought about by the State wielding substantial power with unlimited legal resources.[1] This, accordingly, creates a serious power imbalance whereby parents may become distraught, instinctively using a 'fight or flight' reaction when contesting any State intervention.[2] For these parents, who are often from lower-socio economic or marginalised backgrounds, do not know how to contest the intervention or will feel disenfranchised.[3] They are placed in a position where they are forced to engage against a highly resourced, emotionally detached Department of Child Safety, Youth and Women ('DCSYW').[4]

Under these circumstances, parental engagement becomes a quest, with low prospects of success from funding and legal representation. A likely outcome is that parents are left to undertake self-representation. The potential for severe injustice that may occur as a result of being denied legal representation is one of the more noticeable features of many foreign jurisdictions.[5] Authorities in both the US and Canada provide for those who are not able to obtain Legal Aid funding through other avenues of state-funded legal representation.[6] The premise for alternative methods of securing representation is that the government is taking their children into custody, thus violating their federal or state constitutions.[7] Australian parents are not afforded these same constitutional rights, or the same opportunities, for representation. While

[1] Australian Government Productivity Commission, *Access to Justice Arrangements* (Productivity Commission Inquiry Report, September 2014) 440.
[2] Tamara Walsh and Heather Douglas, 'Lawyers, Advocacy and Child Protection' (2011) 35(2) *Melbourne University Law Review* 19 624.
[3] Ibid.
[4] Ibid 623.
[5] Sande L Buhai, *'Access to Justice for Unrepresented Litigants: A Comparative Perspective' (2009) 42(4), Loyola of Los Angeles Law Review* 1009.
[6] *Canadian Charter of Rights and Freedoms*, s7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[7] Ibid.

many approaches have been provided to parents to reduce the cost of engaging legal representation, there is still a demand for the legal right to representation and a need to improve community legal knowledge.[8]

A *Qualitative and Quantitative Data Explored*

1 *Are self-represented litigants held to the same court standards as the Department of Child Safety Youth and Women?*

One of the greatest difficulties arising from self-representation in Queensland child protection courts is that the self-represented litigant has limited or no understanding of the court procedures or rules, and is reliant on assistance from magistrates, despite the inability of judicial officers to provide legal advice.[9] These litigants are generally referred to Duty Lawyers, community legal centres or Legal Aid, but they invariably confront a well-resourced DCSYW, incorporating the Office of Child and Family Official Solicitor ('OCFOS') and Department of Child Protection Litigation ('DCPL').

The quantitative data from the research undertaken identified two strong themes. The first is that litigants from lower socio-economic, poorly educated, or dysfunctional backgrounds cannot be expected to self-represent against a legally represented department. The second theme, which emerges organically from the first, is that these litigants are opposed by a well-resourced government department and should be provided legal representation.

The 2004 Carmody Inquiry recognised the tensions between the State and these marginalised parents.[10] The Inquiry considered that it was vital for legal representation to be provided to the parents to ensure just

[8] Buhai (n 5) 1008.
[9] Chapter 4, Part 2 – Legal Service Options Available for Self-Represented Litigants; Chapter 5, Part B(VI), 4 – Competence.
[10] Queensland Parliament, *Record of proceedings* [Hansard], 11 May 2016, 1680 (Ms Linard, Nudgee - ALP).

outcomes in child protection matters.[11] The recommendation was that Legal Aid Queensland provide this support at the earliest possible point in proceedings when directed by the court.[12] Funding for self-represented litigants is now provided up to, but not including, the trial phase in child protection proceedings. Conversely, this is a 'two steps forward, one step back' approach. The State is represented by a solicitor from the DCPL, which is instructed by a solicitor from the OCFOS, who is instructed by the DCSYW.[13]

While the DCSYW refused to participate in the interview process, all contributing participants disagreed that self-represented litigants are held to the same standards as the DCSYW. However, there is also strong agreement that self-represented litigants are held to a lower standard than the State because of their disadvantages. They are given more leeway and options by the court, especially in relation to the application of the rules of evidence and procedure.

2 *Do litigants self-represent in Queensland child protection matters due to a distrust of lawyers?*

While there is a perceived substantial power imbalance between self-represented litigants and the DCSYW,[14] research has found that it is not due to a determinative factor of distrust.[15] In situations where the Department has removed children,[16] parents will become distressed and emotional.[17] This is not a matter of distrust, but a feeling of further marginalisation,[18] as their frustration is with the process, DCSYW and even their lawyer.[19]

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[11] Tim Carmody, 'Queensland Child Protection Commission of Inquiry, *Queensland Child Protection Commission of Inquiry* (Webpage, June 2013) 476. <https://www.cabinet.qld.gov.au/documents/2013/dec/response%20cpcoi/Attachments/report%202.pdf>.
[12] Ibid.
[13] *Director of Child Protection Litigation Act 2016* (Qld) s 5.
[14] Australian Government Productivity Commission, *Access to Justice Arrangements* (Productivity Commission Draft Report Overview, April 2014) 20.
[15] Chapter 5, Part B(VI), 4 – Distrust.
[16] Ibid.
[17] Ibid.
[18] Ibid.
[19] Ibid 623.

All participants interviewed disagreed that litigants self-represent in Queensland child protection matters owing to a distrust of lawyers. This position is supported by the lack of substantive information provided in Chapters 2 to 5 in determining whether distrust of lawyers was a factor in self-representation in Queensland child protection matters.

Because of the inability to contact or interview self-represented litigants involved in child protection matters (as discussed in Chapter 6), information could only be obtained from interviews with lawyers, magistrates, and Legal Aid Queensland officers. The data collected from these legal services personnel participants is based on their experiences – and it should be recognised that those experiences may well be shaped by the participants' understanding of their own place as official actors in the legal system. It should also be recognised that as, by definition, they have not directly represented self-represented litigants, their appreciation of the motivations for self-representation will be limited to their contact with self-represented litigants either by hearing submissions from a self-representing litigant, representing an opposing party, or by observing them in the daily work of the courts. Therefore, using the transcendental phenomenological approach, RQ1 may be substantiated as it relies on an assessment of the experiences of legal services personnel. However, a clear picture painted from these legal services personnel was that self-represented litigants, while holding some animosity toward the DCSYW, were more frustrated with not understanding the child protection court processes and procedures. It may be that legal services personnel had articulated a position that is self-serving. That is, nevertheless, irrelevant in a phenomenological study which aims to identify the perceptions of the people interviewed. One interviewed lawyer stated that they could see where an element of distrust could evolve whereby a litigant may become frustrated with their lawyer if they do not believe that the lawyer is acting in their best interest.[20] The example provided was that of a litigant who was advised to engage with the DCSYW to

[20] Interview with BLA1-1 (Kathy Reeves, In-person Interview, 15 January 2019).

work towards reunification with their children. The view held was that many of these litigants believe that their legal representative should charge into court stating, 'this is all lies, my client is innocent'.[21] The perception and initial response is one of disappointment, rather than of a distrust of lawyers.

Those interviewed reinforced the position that, based on the litigants' circumstances, if they had the opportunity to have legal representation, they would take it.

III RQ2: ARE THE EFFECTS OF LIMITED ACCESS TO FUNDING A MAJOR CONTRIBUTING FACTOR TO SELF-REPRESENTATION?

Despite the numerous legislative changes throughout the history of the regulation of child protection,[22] the concept of the 'best interest of the child' continues to remain second to the interests of the State and the power of the executive government. This historical and persistent control culture continues into the 21st century with the State continuing to wield this substantial power while parents continue to struggle with obtaining affordable legal representation or financial access to justice in child protection proceedings.

Legislative developments since colonisation saw a shift from the State having 'complete control', including financial responsibilities of maintaining children,[23] to taking a more therapeutic approach[24] toward family reunification. One of the key themes to emerge from early child protection reformation was the paternalistic role (and the 'ideal' family)[25] that the State undertook when consideration was being

[21] Ibid.
[22] Chapter 2, Part 2 – History of Queensland Child Protection.
[23] Shurlee Swain, 'History of Child Protection Legislation' *Royal Commission into Institutional response to Child Sexual Abuse* (March 2014) 6.
[24] Australian Institute of Family Studies, *History of child protection services* (January 2015) Australian Government <https://aifs.gov.au/cfca/publications/history-child-protection-services>.
[25] Chapter 2, Part 2A – Neglected Children.

given to placing children into care. This involvement in developing child protection policies was considered as biased toward political and economic measures rather than the best interests of children.[26]

A *Qualitative and Quantitative Data Explored*

1 *Is self-representation in Queensland child protection increasing?*

Interviews with participating lawyers and magistrates support the 2019 findings of the DCSYW wherein the number of children living away from home, in home-based care, or placed with other family carers had significantly increased.[27] The Carmody Report suggested that this increase is based on communities being more aware of their responsibilities in prioritising and achieving child safety from abuse through measures such as mandatory reporting.[28]

Of the five Legal Aid Officers interviewed, all disagreed that self-representation in Queensland child protection was increasing. They further provided that, owing to changes in their merits testing, litigants are now able to obtain further legal aid funding.[29] Lawyers acknowledged that there was some relaxation on the merits testing but, as one lawyer stated, '…it depends. The answer to your question depends on what stage you are at.'[30] In reference to final hearings, the position was that self-representation was increasing or at least at a high rate of stagnation.[31] It was posited that, for early stage mentions, family group meetings and court ordered conferences, Legal Aid funding had increased and improved.[32]

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[26] Community Affairs References Committee, The Senate, *Forgotten Australians* (August 2004) xv, 16 [2.67].
[27] Department of Child Safety, Youth and Women, 'Living away from home', *Child and Family* (Queensland Government site, 9 October 2020) < https://www.csyw.qld.gov.au/child-family/our-performance/ongoing-intervention-phase/living-away-home> 13.
[28] Carmody, *Queensland child protection commission of inquiry* (Queensland Child Protection Commission of Inquiry, June 2013) 429; Institute of Health and Welfare, 'Child protection Australia 2012-2013 Report' *Australian* Government (Report, 2014) <www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129548164>.
[29] Interview with BLA1-2.
[30] Interview with TL3.
[31] Ibid.
[32] Ibid.

This position was supported by the Carmody Inquiry which addressed issues of need surrounding various levels of government departments and litigants.[33] However, the outcome was that the government departments were funded for an in-house legal team and associated caretaker, with litigants having their Legal Aid means and merits tests relaxed for work undertaken up to, but not including, the trial phase. Thus, theoretical debates continue about the State's power and the lack of legal representation afforded to correct this imbalance.

The effect of limited Legal Aid funding was not lost on magistrates. However, as one stated '…. I think they do quite well for funding for particular stages of the matter going through court but if you are looking at hearings, I think that generally, the pressure is on and there is less people being funded for a hearing. There are probably a whole lot of reasons for that, not just financial.'[34]

(a) Access to Justice

Over the years, the government's response to 'access to justice' has been the provision of legal representation through secure funding through State based Legal Aid services.[35] A major obstacle in securing this access is that marginalised individuals have been unable to meet the access requirements (means and merits tests).[36] Increasing legal costs, Legal Aid funding limitations and barriers to access have brought attention to the need for 'access to justice' reform.[37]

Given the complexity of legal procedures, the inability to obtain 'access to justice' impacts on the ability of parents to obtain a fair and just resolution to their child protection matters,[38] especially for those who

[33] Chapter 2, Part 3B – Carmody Inquiry.
[34] Interview with BM8.
[35] Peter Salem and Michael Saini, 'A Survey of Beliefs and Priorities About Access to Justice of Family Law: The Search for a Multi-Disciplinary Perspective' (2016) 17.3 *Cardozo Journal of Conflict Resolution* 664.
[36] 'Access to Justice', *United Nations and the rule of Law* (Government, 2019) <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>.
[37] J McHale, 'Access to Justice: A Government Perspective', (2012) 63 *University of New Brunswick Law Journal* 353.
[38] Ibid.

cannot afford to pay for legal representation.[39] These parents' rights to a fair hearing effectively becomes violated and disregarded[40] and, unlike the position in the US and Canada, there is no state-based funding, other than Legal Aid, available to them. Pro bono work was identified as the best support for access to justice in the Queensland Law Society's annual 'Access to Justice Scorecard'.[41] Such work includes co-production, unbundling of legal services, community legal centres, Duty Lawyer services, as well as pro bono work undertaken by private legal professionals.

(i) Unbundling and Co-Production Services

Unbundling and co-production practices have become characteristic of traditional legal services for self-represented litigants. Lawyers are not being granted Legal Aid funding for trials and, therefore, self-represented litigants must make alternative arrangements for their representation. Unbundling and co-production services have worked collaboratively for self-represented litigants to undertake active roles in their proceedings, as well as providing them with legal services, that vary by reference to cost and corresponding need.

Lawyers interviewed agreed that it was difficult to put any evidence before the court without a grant of Legal Aid funding for final hearing. One lawyer said that 'I was funded once to run an interim hearing and that was it in five and a half years. I was never funded for a final hearing.' [42] It was thought that without any legal assistance to put evidence before the court, child protection hearings were one-sided and strongly favoured DCSYW.[43] The lawyer said that:

> ….even if you are prepared to run the interim hearing pro bono, if you haven't been funded to put the evidence before the court, then how do you run an interim hearing if there is no other evidence before the

[39] Ibid.
[40] Ibid 11 [6.2].
[41] Ibid.
[42] Interview with TL3.
[43] Ibid.

> court? So, as I said, to me, it just seemed to come down to the guise of legal representation, particularly when you are confronted now with professional lawyers attending, whose sole purpose was to prepare the case on behalf of child safety or the Director of Child Protection Litigation, on the basis of that evidence, in any event, prepare that case. It really is reaching the point of being ludicrous, frankly, and is ludicrous really.[44]

Not unlike the lawyers interviewed, magistrates agreed that unbundling services were beneficial in that they allowed the self-represented to have the opportunity to have their say before the court, yet in a way that is more sophisticated than perhaps they could express without some sort of legal assistance. One magistrate summed up their position as 'something is better than nothing.'[45]

Although Legal Aid Officers did not agree that self-representation in Queensland child protection courts was increasing, they did agree that the unbundling and co-production of services were beneficial in that statements and affidavit materials were prepared in a way that was clearer and more legible. One stated 'Far too often I see affidavits in fair level matters, it's getting better there, certainly in child safety matters, where they have the thickness of the Hong Kong telephone book.'[46]

(ii) Pro Bono

As indicated in Chapter 2, between the 1970s and early 1990s, legal service provision for marginalised individuals was undertaken mainly by volunteer lawyers (funded by Legal Aid and Community Legal Centres).[47] However, by 2018, on average, every Queensland legal practitioner was expected to provide approximately 35 hours of pro bono work per annum.[48] Most participating lawyers stated that they have

[44] McHale (n 37).
[45] Interview with BM13.
[46] Interview with TLA1.
[47] Tim Carmody, 'Queensland Child Protection Commission of Inquiry, *Queensland Child Protection Commission of Inquiry* (Webpage, June 2013) 458 <https://www.cabinet.qld.gov.au/documents/2013/dec/response%20cpcoi/Attachments/report%202.pdf>; Chapter 2, Part 3B – *Children's Court Rules 2016* (Qld).
[48] Australian Government Attorney-General's Department, *Legal Services Expenditure Report 2017-2018* (Report, 2019) 12.

had instances of having to work 'pro bono,' as well as instances where funding expired during the mention. While some advised that they ceased to act when funding expired, others completed the mention:

> Yeah, we always complete, like you never get as many hours from legal aid as you spend on the matter. . The initial grant that you get from legal aid is like three hours, one hour to read the affidavit, which are incredibly huge and full of hearsay from the department, one hour to meet with the client, and one hour for court, for the first initial mention and you are usually there waiting for two or three hours. And the affidavits are huge and usually take you a lot longer than that to go through and prepare. So you end up doing five to six more hours for the first court date and getting paid three hours, and as well as that we were filling in the legal aid applications, which was another half hour or hour appointments with the client which we generally don't get paid for as well. So, it just couldn't even cover our costs…..[49]

Another lawyer supported this position, stating:

> But for us, as an internal lawyer, what they do is they record how many hours you worked on the file against that grant of aid and often, and unfortunately (name redacted) are often seeing double, triple hours are allocated. I mean, if they bill us to the file at $129 per hour on a grant of $1600, we obviously have about 10 hours to work on the file. If it is a voluminous amount of material, you might find yourself spending five hours reading, reviewing and making detailed file notes. What I will do is, I will make a file note, as much a summary note setting out who the parties are, the background, what the different things are, when family group meetings are, and a chronology setting out the next, what needs to happen, whether I need to make a request for disclosure, you know. . . rule 13 affidavits, you know, to do that thoroughly can take a long time, at least a half of a day. Then you have got the mention, meet with the client and give them advice and I also write a letter of advice as well. So, to do all of that, there is no way you can do that in a grant of aid. It is impossible. Can't be done.[50]

This volunteer scheme continues to provide legal services to self-represented litigants by way of assistance and advice. However, the lawyer's time in providing this assistance is limited which, in turn, sees the

[49] Interview with TL15.
[50] Interview with TL15.

lawyer-litigant relationship fail and the legal 'gap' in child protection services becoming merely a band aid solution to a legal funding problem.

(iii) Duty Lawyer Services

Services provided by Duty Lawyers are an amalgamation of pro bono advice and representation to assist self-represented litigants,[51] albeit funded directly by Legal Aid Queensland. There are limitations to this perception of a 'free lawyer' service[52] as they cannot appear on behalf of the self-represented litigant and can provide only limited assistance in the form of information, explanations, and legal aid eligibility.[53]

All interviewed participants agreed that the Duty Lawyer service can aid self-represented litigants. However, some lawyers found this approach to be far from ideal as it does not allow for any time for preparation or in-depth discussions to provide the self-represented litigant with appropriate advice.[54] Further, although it is viewed as an invaluable asset to the litigant, provision is only for limited scope advice for the matter occurring on the day. There is no consistency in the Duty Lawyer's availability, so litigants are having to tell their stories repeatedly to different lawyers. Finally, and perhaps most importantly, Duty Lawyers cannot represent litigants in child protection trials. As one Legal Aid officer stated 'They will certainly be given a Legal Aid application form at the very least and assistance with whatever's happening for that mention on that day. There's nothing more that we can do as a Duty Lawyer.'[55] The Duty Lawyer service is merely a co-production relationship between the lawyer and self-represented litigant, albeit no remuneration is provided as the lawyer is paid by Legal Aid Queensland. Information and advice services (including the provision of a Legal Aid application) may be a 'better than

[51] Povey, McKernan, Husper and Webster (n 7) 40 [20.5].
[52] Legal Aid Queensland, 'Child Protection Duty Lawyer', *Child Protection Overview* (Webpage, 2015-2018) <https://www.legalaid.qld.gov.au/Find-legal-information/Relationships-and-children/Child-protection-overview/Child-protection-duty-lawyer>.
[53] Ibid.
[54] Tamara Walsh and Heather Douglas, 'Lawyers, Advocacy and Child Protection' (2011) 35(2) *Melbourne University Law Review* 19 646.
[55] Interview with ILA1.

nothing' approach, however, it is still determined by the executive government, which may be too inflexible to give the self-represented litigant appropriate access to justice.

2 *Do litigants self-represent due to funding issues?*

Research provides that, historically, funding has been a major issue regarding child protection.[56] Since the inception of children's courts in the 1890s, child protection services have remained a significant presence and within the State's responsibility.[57] As early as 1895, children deemed 'neglected' were made wards of the colony. Since that time, and despite numerous legislative changes and inquiries, the State continues to wield superior financial power, not only in deeming a child to be in need of care (based on mainstream societal standards) but, in a point to be expanded on later, also in the granting of Legal Aid funds.

Both lawyers and magistrates interviewed agreed that there had been an increase in self-representation as a result of funding issues. One lawyer expressed concern with respect to marginalised litigants in particular, stating that there were 'so many other issues going on such as prejudices…in any event, in terms of mental health, their [ie, self-represented litigants'] ability to access any funding that might be available to complete the forms for Legal Aid …...'[58] Another supported this position providing 'If they had funding, they would take it. They would have representation.[59]

Seventy-five per cent of Legal Aid participants disagreed with the position that there had been an increase in self-representation because of funding issues. One interviewed participant believed that it has nothing to do with a lack of Legal Aid funding, stating 'I just think it's because parties choose not to engage so that has nothing to do with legal aid…that is the primary reason I don't think it's because of a lack of legal

[56] Chapter 2, Part 2A.
[57] Ibid.
[58] Interview with TL10.
[59] Interview with TL5.

aid, I think it is, in many instances, because of the clients own, unfortunately, dysfunction'.[60] A further participant provided:

> …that's why I think it is not a legal aid issue. I think the majority of the client base would rely on Centrelink for their income and in most cases, they would probably be on the lower end of Centrelink because unfortunately they don't have their children in their care, so they have lost that. I think, obviously, there are well-to-do families in the child protection system, but I think, obviously, they have the capacity to pay for private lawyer...I don't think it would be like a massive proportion I would just think it would be some poor people that would unfortunately, are in that situation.[61]

Both magistrates and lawyers held concerns about DCSYW standards, especially on the basis that children are being taken away from their parents. One magistrate explained, 'everything that they do should be beyond reproach, which isn't always' the case'.[62] This statement is concerning, as the Carmody recommendations have provided the DCSYW not only with in-house legal counsel OCFOS, but also a departmental caretaker DCPL to ensure that these issues are no longer problematic. Further, contextually aligned with the Carmody recommendations and the comments of the Legal Aid participant above,[63] it is clear that 'marginalised' applicants would be better suited for further funding and assistance than the well-resourced, educated and knowledgeable DCSYW.

3 *Should self-represented litigants be provided with Legal Aid funding for trial?*

Legal Aid funding has improved in recent years with the means and merits tests relaxing to an extent whereby funding can be more easily obtained for matters up to, but not including hearings.[64]

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[60] Interview with BLA1.
[61] Ibid.
[62] Interview with TM1.
[63] Chapter 2, Part 3B – Carmody Inquiry.
[64] Department of Communities, Child Safety and Disability Services, *What is the Office of Child and Family Official Solicitor?* (5 June 2018) Queensland Government, Department of Communities, Child Safety and Disability Services (https://www.communities.qld.gov.au/resources/campaign/supporting-families/what-is-ocfos-information-sheet.pdf).

This is supported by comments made by participating lawyers who agreed that some applications for Legal Aid funding are without merit and Legal Aid should not be expected to fund every litigant merely because they are in a child protection hearing. However, as one lawyer stated 'I think that there needs to be a greater flexibility in the policy of legal aid as to their decisions about what they will fund for trial and the reasons why they rule.'.[65]

In considering whether Legal Aid Queensland funding guidelines limit decision making, one lawyer advised that Legal Aid should take a 'more holistic approach to decision-making about funding for trial rather than simply using the current guidelines that are limiting'.[66] However, another gave more context in that there is a limited amount of taxpayer money available and, ultimately, it should be 'used to fund those people that are in a 'better position to assist the children because the parents are really quite clearly unable to care for these children and shouldn't care for these children.' However, after giving this opinion, the lawyer changed their position, expressing that the main problem is that Legal Aid 'just don't fund any of these clients.'[67] By way of example:

> One of them had an intellectual, a low-level intellectual impairment. She had some children when she was very young, they had been taken on a long-term guardianship and then a number, many years later, she had re-partnered and had another child and child safety just went and took that child. They made an application for a short-term custody order to work towards reunification over the next 18 months, or I think it was two years. At the end of this period, this is where I became involved, and they made an application for long-term guardianship but what became apparent was they actually never tried to reunify at all. They were just going through the motions of doing it. I actually found an email in amongst the 800 or 900 pages of affidavit material, it was huge, it may even have been over 1000 pages in the disclosure documents. I actually found an email which quite clearly said, this was six months before the

[65] Interview with BL11.
[66] Ibid.
[67] Interview with TL15.

> expiry of the child protection order, there was an email from the team leader, CSO or somebody else, listed external service provider said well, just confirming that you don't actually want us working towards reunification with this mother because you have already made up your mind that it should be a long-term guardianship application, and the team leader said yes. Legal Aid still did not fund her for a final hearing, even though, quite clearly, on the evidence that had been provided, and consistent with her statements, had made no attempts to actually work towards reunification and follow the case plan goal during that period. Yeah, look, more and more I am leaning toward the view, look, I think they should all be represented.[68]

Fifty per cent of magistrates interviewed disagreed with this position. They considered that there must be a merits test 'somewhere' or else the court would be overloaded with trials that have no contestable matters. If 'everybody was funded for trial, then there would be people running trial just without any legitimate reason … and it would also create havoc in the court because just about every matter would potentially go to trial.[69]

Regardless on which side of the fence the interviewed participants sit, perhaps one of the best responses received in relation to funding was expressed by a single magistrate. 'Well, we are not here for the SRLs, we are not here for the parents, we are here for the children. It is the best interest of the children. Sometimes people sort of forget that, think we are here to placate the parents-and we are not.'[70]

4 *On the premise of potential detrimental effects to children, should self-represented litigants have a right to legal aid funding for trial?*

[68] Interview with TL15.
[69] Interview with BM8.
[70] Interview with TM5.

The Carmody Inquiry considered the conceptual idea of there being any significant detrimental effects on a child's physical, psychological, or emotional wellbeing.[71] The argument is that, based on the nature of child protection, every person should have a right to access representation, not necessarily a right to funding without merit.[72] Public funds are limited, especially within civil matters such as child protection, and providing every self-represented litigant with funds is going to change their prospects of success. Based on this premise, the means and merits test are satisfactory in that these tests are accessible by all litigants. This was the position of all participants interviewed. Parents have a right to the funding, until such time as it becomes a pointless effort. However, a substantial issue raised was that 'there is a lawyer seeking funding from a grants officer with no law degree who, as one lawyer stated 'is judge, jury, and executioner of the merits of the case. They don't know the law, nor do they know the particular circumstances of the case'.[73] This position reinforces the significant issue of executive government officers deciding questions of legal prospects in child protection matters; thus, undermining the potential application of law to questions of the removal of children. It also invests the legal availability of a claim in the executive government instead of independent courts.

a) Power imbalance vs misuse of public funds

There has been a substantial power imbalance since the inception of children's courts in early colonial Australia.[74] Children whose parents were not in an economic position to care for them were deemed to be neglected and either gaoled or placed into a form of State care.[75] While there have been substantial

[71] Tim Carmody, 'Queensland Child Protection Commission of Inquiry, *Queensland Child Protection Commission of Inquiry* (Webpage, June 2013) 458.
[72] Ibid 476.
[73] Interview with TL4.
[74] See Chapter 2.
[75] E Mellor, *Stepping stones: the development of early childhood services in Australia* (Harcourt Brace Jovanovich, London, 1990) 92-94 cited in Commission of Inquiry into Abuse of Children in Queensland Institutions (Forde Report), 1999, 18 cited in Community Affairs References Committee, The Senate, *Forgotten Australians* (August 2004) 31 [2.61].

legislative reforms to child protection, the imbalance remains the same with marginalised parents coming up against well resourced, government-funded, departments.[76]

While all participants agreed that there is a power imbalance between self-represented litigants and the DCSYW in Queensland child protection trials, lawyers were quite rigorous in their responses. They believed that there is a "huge imbalance" between the self-represented litigant and the DCSYW. One lawyer stated that:

> There is a huge imbalance. Well, it has two effects really. It has changed the power imbalance because now there is a legally trained person as opposed to a more junior, less legally trained person if you like at the other end of the bar table. I have noticed that because they are not lawyers, they talk in lawyer language more, and that is more confusing and more derailing for these people that don't understand the words. It is more intimidating for them I think, because they feel great they are standing at a bar table and they are the only person that doesn't have the education or law degree and everyone is smarter than them. I see that comment sometimes. It makes more of a difference, more than imbalance. The other problem that they have is because they are lawyers, they are in a position where they are not fully aware of what goes on in the case. The briefing is obviously deficient, they have a situation where the information that the OCFOS or DCPL may not be up-to-date, or even correct. So that makes it more difficult.[77]

Another lawyer made comparisons with the criminal law in that 'It would be a bit like the department of public prosecution against a self-represented defendant, the weight of the state against an individual, which is why it is so fundamental for self-represented people to have access to persons, or lawyers, that have expertise in this area.'[78]

[76] Australian Government Productivity Commission, *Access to Justice Arrangements* (Productivity Commission Draft Report Overview, April 2014) 20; Chapter 5, Part 5(2) – Canada.
[77] Interview with BL11.
[78] Interview with TL11.

In contrast, one lawyer stated that while there is a power imbalance, there are cases that could not be anything more than a misuse of public funds, which are not easily available. 'I would not want a situation where Legal Aid was put in a position of not being able to fund matters because it had funded a large number of matters that were totally without merit.'[79]

b) There should be no automatic right to Legal Aid funding

The right to state funded legal representation in child protection has been adjudicated in many jurisdictions, including Australia, the US and Canada.[80] While the law in Australia does not recognise an automatic right to Legal Aid funding in child protection matters, in Canada the law provides a right to ensure a fair hearing and ensure fundamental justice.[81] Further, in the US there is no common law right to state funded legal assistance.[82] However, the US Supreme Court did recognise that there was a discretion, on a case-by case basis, in the role that legislation plays when determining legal representation in the termination of parental rights.[83]

All participants interviewed agreed that, given potential detrimental effects to children, there should be a right to Legal Aid funding. However, one magistrate stated a disclaimer in that 'it should not be an automatic right, but at least provide access'.[84]

One lawyer's position was to compare child protection funding with criminal law matters:

> So, if you are facing six months or more in prison, you are given a grant of aid. Compare that to child safety, you have got these families that are going to lose their children for a minimum of two years on a

[79] Interview with BL11.
[80] See Chapter 5.
[81] *Canada Act 1982 (UK)* c 7, sch B pt I ('*Canadian Charter of Rights and Freedoms'*); Chapter 5, Part 5(2) – Canada.
[82] K Kehoe and D Wiseman, 'Reclaiming a Contextualized Approach to the Right to State-Funded Counsel in Child Protection Cases', (2012) 63 *University of New Brunswick Law Journal* 180.
[83] Vivek S Sankaran, 'Moving Beyond Lassiter: The Need for a Federal statutory Right to Counsel for Parents in Child Welfare Cases' (2017) 44(1) *University of Michigan Law School Scholarship Repository* 6.
[84] Interview with BM8.

> short term custody order or potentially 18 years, depending on the age of the child, obviously you don't know how long that will be… but to tear a family apart, put them in care for years...and they are not entitled – but a criminal, or an alleged criminal, who might face six months of loss of their liberties, six months imprisonment, they get a grant of aid regardless of whether they have a good prospect of success.[85]

This position was supported by a Legal Aid Officer:

> Legal Aid is not a bottomless pit, as it were, and if hopeless cases are to be funded, they ought to be the most serious ones in the courts of criminal law where people's liberties are affected.' Of course, I appreciate that the people here, children are pretty important as well, but if we are to remain a civilised country then liberty should be the thing that is most protected.[86]

Unlike the other participants interviewed, the Legal Aid Officers represented the views of the Legal Aid Queensland organisation, which is based on a framework funded by both federal and state governments - despite being established as an independent statutory agency.[87] Accordingly, the position held by this Legal Aid officer is surprising in that it 'humanises' Legal Aid in the context of supporting individual liberties, in particular, children's liberties regardless of whether the proceedings be civil (state) or criminal (federal) in nature.

c) Right to funding and Legal Aid Queensland and DCSYW decision makers

One of the major impediments to accessing justice in Queensland child protection is that marginalised individuals are hindered by their right, not in accessing justice, but in accessing Legal Aid funding.[88]

[85] Interview with TL15.
[86] Interview with TLA1.
[87] Mark Rix, 'Legal Aid, the Community Legal Sector and Access to Justice: What has been the Record of the Australian Government?' (International Symposium on Public Governance and Leadership: Managing Governance Changes Drivers for Re-constituting Leadership, 24-25 May 2007) 3.
[88] Queensland Law Society, 'Access to Justice Scorecard: evaluating access to justice in Queensland', *Access to Justice* (Queensland Law Society, 2016) 2.

As discussed above, one of the issues arising from interviews with at least two lawyers and one magistrate was that the right to Legal Aid funding was controlled by a grants officer with no law degree and no knowledge of the circumstances of the case,[89] other than a brief outline provided by either the self-represented litigant or their lawyer making the funding application. This position was supported by a participating magistrate who stated:

> Legal Aid makes decisions based on merit and if you are not likely to succeed, then you don't get funding for trial. You know, where the Legal Aid office makes decisions based on merit and, if you are not likely to succeed, then they don't get funding to go to trial. I agree [legal aid grants officers should have legal background]. And they used to back in the day when I worked in the Legal Aid office. They were all lawyers.[90]

This position was further reinforced in that the mechanisms for review, if not a potential for bias, of funding applications are 'not that good, you have got effectively, people being funded by Legal Aid so they know what side their bread is buttered on and, rarely, reviews are successful at Legal Aid'.[91]

4 *Are Legal Aid criteria for funding child protection matters (means and merits test) satisfactory?*

The 2013 Queensland Child Protection Commission of Inquiry recommended several improvements in relation to child protection, including the need to address the problem of families not being legally represented and there not being enough legal advice provided to families.[92] In its published report, *Taking Responsibility: A Roadmap for Queensland Child Protection*[93] it was considered that current child protection system was not sustainable and contrary to policy and public expectations,[94] with an increase

[89] Interview with TL4.
[90] Interview with BM13.
[91] Interview with TL4.
[92] Department of Communities, Child Safety and Disability Services, *What is the Office of Child and Family Official Solicitor?* (5 June 2018) Queensland Government, Department of Communities, Child Safety and Disability Services (https://www.communities.qld.gov.au/resources/campaign/supporting-families/what-is-ocfos-information-sheet.pdf).
[93] Queensland Parliament, *Record of proceedings* [Hansard], 11 May 2016, 1691 (Mr Dickson, Buderim - LNP).
[94] Ibid.

in children being taken into care. Reference was made to limited Legal Aid Queensland funding resources and that there was a need for appropriate legal representation to ensure just outcomes, while safeguarding rights and decision-making.[95]

The Terms of Reference for review included that there was a need for more resource adequacy for child protection processes, procedures, and investigations, which brought about the introduction of the *Director of Child Protection Litigation Act 2016* (Qld). However, one of the major reform recommendations was that parents be supported at the earliest possible point in child protection proceedings, which inevitably saw the acceptance of means and merits flexibility up to, but not including, the trial phase.

This supports the position of 82 per cent of participating lawyers and 50 per cent of magistrates, who disagreed that Legal Aid criteria for funding child protection matters was satisfactory. One lawyer stated that the test was satisfactory. However, they took issue with those who used their discretion to grant the aid.[96] Another stated:

> …these changes were a good move for practitioners, but the problem is that it creates hurdles for litigants to be able to keep funding as it is easier to refuse them as in the past, they were given a blanket grant which could include the trial. Then it was a case of the grant being reviewed as the matter progressed. There was always a risk that the funding could be withdrawn, but you weren't in a situation of having to constantly reapply for funding and meet new criteria. So, it's not satisfactory in in that it comes from, I think, a position of the litigant having to prove their case, rather than having to prove there's prospects of success.[97]

[95] Ibid.
[96] Interview with BL13.
[97] Interview with BL11.

While agreeing that the test was satisfactory, one magistrate stated that 'the problem is that there is a limited pool of money, so it is not just…people are being judged not purely on their means and merit, if there was an unending supply of money, but they are being judged on that within the framework of how much money there is'.[98]

Seventy-five per cent of Legal Aid participants believed that the criteria were satisfactory. One Legal Aid Officer stated that, although it was thought that they were influenced by their own matters, they believed that:

> …there were people who think it is the best interest jurisdiction and I have, I guess enough experiences with people who, it's not about the children, it is about point scoring so I feel that would just entrench that sort of thing. And I think the merits thing, whilst it can be a bit strict, in my view, I would not support a complete drop off of the merits.[99]

Interviewed participants have drawn very clear lines regarding their position as to whether the Legal Aid Queensland means and merits test is satisfactory. There is no dispute that there been substantial improvements whereby litigants are now provided with legal aid funding up to trial (satisfying the means and merits test). Unfortunately, when it comes to satisfying the means and merits test for trial, the legal aid grants applications are considered by Legal Aid Grants Officers with no legal background. Further, the DCSYW, as part of the Terms of Reference Review, obtained in-house legal counsel in OCFOS. This, perhaps, could be considered as balancing the scales for access to justice. However, there are still obstacles that tip the scales in the government's favour. In particular, the inclusion of the DCPL, which provides additional safeguards for the DCSYW, via OCFOS, to ensure that decisions relating to child protection applications, through to litigation, would fall under this agency.[100]

[98] Interview with BM8.
[99] Interview with BLA1-2.
[100] Ibid.

IV RQ3: DO SELF-REPRESENTED LITIGANTS HOLD EMOTIONAL ATTACHMENTS TO THEIR CASE?

There is no evidence available to support the question of whether self-represented litigants hold emotional attachments to their cases. However, there is no denying, from the interviews undertaken, all participants held the view that parents may have love and affection for their children, but not necessarily the capacity to care for them. This gives rise to the potential emotional attachment to the proceedings themselves. Thus, in order to have adequate representation, there must be not only appropriate expertise, advocacy or support skills, but a lack of impartiality and emotional distance.[101] Alternatively, the most effective option for marginalised parents is to have the case presented by a legally qualified person.[102]

A *Qualitative and Quantitative Data Explored*

1 *Do litigants self-represent due to knowing their family better than a lawyer?*

Participant lawyers and Legal Aid Officers did not agree with the proposition that litigants self-represented in Queensland child protection matters on the basis that they knew their family better than a lawyer. Lawyers indicated that while these litigants do know their family, having legal representation allows them to take the emotional attachment out of the presentation of the case and convey to the court what is necessary and in the best interests of the children.

As provided above, qualitative data provided is limited to interviews undertaken with lawyers, magistrates, and Legal Aid Queensland officers because of an inability to contact or interview self-

[101] Australian Institute of Judicial Administration, 'Litigants in Person Management Plans: Issues for Courts and Tribunals' (2001) 29 *Australian Institute of Judicial Administration Incorporated* 4.
[102] Ibid.

represented litigants involved in child protection matters.[103] However, not unlike the position under RQ1 and RQ2 above, the issue is not necessarily whether they know their family better than a lawyer. These self-represented litigants want the opportunity to be properly heard by the DCSYW and in the Queensland child protection courts. They believe that this can only be undertaken with the assistance of legal representation.

Of the lawyers interviewed, one agreed that all parents express the view that they know their family best, and that they do not believe that lawyers were doing a good enough job because they are not putting forward to the court what they want to say. However, the lawyer did not believe that this was a reason as to why they would want to self-represent.[104] Another stated that it made no difference whether they knew their family better, because the lawyer would be able to convey the truths the court needs to be convinced of, eg '…. if you are represented by a lawyer, you are able to convey that a lot better.'[105]

The responses from the Legal Aid officers were diverse and contradictory. One stated that 'they [ie, the parents] have their knowledge, but they often think that they will get their children back by saying that the DCSYW is not doing a good job of looking after their children'. This is not the question for the court, but they think if they 'throw enough mud on the Department then they will be successful'.[106] Another Legal Aid officer stated that 'it occurs to me that people who represent themselves tend to have a fool for an advocate'. [107] This was not to say that it was not unheard of that people think that they know best. Legal Aid officers provided an example whereby people can be good advocates for themselves, but these usually involve some scientific technical evidence (eg patent cases).[108] Another stated that while there were parents who did think that they knew their family better than a lawyer, it would be fewer than 50 per

[103] Chapter 3, Part 2B – Department of Child Safety, Youth and Women.
[104] Interview with TL5.
[105] Interview with IL12.
[106] Interview with ILA1.
[107] Interview with TLA1.
[108] Interview with TLA1.

cent of the people engaged. This was considered a fairly large proportion.[109] In contrast, another Legal Aid officer stated that while this did occur in the family law jurisdiction, they did not believe this occurred in their child protection matters.[110]

One participating magistrate summed up by stating that they [ie, the magistrates] must be guided by the paramount principle of 'what is in the best interest of the child.' The parents may know their child better, but it does not mean that they [ie, the parents] will make the best decisions as to what is in their child's best interest.[111]

While all participants held that some self-represented litigants believe that they do know their children better than a lawyer, it does not mean that they understand or can advocate as to what is in the best interest of their child.

V CONCLUSION

This chapter has discussed the research results based on the quantitative and qualitative data obtained from interviews undertaken and literature reviewed with respect to the research question: 'why do litigants self-represent in Queensland child protection courts?'. This chapter considered the importance of the literature covered in Chapters 2 to 5 as aligned with the data obtained from interviews with magistrates, lawyers, and Legal Aid Officers in the Brisbane, Toowoomba and Ipswich regions, and work within the scope of Queensland child protection.

[109] Interview with BLA1-2.
[110] Interview with BLA1-1.
[111] Interview with TM4.

This chapter considered, based on the data obtained by legal services personnel interviewed, the extent of the research questions (RQ1- RQ3) and their application and importance with respect to self-represented litigants. The chapter identified that, based on comparisons between the literature review and quantitative and qualitative data obtained from interview participants, RQ1 and RQ3 (distrust of the legal profession and emotional attachments to their case) were not reasons for litigant self-representation in Queensland child protection courts. However, the chapter did provide recognition to the strong correlation between the literature review (including legislative inquiries) and quantitative and qualitative data from participant interviews that support RQ2 (the effects of limited access to funding are a major contributing factor to self-representation).

The following chapter will draw on the conclusions formed from the research findings and data obtained, as well as identification of proposed areas of further research.

CHAPTER 10 – CONCLUSION

I INTRODUCTION

Access to justice within the Queensland child protection courts is perhaps one of the most important practical functions, as well as formal rights, that should be afforded to marginalised families. The lack of ability to access justice has the potential to have an impact on the experiences and subsequent transitions faced not only on these marginalised families, but also by the children who are placed within the child protection system. Significantly, the largest portion of child protection trials involve parents acting as self-represented litigants. There has been some information provided as to who these litigants are, however, there has been limited information as to why they self-represent in Queensland child protection courts. Many people assume that, because of their marginalisation, these parents cannot afford legal representation. It would stand to reason, *inter alia*, that these parents would generally be eligible for Legal Aid funding. This is not necessarily the case, and many litigants have limited options – because of their lack of awareness or education in working within the legal system - to access justice even through avenues other than Legal Aid.

To reach conclusions in response to the research questions, this chapter considers how to respond to the research questions as a consequence of the review of materials in Chapters 2 to 5 and the data obtained from quantitative and qualitative interviews. The overall conclusions drawn provide context to the main research problem, 'Why do litigants self-represent in Queensland child protection courts?'.

II JUSTIFICATION OF THE STUDY

The purpose of this thesis is to explore and determine why litigants self-represent in Queensland child protection courts. Access to justice and a lack of funding have been at the core of self-representation in Queensland child protection courts. The issues raised by the research questions, along with the data that addresses them, give explanations as to why self-representation is occurring.

The results of this thesis further provide recommendations in terms of areas of future research, legislative development, and policy implications for the broad principle of giving effective access to justice in Queensland child protection courts and, institutionally, to both Legal Aid Queensland and the Department of Child Safety, Youth and Women ('DCSYW').

III SCOPE OF THE STUDY

The key objective of this thesis has been to identify why litigants self-represent in Queensland child protection courts. Literature in child protection has been instrumental in providing the settled position that the self-representation of parents in child protection matters has at its core, been a consequence of a lack of funding.

The thesis provides a greater understanding of the different approaches used in the provision of services to families who are forced to make decisions regarding their children in child protection matters and, in particular, how access to justice, or compromised access to justice, has an impact on those decisions. Chapters 2 to 5 and the quantitative and qualitative data obtained identified that the expectations set between the legislation and the associated Inquiries in the Queensland child protection system have not been met because of reality of an absence of adequate legal funding for litigants. Key milestones were not

only the comprehensive and organic shifts toward child protection legislation historically, but the details that emerged from detailed data collection from participant interviews. Perhaps the most obvious conclusion from these interviews is that, although the nature, orientation, extent and detail of child protection legislation have evolved significantly since the colonial period, there is still a substantial power imbalance between government departments and parents (who are now also child protection litigants).

The major limitation in the thesis was the inability to obtain information from integral participants within the child protection system. Perhaps most disappointing was that all requests to interview child safety officers at the DCSYW (including as gatekeeper for self-represented litigants within the Queensland child protection system to ensure anonymity) were declined.

The framework provided was initially developed from Chapters 2 to 5. However, some practical delimitation was necessary, particularly in relation to participation and travel constraints. Further, the approach was to represent all self-represented litigants in Queensland child protection matters, rather than to delineate between cultural identities. Despite the nature of child protection proceedings, the focus was solely on self-represented litigants rather than children.

IV Research Questions

The question examined in this thesis is: 'Why do litigants self-represent in Queensland child protection courts?' This thesis explored the self-represented litigant's access to justice through critical analysis of the history of Queensland child protection, legislative changes (including government funding policies, systemic costs, and access to justice), children's court process and procedures, and structured interviews with relevant legal service personnel (magistrates, lawyers and Legal Aid Officers) involved in child protection matters.

A *RQ1: Are self-represented litigants distrustful of the legal profession?*

In most child protection matters, the DCSYW has removed, or is seeking to place, a child into care. Parents and guardians may want to contest the intervention but have no idea of how to adequately engage with the DCSYW or the court system. Without the appropriate legal representation, they put in a position in which they are forced to engage against a highly resourced, emotionally detached, DCSYW.

There is strong agreement that self-represented litigants in child protection matters are held to a lower standard in court than the DCSYW because of their marginalisation, especially in relation to the rules of evidence. Two strong themes emerged from the quantitative data obtained. The first theme is that litigants in the Queensland child protection court are generally from lower socio-economic, poorly educated, or marginalised backgrounds and cannot be expected to self-represent successfully against the DCSYW. The second theme flows from the first in that litigants should be provided legal representation because of this imbalance. In terms of a substantial power imbalance between the government, and the parent, this could be a major contributing factor to self-representation, which may lead to a potential distrust of the legal profession. However, while there is a certain degree of animosity held by self-represented litigants toward the DCSYW, Chapters 2 to 5 and the quantitative and qualitative data provided no substantive information to support the position that litigants are distrustful of the legal profession. Perhaps the main issue is that parents have a perception about their child protection matters and these do not always come to fruition. Regardless, the data obtained provided that litigants would prefer to be afforded access to justice and legal representation to assist in making this perception a reality. While lawyers may be perceived as 'bursting the bubble' in relation to this perception, they are able to provide clarity as to child protection processes and procedures that otherwise would continue to have a negative impact on the chances of having children returned.

B *RQ2: Are the effects of limited access to funding a major contributing factor to self-representation?*

Throughout Queensland's history, the State – and particularly the executive government – has been omnipresent in child protection. Despite numerous legislative changes and inquiries, the State continues to maintain substantial power, not only in deeming a child to need care, but also in the granting of funding for legal representation where the decision is subject to challenge.

There have only been three Inquiries into Queensland child protection. The Forde Inquiry and the Crime and Misconduct Commission Inquiry established investigations into allegations of past abuse of children in care.[112] The resulting recommendations were for changes in legislation, as well as the formation of a department for exclusive protection of the rights of children. It was not until the establishment of the Carmody Inquiry in 2012, that there was a recognition of the significant power imbalance between the State and marginalised parents or guardians within the system.

Report recommendations from the Queensland Child Protection Commission of Inquiry ('QCPCI') found fundamental inadequacies within the DCSYW. As a result of these outcomes, the Department of Child Protection Litigation ('DCPL') and Office of the Child and Family Official Solicitor ('OCFOS') were formed. Another major reform was that parents were to be supported at the earliest point in child protection proceedings, which inevitably saw the acceptance of means and merits flexibility up to, but not including, the trial phase. This test is made more complex as the decision maker for this test has no formal legal background, albeit Legal Aid Queensland training. Despite the recommendations of the Carmody Inquiry, the position continues to be a significant power imbalance between the DCSYW and marginalised families within the child protection system.[113]

[112] Chapter 2, Parts 3(A)(B) – Crime and Misconduct Inquiry and Carmody Inquiry.
[113] Ibid, Part 3B – Carmody Inquiry.

C *RQ3: Do self-represented litigants hold emotional attachments to their case (eg 'no one can know my family better than me').*

Regardless of the reasons, client motivations and attitudes toward child protection vary as some may actively participate in the process, while others may not. However, there is no empirical evidence or precedent available on whether litigants self-represent because of their emotional attachments to their case. There is no denying that parents may have love and affection for their children, yet still not necessarily have the capacity to care for them. However, having access to legal representation allows the emotional elements of the question to be reduced and to convey to the court what is necessary and in the best interest of the children.

V ACCESS TO JUSTICE

The law in both the US and Canada provides that those who are not eligible for legal assistance funding may be successful for other state-funded legal representation. This is because the custody of their child is being challenged by the government and considered a possible violation of their constitutional rights, compounded by the potential for injustice if there was no access to justice.

A *LEGAL ASSISTANCE SCHEMES*

A key aspect of this thesis was to review whether access to justice should be made freely and readily available to marginalised litigants. While there are many legal service options available to marginalised litigants, the high costs involved in obtaining this assistance, along with the dwindling ability to access Legal Aid funding, means that there is more pressure than ever before on access to legal representation. Accordingly, as this ability to access justice has no readily available solution, there is a rise in clients

seeking to 'shop' for consumer-based legal assistance. While these options, *prima facie*, appear viable, there is a risk to the self-represented litigant as to both quality (legal experience offered) and quantity (affordability of services).

1 *Legal Aid Queensland*

Legal Aid Queensland is funded by both federal and State governments. Federal funding is earmarked specifically for federal matters (eg family law), with no surplus funding being provided to State civil matters (ie child protection). States and territories must find surplus funding under their own initiative. This means that applications for grants of aid in child protection matters are subject to Commonwealth guidelines, which inevitably set the terms and conditions for state-funded representation.

As a consequence of the recommendations of the Carmody Inquiry, grants of aid are now available for eligible litigants (under the means test) to be represented in Queensland child protection proceedings brought by the DCSYW. However, the merits test only applies to contested hearings (ie to trials) whereby additional guidelines must be met. This includes providing evidence that a different outcome from that sought by the DCSYW will be obtained. This causes a two-fold dilemma to the self-represented litigant; they will need legal assistance to complete the Legal Aid Queensland application for further funding based on the merits test; and the Legal Aid Queensland grants officer does not have the relevant legal qualifications to decide the merits of the application.

2 *Co-Production*

Research into co-production theory has addressed issues of advantages and disadvantages of task differentiation in the lawyer-client relationship. The research contributes to questions of the power imbalance between the lawyer and the parent-client; the client's need for assistance (financial); the respective abilities of lawyer and client to bring integral knowledge or skill to the co-produced services;

and service delivery satisfaction (emotion). In its simplest form, co-production is that of a commercial transaction whereby the client is the user of lawyer's supply of legal expertise. To be successful, co-production must have a genuine impact on the self-represented litigant's trust in the lawyer. However, while it may provide benefits of affordability and provide a sense of active engagement to the litigant, it also raises the same questions of power, influence and control over decision making that the government wields over them. The client is reliant on the skills and knowledge of their lawyer and, at times, this may mean the exercise of control in the user/consumer relationship. Thus, this may sever any trust that is built in the relationship.

3 *Unbundling*

While the practice of representing a client under a limited scope retainer is familiar to lawyers, the term 'unbundled legal services' is not. As an example of co-production, this unbundled service requires a negotiated understanding between the lawyer and client as to how a limited service is to be provided. However, in contrast, unbundling sees the client as an active participant rather than a consumer. It is the need (and affordability) which drive the client's contribution. Again, as an example of co-produced services, there may nevertheless continue to be a balance of power between lawyer and litigant. There may be an ability to work collaboratively, especially in an emotionally overwhelming or legally complex situation. The inference here is that the litigant may not be able to separate their emotional attachment from their personal involvement in self-representation.

4 *Pro Bono*

Pro bono lawyers are those who advise or represent clients, either without or at a reduced fee. This model of legal representation is relatively modest at best and not realistically 'free'. The legal services meant to be provided are a stop gap measure in providing representation in civil legal matters (eg child protection). However, its role in assisting marginalised litigants is often misrepresented because obtaining legal

representation, even pro bono, has opportunity costs, as lawyers give up time and resources to provide these services to litigants. Accordingly, this system is arguably a mere band-aid solution as it does not address the basic challenge of litigants being able to afford access to justice.

5 *Duty Lawyer*

Research on Duty Lawyer services has provided that, although an invaluable resource in providing legal assistance to marginalised self-represented litigants. Unfortunately, restrictions include limited availability, inability to appear on behalf of the self-represented litigant and an inability to represent them at trial. Duty Lawyers are able to provide explanations as to court processes and procedures, advice, and discuss legal aid eligibility requirements (including assistance in completing forms). Many lawyers do not believe that this approach is effective as there is not sufficient time to prepare or get to know the litigants or the complexities of their cases within the short time frames available. While many lawyers acknowledge that, despite the limitations, it is still an important role for those without legal representation, it is still also a mere 'band aid solution' to an ongoing problem. It is an instance of co-production having limited effectiveness in securing access to justice because the executive government, through Legal Aid funding conditions, restricts the way that legal tasks are distributed between lawyers and litigants.

6 *Community Legal Centres*

Research provides that the original concept of the Community Legal Centre ('CLC') was to empower and educate marginalised individuals about their legal rights and responsibilities.[114] However, because of the increased need for legal assistance, these services have grown into not-for-profit legal service organisations[115] that tend to 'take up the slack' from Legal Aid Queensland when self-represented litigants cannot meet funding requirements. However, this assistance can only go so far. The Commonwealth

[114] Jeff Giddings and Michael Robertson, ''Lay people, for God's sake! Surely I should be dealing with lawyers?': Towards an assessment of self-help legal services in Australia' (2002) 11(2) *Griffith Law Review* 438.
[115] Australian Government Productivity Commission, *Access to Justice Arrangements* (Productivity Commission Draft Report Overview, April 2014) 29.

funds both Legal Aid Queensland and CLCs, and its decision to provide funding to Legal Aid Queensland only for matters falling under federal jurisdiction serves to add more pressure on CLCs to meet the overwhelming demand in civil law matters, including child protection.[116]

VI Right to Legal Representation

There is no immediate legislative right to state-funded legal representation in child protection matters within Australia, Canada, or the US. There are, however, significant differences in their recognition of their right to legal representation in child protection matters.

The right to State-funded legal representation in child protection has been adjudicated in many jurisdictions, including Australia, the US and Canada. While Australian law does not have an automatic right to Legal Aid funding in child protection matters, the law in Canada provides a right to ensure a fair hearing and ensure fundamental justice.[117] Again, not unlike the position in Australia, the position in the US is that there is no common law right to state funded legal assistance. The US Supreme Court nevertheless did recognise that there needed to be discretion, on a case-by case basis, in the role that legislation plays when determining legal representation in the termination of parental rights.[118]

Chapter 4 has identified that Legal Aid funding has improved in recent years, with funding becoming more easily accessible for matters up to, but not including, child protection hearings.[119] Quantitative analysis supported this position,[120] although it was held that matters without merit should not expected to

[116] Queensland Government, 'Investment in legal assistance services 2017-2020', *Queensland Government* (Government, 1995-2019) <https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/legal-advice-and-investment/legal-investment/legal-assistance-service-investment/investment-in-legal-assistance-services-2017-20>.
[117] Chapter 5, Part 5(2) – Canada.
[118] Chapter 5, Part 5(3) – United States.
[119] Chapter 4, Part 2A(3) – Australia.
[120] Chapter 6, Part 6A – Quantitative Data Analysis.

be funded merely because it was a child protection hearing. However, there needs to be a greater flexibility in policy and decision making.

VII CONCLUSION

As provided in Chapter 1, the aim of this thesis is to answer the question 'Why do litigant's self-represent in Queensland child protection courts?' A subset of research questions (RQ1-RQ3) was identified to determine some potential motivating factors for answering the thesis question.

Based on Chapters 2 to 5 and the qualitative and quantitative data obtained, RQ1 and RQ3 were not considered to be substantive factors as to why litigants self-represent in Queensland child protection courts.

However, RQ2 (Are the effects of limited access to funding a major contributing factor to self-representation?) brought out important elements regarding not only funding, but due process and aspects of natural justice. While access to justice does not mean fairness, it has implications beyond just judicial processes and procedures. It is meant to provide litigants with the ability to obtain legal assistance, regardless of their education, socio-economic status or capacity to engage within the system.

Self-represented litigants are finding it difficult to obtain any legal assistance, and the reasons why this is the case include a lack of legal aid funding, gaps in time and resources, and limited available services or the capacity to be served. Compounding this, there continues to be a substantial power imbalance between not only the self-represented litigant and the DCSYW, but also between the self-represented litigant and Legal Aid Queensland. The Carmody Inquiry, in its recommendations, sought for funding changes for

litigants,[121] but provision was also made not only for in-house counsel for DCSYW, but also for funds for the DCPL. Further, self-represented litigants apply for grants of legal aid funding for child protection hearings, yet the applications are being determined by grants officers with no formal legal training.

VIII Considerations for Future Research

This part of the chapter identifies areas that require further and more detailed research.

A Limitations of the Thesis: Their Effect on Future Research

Prior to providing any considerations or recommendations stemming from this thesis, it is important to reiterate the limitations of the study that can be included in further research that would enable a more exhaustive study. In particular, the thesis is limited by participation and travel constraints. Further, the thesis framework was based on Queensland child protection as a whole, rather than distinguishing between cultural identities. Accordingly, there is significant information for this to be pursued in further research.

Finally, the thesis sought participant views within their experiences in Queensland child protection courts. The purpose of the thesis is to examine why litigants self-represent in Queensland child protection courts, not to address appropriate quantum of legal aid funding for individual litigants. Not unlike the cultural delimitations noted, there is ample information available for this to be pursued in further research. Further, it would be beneficial for the DCSYW to undertake to participate in any further research in this area.

B Future Research Recommendations

[121] Chapter 2, Part 3B – Carmody Inquiry.

Chapters 5 to 8 have contributed to RQ2 in that it identifies specific and unique issues experienced by self-represented litigants in accessing not only justice, but legal funding and representation.

One of the major impediments to accessing justice in Queensland child protection is that marginalised individuals are hindered by their inability to access Legal Aid funding. The impediment is greater because the funding criteria do not assure a balance of legal expertise between the litigant and the executive government. Further research should be undertaken to address the power imbalance the government wields in child protection matters. The thesis addressed several areas whereby power, decision making, and an inequality of financial resources appeared imbalanced, favouring the government. As this thesis sought to provide the reasons why litigants self-represent in Queensland child protection courts, it is outside scope to discuss these arguments explicitly.

It is considered that further and more detailed research needs to be undertaken into the Commonwealth's position in their funding 'divide' between federal and State civil matters. A review of using surplus federal funding to be absorbed by civil matters, including child protection, should also be considered.

Further research is also needed into regulatory and ethical compliance when it comes to undertaken recommendations based on legislative inquiries. On the basis of the Carmody Inquiry, it is clear that Legal Aid funding was relaxed to include funding up to trial, but this benefit is far outweighed by the practical reality that the DCSYW not only has an in-house legal team (OFCOS), but also now the incorporation and active role of the DCPL.

Finally, as suggested by participants in the interviews, there should be further investigations into the concerns held by lawyers as to the litigants' application for legal aid funding being controlled and administered by grants officers who have no legal qualifications or any necessary understanding of legal

matters. The grants officers are potentially exercising a quasi-judicial role, in assessing prospects of success and, therefore, something more than the arguability of the case. In doing so, the system compromises the long-term trend of Queensland child protection legislation of greater subjection of administrative decisions about children to the rule of law (expressed in the decisions of the courts). The role, in effect, sees the DCSYW's decisions about children monitored in a significant way only by the decision of a Legal Aid grants officer.

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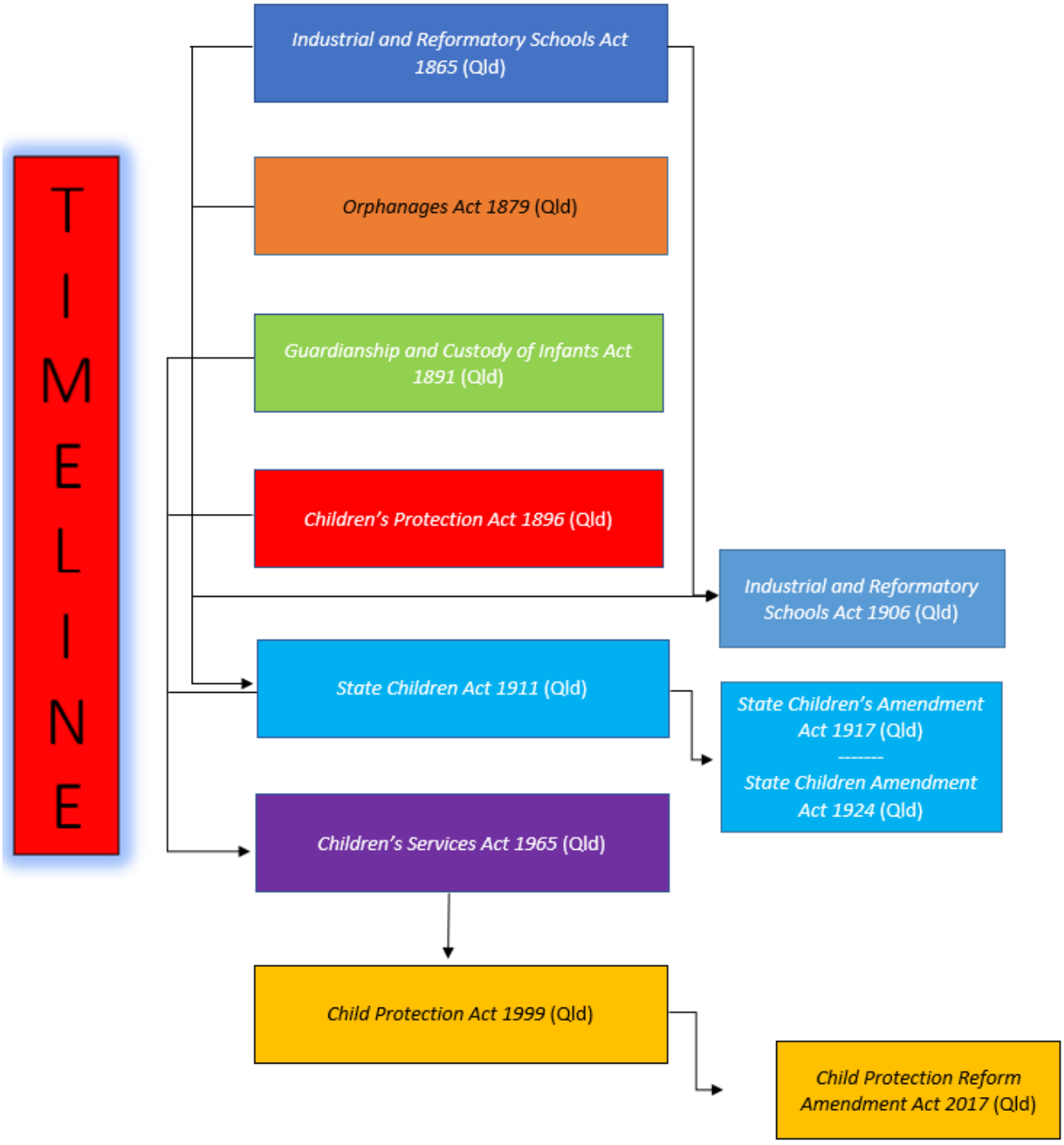
APPENDIX 1

HISTORY OF CHILD PROTECTION LEGISLATION



APPENDIX 2

The Four Government Funded Legal Assistance Providers[122]					
	Legal Aid Commissions		**Community Legal Centres**	**ATSILS**	**Family violence prevention legal services**
Where are they located	In all states and territories		• 140 funded by the Cth • In all states and territories	• One in each state, two in NT, ACT serviced by NSW	In all states and territories except ACT and Tasmania
Funding Arrangements	Cth	$212.6m	$36.7m	$68.2m	$19.1m
	State	$366.5m	$30.9m	-	-
	Other	$30.4m	$22.0m	-	-
	National Partnership Agreement and funding by state/territory governments		LAC's in all states except SA where provided through Attorney General's Dept. NT and ACT through Cth Govt	Cth Govt	Cth Govt
What are their Objectives	• Provide access to assistance for the vulnerable and disadvantaged • Provide community with improved access to just and legal remedies.		Contribute to access to legal assistance services for vulnerable disadvantaged members of the community and those whose interest should be protected as a matter of public interest	Deliver legal assistance and related services to Aboriginal and Torres Strait Islander people.	Provide legal services and assistance to Aboriginal and Torres Strait Islander victims of family violence and sexual assault.
Who do they target?	• State and territory communities • Focus on vulnerable and disadvantaged people.		• Local communities, except specialist QLCs who service their state/territory community • Those who do not qualify for legal aid focusing on the vulnerable and disadvantaged.	Aboriginal and Torres Strait Islander people or a partner or carer of an Aboriginal or Torres Strait Islander person.	Aboriginal and Torres Strait Islander people or a partner or carer of an Aboriginal or Torres strait Islander person, who is a victim of family violence or a child at risk of family violence and in need of protection.

[122] Australian Government Productivity Commission, *Access to Justice Arrangements*, Productivity Commission Draft Report Overview (April 2014) 30.

APPENDIX 3

Self-Represented Litigant Interview Questions

Interview Details

Interview Code: _____ **Date**: _____ **Time**: _____

Interviewer Name: Kathy Reeves
PhD Student

Interviewer Title: Lecturer (Family Law)
University of Southern Queensland

Interviewer Phone Number: 07 4631 1852

Thesis Title: Access to Justice: Why Litigants Self-Represent in Queensland Child Protection Courts

Region: Brisbane / Ipswich / Toowoomba

Consent to Record Yes / No

Interview Questions

Question #1: **What is your Gender?**

☐ Male ☐ Female ☐ Prefer Not to Say

Question #2: **What is your Age?**

☐ 20-30 ☐ 30-40 ☐ 40-50 ☐ 50+ ☐ Prefer Not to Say

Question #3: **What is your level of education?**

☐ Year 12 ☐ Tertiary Uni ☐ Other

Question #4: **Are you employed?** (Years)

☐ Yes ☐ No

☐ Casual ☐ Part Time ☐ Full Time ☐ Other

Field: _____

Question #5: **Are you on a disability plan and/or Centrelink benefits?**

☐ Yes ☐ No

Which benefit/plan?_____

Question #6: **How many children do you have?**

☐ 1 ☐ 2 ☐ 3 ☐ 4+

Question #7: **How many boys? girls?**

Boys_____ Girls_____

Question #8: **What are your child/ren's ages?**

☐ 0-5 ☐ 6-10 ☐ 11-15 ☐ 15+

Question #9: **How many of your children are in the care of DCYW?**

☐ 1 ☐ 2 ☐ 3 ☐ 4+

Question #10: **What is your current relationship status?**

☐ Single ☐ Married ☐ Separated ☐ Divorced ☐ Other

Question #11: **To what extent do you agree or disagree that the other parent is involved in the current child protection matter?**

Strongly Disagree	**Disagree**	**Neutral**	**Agree**	**Strongly Agree**
1	2	3	4	5

Question #12: **How long have you been involved with DCYW and the Queensland child protection court?** (months)

☐ 1-6 ☐ 6-12 ☐ 12-15 ☐ 15-18 ☐ 18-24 ☐ 24+

Question #13: **How long have your children been in DCYW care?** (months)

☐ 1-6 ☐ 6-12 ☐ 12-15 ☐ 15-18 ☐ 18-24 ☐ 24+

Question #14: **What Order is DCYW seeking for the children?**

☐ 1 Year ☐ 2 Year ☐ LTG ☐ Other

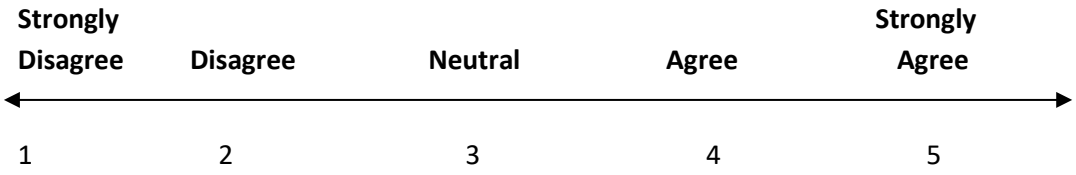
Question #15: **To what extent do you agree or disagree that, at the time the children were taken into care, you were given an opportunity to express your view about where they should live.**

Strongly Disagree	**Disagree**	**Neutral**	**Agree**	**Strongly Agree**
1	2	3	4	5

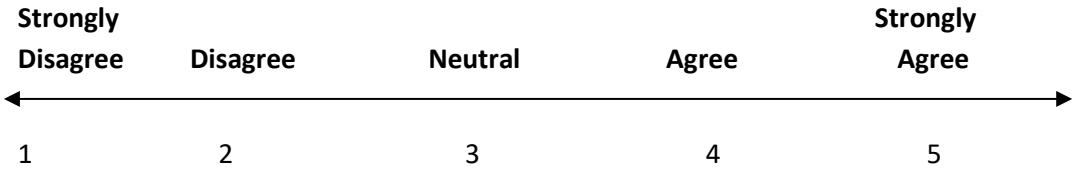
Question #16: **To what extent do you agree or disagree that, at the time the children were taken into care, you were given an opportunity to express your view about the contact you should have with them.**

Strongly Disagree	**Disagree**	**Neutral**	**Agree**	**Strongly Agree**
1	2	3	4	5

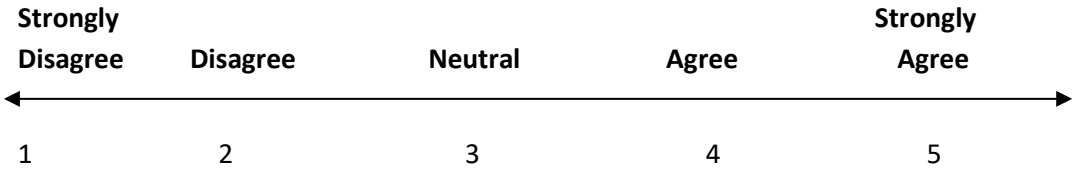
Question #17: **To what extent do you agree or disagree that, at the time the children were taken into care, you were able to talk to the children about what was happening.**



Question #18: **To what extent do you agree or disagree that, at the time the children were taken into care, they were able to express their views to you about where they wanted to live.**



Question #19: **To what extent do you agree or disagree that the DCYW provided you with advice regarding obtaining legal assistance.**



Question #20: **Did you seek legal assistance?**

☐ Yes ☐ No

☐ Legal Aid ☐ Private ☐ CLC ☐ Duty Lawyer ☐ Unbundling

☐ Friend ☐ Other

Question #21: **At what point in your child protection matter did you first attempt to gain legal assistance?**

☐ Notification ☐ Intervention ☐ First Court Date ☐ FGM ☐ Trial

Question #22: **To what extent do you agree or disagree that you were able to obtain a grant of legal aid for your child protection matter.**

Strongly Disagree	**Disagree**	**Neutral**	**Agree**	**Strongly Agree**
1	2	3	4	5

Question #23: **At what point in your child protection matter did obtain legal assistance?**

☐ Notification ☐ Intervention ☐ First Court Date ☐ FGM ☐ Trial

Question #24: **What was the reason given for not obtaining Legal Aid Queensland assistance?**

☐ Means (Income)
☐ Merits (Prospects of Success)
☐ Other

Question #25: **If you had initial Legal Aid funding, at what point in your child protection matter did that cease?**

☐ Notification
☐ Intervention
☐ First Court Date
☐ FGM
☐ Trial

Question #26: **What was the reason given for Legal Aid Queensland funding ceasing?**

☐ Means (Income)
☐ Merits (Prospects of Success)
☐ Matter Concluded
☐ Other

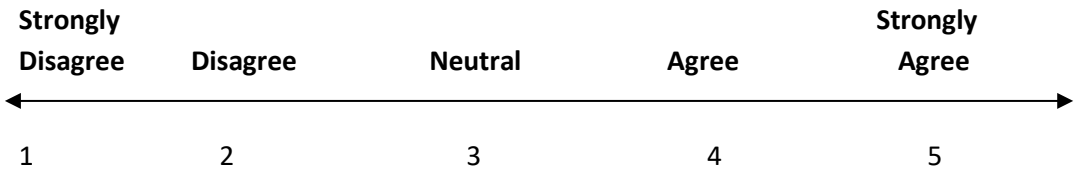
Question #27: **If you lost Legal Aid Queensland funding, did you approach any other form of legal assistance provider?**

☐ Private
☐ CLC
☐ Duty Lawyer
☐ Unbundling
☐ Other

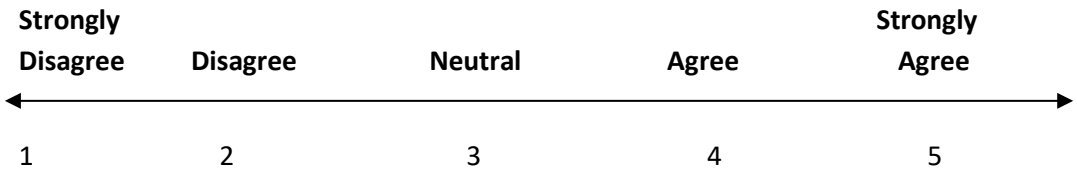
Question #28: **To what extent do you agree or disagree that parents should be provided legal assistance for child protection matters?**

Strongly Disagree	**Disagree**	**Neutral**	**Agree**	**Strongly Agree**
1	2	3	4	5

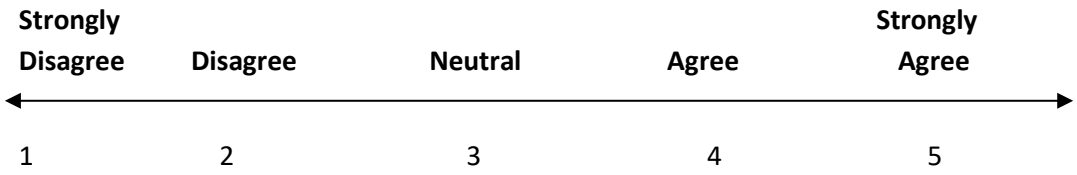
Question #29: **To what extent to you agree or disagree that litigants should be held to the same court standards and rules as DCYW?**



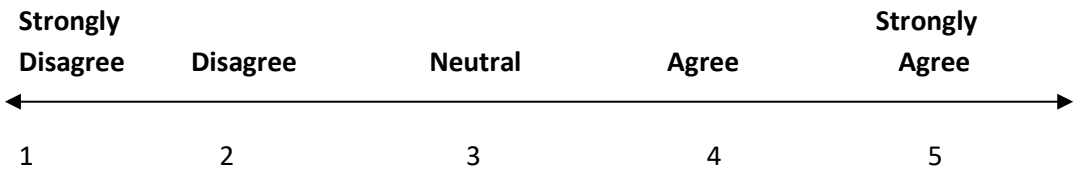
Question #30: **To what extent do you agree or disagree that litigants self-represent in child protection matters due to funding issues?**



Question #31: **To what extent do you agree or disagree that litigants self-represent in child protection matters due to distrust of lawyers?**



Question #32: **To what extent do you agree or disagree that litigants self-represent in child protection matters due to knowing their family better than a lawyer (case merits)?**



Question #33: **To what extent do you agree or disagree that the Magistrate should explain the process and procedures to you, indirectly assisting you.**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #34: **To what extent do you agree or disagree that court programs assist you to have meaningful access to justice, e.g. ability to obtain representation?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #35: **To what extent do you agree or disagree that informing you of proper procedures makes the Magistrate an advocate?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #36: **To what extent do you agree or disagree that court programs encourage you to try cases without legal representation?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #37: **To what extent do you agree or disagree that the Magistrate makes reasonable accommodations for you in court?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #38: **To what extent do you agree or disagree that informing you about court processes and procedures turns you into an effective advocate in you matter?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #39: **To what extent do you agree that there is a power imbalance between you and DCYW in child protection trials?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #40: **To what extent do you agree or disagree that unbundling legal services has been offered to you?** (whereby you do majority of work with services provided by a solicitor, e.g. writing documents)

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #41: **To what extent do you agree or disagree that you have been provided with unbundling legal services in your current matter?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #42: **To what extent do you agree or disagree that you would utilise unbundling legal services if they were offered?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #43: **To what extent do you agree or disagree that the duty lawyer services has been offered to you?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #44: **To what extent do you agree or disagree that you have been provided with duty lawyer services in your current matter?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #45: **To what extent do you agree or disagree that you would utilize duty lawyer services if they were offered?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #46: **To what extent do you agree or disagree that the Duty Lawyer Service is beneficial to you at the trial phase?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #47 : **To what extent do you agree or disagree that all SRLs should be provided with legal aid funding for trials.**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #48: **To what extent do you agree or disagree that, based on the premise of detrimental effects to the child/ren, that you should have a right to legal aid funding.**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #49: **Overall, to what extent do you agree or disagree that the Legal Aid Queensland criteria for funding child protection matters (e.g. means/merit test) is satisfactory.**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #50: **To what extent do you agree or disagree that there are often lengthy delays in finalising child protection Long Term Guardianship Orders due lack of legal representation.**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #51: **To what extent do you agree or disagree that the quality of statements, affidavits and evidence provided by the court are not easily understood.**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #52: **Overall, to what extent do you agree or disagree that you are/were provided with an appropriate measure of access to justice at your child protection trial.**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Additional Notes

Solicitor Interview Questions

Interview Details

Interview Code: _____ **Date**: _____ **Time**: _____

Interviewer Name: Kathy Reeves
PhD Student

Interviewer Title: Lecturer (Family Law), University of Southern Queensland

Interviewer Phone Number: 07 4631 1852

Thesis Title: Access to Justice: Why Litigants Self-Represent in Queensland Child Protection Courts

Region: Brisbane / Ipswich / Toowoomba

Consent to Record Yes / No

Interview Questions

Question #1: **What is your Gender?**

☐ Male ☐ Female ☐ Prefer Not to Say

Question #2: **What is your Age?**

☐ 20-30 ☐ 30-40 ☐ 40-50 ☐ 50+ ☐ Prefer Not to Say

Question #3: **What are your Qualifications?**

☐ LLB ☐ JD ☐ Specialist ☐ Other

Question #4: **How long have you been in the legal profession?** (Years)

☐ 1-5 ☐ 5-10 ☐ 10-20 ☐ 20+

Question #5: **How long have you been involved with the Queensland child protection court?** (Years)

☐ 1-5 ☐ 5-10 ☐ 10-20 ☐ 20+

Question #6: **Are you currently representing a parent at trial in the Queensland child protection court?**

☐ Yes ☐ No

Question #7: **How many child protection matters are you currently involved in?**

☐ 1-5 ☐ 5-10 ☐ 10-20 ☐ 20+

Question #8: **How many child protection matters, on average, do you run at any one time?**

☐ 1-5 ☐ 5-10 ☐ 10-20 ☐ 20+

Question #9: **How many child protection trials, on average, do you run per annum?**

☐ 1-5 ☐ 5-10 ☐ 10-20 ☐ 20+

Question #10: **What proportion of your litigants in CP are men? Women?**

☐ Men ☐ Women

Question #11: **What proportion of your child protection clients are legally aided?**

☐ <10% ☐ 10-25% ☐ 25-50% ☐ 50-75% ☐ 75-100%

Question #12: **Are you on the Legal Aid panel for child protection matters? If so, how long?**

☐ Yes ☐ No

☐ 1-5 ☐ 5-10 ☐ 10-20 ☐ 20+

Question #13: **If so, how many have been funded to proceed to trial (in your experience)?**

☐ 1-5 ☐ 5-10 ☐ 10-20 ☐ 20+

Question #14: **Do you assist litigants in completing their legal aid applications?**

☐ Yes ☐ No

Question #15: **How many privately funding child protection clients do you currently have?**

☐ 1-5 ☐ 5-10 ☐ 10-20 ☐ 20+

Question #16: **If so, how many do you represent, on average, per annum?**

☐ 1-5 ☐ 5-10 ☐ 10-20 ☐ 20+

Question #17: **How do CP litigants make contact with you?**

☐ LAQ ☐ Walk In ☐ Referral ☐ Unknown

Question #18: **In child protection matters, have you had instances where aid ran out completely during a matter? If so, what did you do?**

☐ Yes ☐ No

☐ Finalised matter Pro Bono

☐ Finished matter at aid end - finalizing

☐ Finished matter at aid end – **not** finalizing

☐ Walked out mid court at end of time funded for matter

Question #19: **To what extent do you agree or disagree that self-representation in child protection matters is increasing?**

Strongly Disagree	**Disagree**	**Neutral**	**Agree**	**Strongly Agree**
1	2	3	4	5

Question #20: **To what extent to you agree or disagree that SRLs are held to the same court standards and rules as the Department?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #21: **To what extent do you agree or disagree that litigants self-represent in child protection matters due to funding issues?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #22: **To what extent do you agree or disagree that litigants self-represent in child protection matters due to distrust of lawyers?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #23: **To what extent do you agree or disagree that litigants self-represent in child protection matters due to knowing their family better than a lawyer (case merits)?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #24: **To what extent do you agree or disagree that the role of the Magistrate is more of an arbitrator, referee or moderator.**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #25: **To what extent do you agree or disagree that the Magistrate should explain the process and procedures for SRLs, even if it would indirectly assist them.**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #26: **To what extent do you agree or disagree that court programs assist SRLs to have meaningful access to justice?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #27: **To what extent do you agree or disagree that informing the SRL of proper procedures makes the Magistrate an advocate?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #28: **To what extend do you agree or disagree that court programs encourage SRLs to try cases without legal representation?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #29: **To what extend do you agree or disagree that Magistrates make reasonable accommodations for the SRL?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #30: **To what extent do you agree or disagree that informing a SRL about court processes and procedures turns them into an effective advocate in their matter?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #31: **To what extent do you agree that there is a power imbalance between SRLs and DOCS in child protection trials?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #32: **To what extent do you agree or disagree that unbundling legal services is beneficial to SRLs at the trial phase?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #33: **To what extent do you agree or disagree that the Duty Lawyer Service is beneficial to SRLs at the trial phase?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #34: **To what extent do you agree or disagree that all SRLS should be provided with legal aid funding for trials.**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #35: **To what extent do you agree or disagree that, based on the premise of detrimental effects to the child/ren, that SRLS have a right to legal aid funding.**

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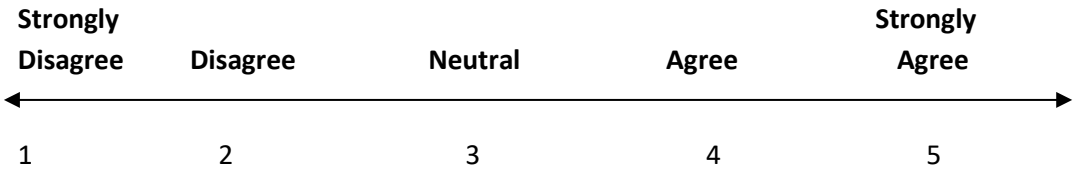
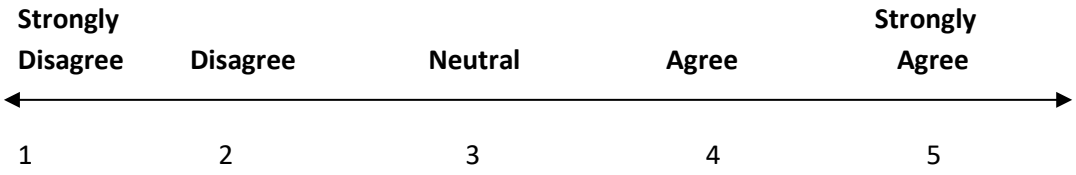
1	2	3	4	5

Question #36:	Overall, to what extent do you agree or disagree that the Legal Aid Queensland criteria for funding child protection matters (e.g. means/merit test) is satisfactory.



Question #37:	Overall, to what extent do you agree or disagree that SRLs are provided with an appropriate measure of access to justice at their child protection trial.



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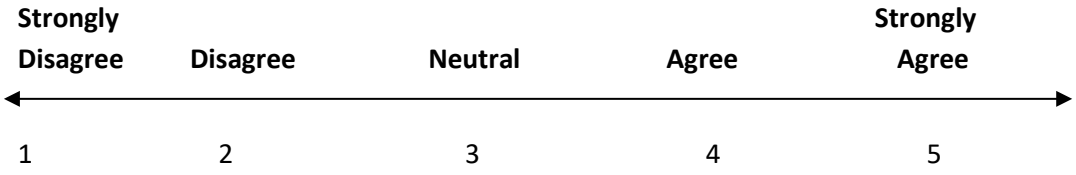

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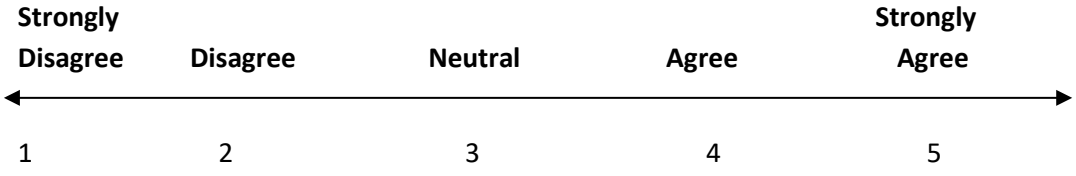

Additional Notes

Magistrate Interview Questions

Interview Details

Interview Code: _____ **Date**: _____ **Time**: _____

Interviewer Name: Kathy Reeves
PhD Student
Lecturer (Family Law)

Interviewer Title: University of Southern Queensland

Interviewer Phone Number: 07 4631 1852

Thesis Title: Access to Justice: Why Litigants Self-Represent in Queensland Child Protection Courts

Region: Brisbane / Ipswich / Toowoomba

Consent to Record Yes / No

Interview Questions

Question #1: **What is your Gender?**

☐ Male ☐ Female ☐ Prefer Not to Say

Question #2: **What is your Age?**

☐ 20-30 ☐ 30-40 ☐ 40-50 ☐ 50+ ☐ Prefer Not to Say

Question #3: **What are your Qualifications?**

☐ LLB ☐ JD ☐ Specialist ☐ Other

Question #4: **How long have you been in the legal profession?** (Years)

☐ 1-5 ☐ 5-10 ☐ 10-20 ☐ 20+

Question #5: **How long have you been involved with the Queensland child protection court?** (Years)

☐ 1-5 ☐ 5-10 ☐ 10-20 ☐ 20+

Question #6: **How many child protection trials are you currently overseeing?**

☐ 1-5 ☐ 5-10 ☐ 10-20 ☐ 20+

Question #7: **How many child protection matters are you currently overseeing in?**

☐ 1-5 ☐ 5-10 ☐ 10-20 ☐ 20+

Question #8: **How many child protection matters, on average, do you oversee at any one sitting?**

☐ 1-5 ☐ 5-10 ☐ 10-20 ☐ 20+

Question #9: **How many child protection trials, on average, do you oversee per annum?**

☐ 1-5 ☐ 5-10 ☐ 10-20 ☐ 20+

Question #10: **Approximately what proportion of SRLs are in child protection matters in your child protection court per annum?**

☐ <10% ☐ 10-25% ☐ 25-50% ☐ 50-75% ☐ 75-100%

Question #11: **To what extent do you agree or disagree that SRLs in child protection matters are mostly women/mothers?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #12: **To what extent do you agree or disagree that SRL would prefer to have a lawyer if circumstances allowed??**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #13: **To what extent do you agree or disagree that self-representation in child protection matters is increasing?**

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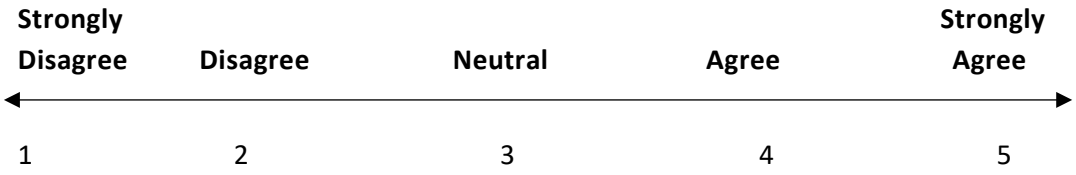

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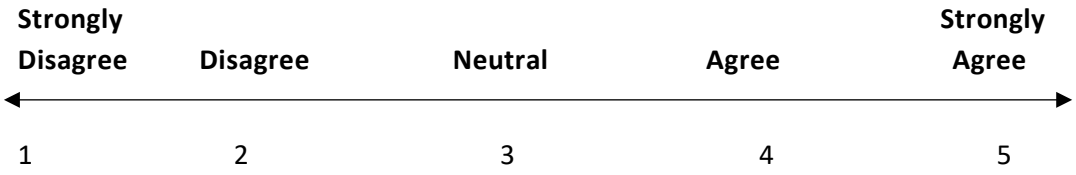

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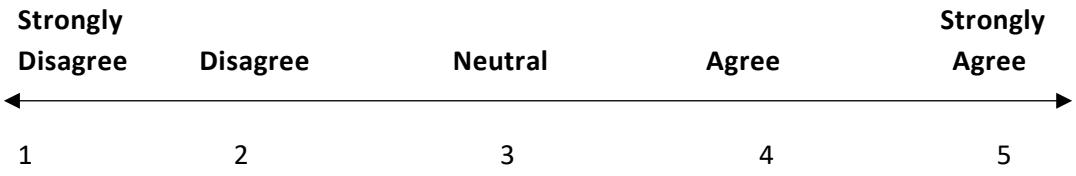

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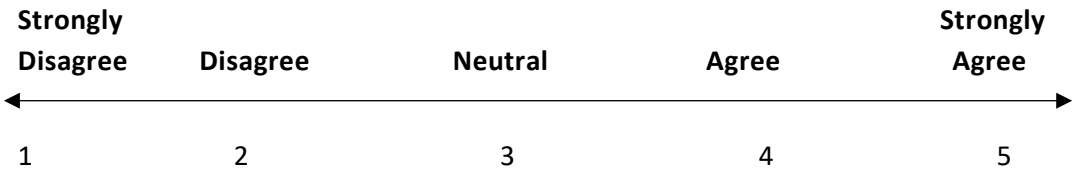

Question #18: **To what extent do you agree or disagree that your role is more of an arbitrator, referee or moderator with respect to a SRL in child protection matters.**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #19: **To what extent do you agree or disagree that you should explain the process and procedures for SRLs, even if it would indirectly assist them.**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #20: **To what extent do you agree or disagree that court programs assist SRLs to have meaningful access to justice?**

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1	2	3	4	5

Question #21: **To what extent do you agree or disagree that informing the SRL of proper procedures makes you an advocate?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

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Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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Question #24: **To what extent do you agree or disagree that informing a SRL about court processes and procedures turns them into an effective advocate in their matter?**

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1	2	3	4	5

Question #25: **To what extent do you agree that there is a power imbalance between SRLs and DOCS in child protection trials?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

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Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #27: **To what extent do you agree or disagree that the Duty Lawyer Service is beneficial to SRLs at the trial phase?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #28 : **To what extent do you agree or disagree that all SRLS should be provided with legal aid funding for trials.**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #29: **To what extent do you agree or disagree that, based on the premise of detrimental effects to the child/ren, that SRLS have a right to legal aid funding.**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #30: **Overall, to what extent do you agree or disagree that the Legal Aid Queensland criteria for funding child protection matters (e.g. means/merit test) is satisfactory.**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #31: **Overall, to what extent do you agree or disagree that SRLs are provided with an appropriate measure of access to justice at their child protection trial.**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

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Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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Question #33: **To what extent do you agree or disagree that the quality of statements, affidavits and evidence provided by the court are not easily understood by the self-represented litigant.**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Additional Notes

LAQ Interview Questions

Interview Details

Interview Code: _____ **Date**: _____ **Time**: _____

Interviewer Name: Kathy Reeves
PhD Student

Interviewer Title: Lecturer (Family Law), University of Southern Queensland

Interviewer Phone Number: 07 4631 1852

Thesis Title: Access to Justice: Why Litigants Self-Represent in Queensland Child Protection Courts

Region: Brisbane / Ipswich / Toowoomba

Consent to Record Yes / No

Interview Questions

Question #1: **What is your Gender?**

☐ Male ☐ Female ☐ Prefer Not to Say

Question #2: **What is your Age?**

☐ 20-30 ☐ 30-40 ☐ 40-50 ☐ 50+ ☐ Prefer Not to Say

Question #3: **What are your Qualifications?**

☐ Year 12 ☐ Tertiary Uni ☐ Other

Question #4: **How long have you worked with Legal Aid Queensland?** (Years)

☐ 1-5 ☐ 5-10 ☐ 10-20 ☐ 20+

Question #5: **What is your current position with Legal Aid Queensland?**

_____

Question #6: **How many child protection applications do you generally have at one time?**

☐ 1-5 ☐ 5-10 ☐ 10-20 ☐ 20+

Question #7: **How many child protection applications, on average, do you have per annum?**

☐ 1-25 ☐ 25-50 ☐ 50-100 ☐ 100-150 ☐ 150-200 ☐ 200+

Question #8: **How many child protection applications, for trials, on average, do you receive per annum?**

☐ 1-5 ☐ 5-10 ☐ 10-20 ☐ 20+

Question #9: **How many child protection applications, for trials, on average, do you approve per annum?**

☐ 1-5 ☐ 5-10 ☐ 10-20 ☐ 20+

Question #10: **What proportion of your applicants for CP funding are men? Women?**

☐ Men ☐ Women

Question #11: **What proportion of your child protection clients are legally aided?**

☐ <10% ☐ 10-25% ☐ 25-50% ☐ 50-75% ☐ 75-100%

Question #12: **On average, at what point do SRLs in child protection matters seek legal assistance?**

☐ Notification ☐ Intervention ☐ First Court Date ☐ FGM ☐ Trial

Question #13: **What is the main reason given for not obtaining legal aid funding for child protection matters generally?**

☐ Means (Income) ☐ Merits (Prospects of Success) ☐ Other

Question #14: **What is the main reason given for not obtaining legal aid funding for child protection trials generally?**

☐ Means (Income) ☐ Merits (Prospects of Success) ☐ Other

Question #15: **To what extent do you agree or disagree that if a SRL is denied Legal Aid assistance, I provide advice SRLs with alternatives.**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #16: **What alternative form of assistance do you provide to SRLs who are denied Legal Aid?**

☐ Private ☐ CLC ☐ Duty Lawyer ☐ Unbundling ☐ Other

Question #17: **How many legal firms are on the Legal Aid panel for child protection matters?**

☐ 1-5 ☐ 5-10 ☐ 10-20 ☐ 20+

Question #18: **If so, how many have been funded to proceed to CP trial (in your experience)?**

☐ 1-5 ☐ 5-10 ☐ 10-20 ☐ 20+

Question #19: **Do you assist litigants in completing their legal aid applications?**

☐ Yes ☐ No

Question #20: **How do CP litigants make contact with you?**

☐ Lawyer ☐ Walk In ☐ Referral ☐ Previous ☐ Unknown

Question #21: **To what extent do you agree or disagree that self-representation in child protection matters is increasing?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #22: **To what extend to you agree or disagree that SRLs are held to the same court standards and rules as the Department?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #23: **To what extent do you agree or disagree that litigants self-represent in child protection matters due to funding issues?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #24: **To what extent do you agree or disagree that litigants self-represent in child protection matters due to distrust of lawyers?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #25: **To what extent do you agree or disagree that litigants self-represent in child protection matters due to knowing their family better than a lawyer (case merits)?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #26: **To what extent do you agree or disagree that the Magistrate should explain the process and procedures for SRLs, even if it would indirectly assist them.**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #27: **To what extent do you agree or disagree that court programs assist SRLs to have meaningful access to justice?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #28: **To what extent do you agree or disagree that informing the SRL of proper procedures makes the Magistrate an advocate?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

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Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #31: **To what extent do you agree or disagree that informing a SRL about court processes and procedures turns them into an effective advocate in their matter?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #32: **To what extent do you agree that there is a power imbalance between SRLs and DCYM in child protection trials?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #33: **To what extent do you agree or disagree that unbundling legal services is beneficial to SRLs at the trial phase?**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

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Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

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Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
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Question #36: **To what extent do you agree or disagree that, based on the premise of detrimental effects to the child/ren, that SRLS have a right to legal aid funding.**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #37: **Overall, to what extent do you agree or disagree that SRLs are provided with an appropriate measure of access to justice at their child protection trial.**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #38: **To what extent do you agree or disagree that there are often lengthy delays in finalizing child protection Long Term Guardianship Orders due to parental self-representation.**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #39: **To what extent do you agree or disagree that the quality of statements, affidavits and evidence provided by the court are not easily understood by the self-represented litigant.**

Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Question #40:	**Overall, to what extent do you agree or disagree that the Legal Aid Queensland criteria for funding child protection matters (e.g. means/merit test) is satisfactory.**

Strongly Disagree	**Disagree**	**Neutral**	**Agree**	**Strongly Agree**
1	2	3	4	5

Additional Notes

DCSYW Interview Questions

Interview Details

Interview Code: _____ **Date**: _____ **Time**: _____

Interviewer Name: Kathy Reeves
PhD Student

Interviewer Title: Lecturer (Family Law), University of Southern Queensland

Interviewer Phone Number: 07 4631 1852

Thesis Title: Access to Justice: Why Litigants Self-Represent in Queensland Child Protection Courts

Region: Brisbane / Ipswich / Toowoomba

Consent to Record Yes / No

Interview Questions

Question #1: **What is your Gender?**

☐ Male ☐ Female ☐ Prefer Not to Say

Question #2: **What is your Age?**

☐ 20-30 ☐ 30-40 ☐ 40-50 ☐ 50+ ☐ Prefer Not to Say

Question #3: **What are your Qualifications?**

☐ Year 12 ☐ Tertiary ☐ LLB ☐ JD ☐ Other

Question #4: **How long have you worked with DCYM?** (Years)

☐ 1-5 ☐ 5-10 ☐ 10-20 ☐ 20+

Question #5: **What is your current role with DCYM?**

Question #6: **Approximately how many Long Term Guardianship Order do you process, per annum, for child protection matters?**

☐ <10% ☐ 10-25% ☐ 25-50% ☐ 50-75% ☐ 75-100%

Question #7: **Approximately how many child protection Long Term Guardianship Order child protection matters, per annum, go to trial?**

☐ <10% ☐ 10-25% ☐ 25-50% ☐ 50-75% ☐ 75-100%

Question #8: **How many of your Long Term Guardianship matters are currently in trial phase?**

☐ 1-5 ☐ 5-10 ☐ 10-20 ☐ 20+

Question #9: **To what extent do you agree or disagree that, at the time of children being taken into care, the DCYM should provide the parent/SRL with advice regarding obtaining legal assistance.**

Strongly Disagree	**Disagree**	**Neutral**	**Agree**	**Strongly Agree**
1	2	3	4	5

Question #10: **Based on your experience, at what point do SRLs typically seek legal assistance?**

☐ Notification ☐ Intervention ☐ First Court Date ☐ FGM ☐ Trial

Question #11: **To your knowledge, what proportion of litigants are self-represented in child protection trials?**

☐ <10% ☐ 10-25% ☐ 25-50% ☐ 50-75% ☐ 75-100%

Question #12: **To what extent do you agree or disagree that SRLs in child protection matters are mostly women/mothers?**

Strongly Disagree	**Disagree**	**Neutral**	**Agree**	**Strongly Agree**
1	2	3	4	5

Question #13: **To what extent do you agree or disagree that SRL would prefer to have a lawyer if circumstances allowed?**

Strongly Disagree	**Disagree**	**Neutral**	**Agree**	**Strongly Agree**
1	2	3	4	5

Question #14: **To what extent do you agree or disagree that self-representation in child protection matters is increasing?**

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Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
1	2	3	4	5

Additional Notes

APPENDIX 4

University of Southern Queensland

Human Research Ethics Application
Form 1 – Part A (All Applicants)

Does this research project involve? (tick all that apply)

- ☒ Recruitment or observation of human participants → **Also Complete Form 1 – Part B**
- ☐ Existing (or archival) data → **Also Complete Form 1 – Part C**
- ☐ Existing biospecimens → **Also Complete Form 1 – Part D**
- ☐ Any form of genetic testing or analysis of genetic material → Contact the Ethics Officer
- ☐ Clinical trial → Contact the Ethics Officer

Project overview

1A.1 Does this project include any of the following participant groups?

	Yes	No
Women who are pregnant and/or the human foetus	☐	☒
Children or young people under the age of 18 years *(Note: Ensure you have assessed and confirmed that all investigators on this project who will be involved with children and/or young people have obtained a Working with Children Check (Blue Card), Blue Card Positive Exemption notice, or are exempt on the basis of their professional duties.)*	☐	☒
People with an intellectual disability or mental impairment of any kind *(this includes intellectual or mental impairment, mental disorder, brain injury, dementia, etc.)*	☐	☒
People considered to be a forensic patient or an involuntary patient	☐	☒
People with impaired capacity for communication	☐	☒

Prisoners or people on parole	☐*	☒
Children who are the subject of a child protection order	☐	☒
People highly dependent on medical care, including a person who is unconscious	☐*	☒
Military personnel	☐*	☒
Military veterans	☐*	☒
People who would not usually be considered vulnerable but would be considered vulnerable in the context of this project	☒	☐
Aboriginal and/or Torres Strait Islander peoples	☐*	☒
Aboriginal and/or Torres Strait Islander peoples' health research	☐*	☒
Hospital patients	☐*	☒
People in other countries	☐	☒
People who would consider English to be their second language	☐	☒

* Please contact the Ethics Team for further advice before proceeding with this application

1A.2 Does the project include any of the following procedures?

	Yes	No
Any physical, psychological, social, economic, and/or legal risks greater than inconvenience or discomfort, in either the short or long term, resulting from participation in, or use of data in, this project	☐	☒
Innovative interventions or therapies *(eg administration of drugs, clinical or psychological treatments, etc.)*	☐	☒
Human genetics	☐	☒
Research intended to study/expose illegal activity	☐	☒
Radioactive substances or ionising radiation *(eg DXA, X-ray)*	☐	☒
Sensitive and/or contentions issues *(eg suicide, eating disorders, body image, trauma, violence, abortion, etc.)*	☒	☐
Toxins, mutagens, teratogens or carcinogens	☐	☒
Deception of participants, concealment, or covert observation	☐	☒
Seeking disclosure of information which may be prejudicial to participants	☐	☒

1A.3 Does the project include any of the following operational requirements?

	Yes	No
Recruitment of USQ students (as participants) *(See table 1A.3a and provide evidence of permission to recruit)*	☐	☒
Recruitment of USQ employees (as participants) *(See table 1A.3a and provide evidence of permission to recruit)*	☐	☒
International travel	☐	☒
Collecting data off-campus or in rural settings	☐	☒
The collection, use or disclosure of IDENTIFIABLE personal information *(eg names and contact details on consent forms)*	☐ #	☒
The collection, use or disclosure of CODED personal information *(eg when identifying details are replaced by codes, pseudonyms, etc.)*	☒ #	☐
The collection of information by observing participants without their knowledge	☐ #	☒
# Will this information be collected or used **without** the consent or knowledge of the individual whose information is being used?	☐ ^	☒
# Will this data include health information	☐ ^	☒

1A.3a Approval to recruit USQ staff and students must be obtained from the appropriate delegate of the University.

Scope of recruitment	Appropriate Delegate
Students with a course/courses within one discipline	Head of School
Students within one Faculty area	Executive Dean
Students across the University and/or across University campuses	Deputy Vice-Chancellor (Students & Communities)
Staff (any)	Senior Deputy Vice-Chancellor

Project details

1A.4 Project title

Access to Justice in Queensland: Why Litigants Self-Represent in Child Protection Courts

1A.5 Investigator Details

The first investigator listed must be the Principal Investigator, who is responsible for the overall conduct of this research.

Role	Staff/Student ID	Full Name *(inc title)*	Contact Details *(inc email and mobile phone)*	Describe your experience relevant to the proposed research
Principal Investigator	X0112006	Kathy Sue Reeves	0481584388	JD (USQ); BCom (USQ); GDipLegPrac (Collaw); Legal Practitioner (Qld) (specialising in Family Law and Child Protection)
Supervisor (for Student)		Dr Caroline Hart	07 4631 1437	BA *Qld*; LLB *Qld*; LLM (QUT); PhD (USQ); Legal Practitioner (Qld)
Choose an item.				
Choose an item.				
Choose an item.				
Choose an item.				
Choose an item.				

Choose an item.				
Choose an item.				

1A.6 In plain language, provide a succinct description of the background and the potential significance of the research project (approx. 400 words).

The term "access to justice" refers to methods where individuals may seek legal assistance. This can be compromised when individuals do not have access to a properly functioning justice system that is meant to provide everyone with affordable legal support. While affordability is viewed as the main reason for an individual's self-representation, individuals may choose to self-represent due to a distrust of the judiciary and legal profession; emotional attachments to their case; as well as a belief in the merits of their case. This is particularly true for disadvantaged individuals who have had their children taken into child protection custody. Literature reviewed provides little information regarding the effects of access to justice for self-represented litigants in Queensland child protection courts. However, there has been substantial research in the United States and Canada which recognises that, in some instances, a right to state-funded counsel in child protection cases is required to ensure a fair trial.

Prior to July 2017, there was a substantial decline in legally aided representation in Queensland child protection matters, with Legal Aid Queensland ("LAQ") panel legal practitioners unwilling to become involved owing to funding reductions. However, funding changes now provide for representation in child protection proceedings, with the merit test applying solely to contested hearings. Unfortunately, many practitioners are unable to obtain legal aid funding as their clients cannot pass the LAQ's "means and/or merits" test, which provides that litigants must have a reasonable prospect of success; be willing to spend their own funds (prudent self-funding litigant test); and whether it is appropriate to spend limited public legal funds. This effectively puts these litigants back into the position of being left with no alternative other than to find some different means of legal assistance or self-represent during the trial phase of their child protection matter. This result, while potentially traumatic for the litigant, may be an impetus for self-representation.
This research will contribute to a seemingly untapped area in access to justice, being reasons why litigants represent themselves in Queensland child protection courts. Empirical methodology will drive the thesis using semi-structured interviews held with thirty (30) relevant participants to collect data to determine the factors that are likely to influence reasons for self-representation in this forum.

1A.7 Clearly state the aims and/or hypotheses of the research project (approx. 200 words).

The thesis aims to add to current literature on improving access to justice for these self-represented litigants by identifying the reasons why litigants self-represent, including (but not limited to) a perceived distrust in the legal system, or an emotional attachment to their matter. The thesis will establish a methodology to obtain important data (Queensland based) in relation to litigants self-representing in child protection courts if there is sufficiently adequate access to justice available.

The primary objectives of the thesis are to:
a) examine reasons why litigants self-represent in Queensland child protection courts;
b) investigate effects of limited access to funding; and
c) identify impediments that self-represented litigants may face in obtaining timely and affordable justice.

1A.8 Outline the benefits to participants and/or to the community as a result of this research being conducted

This research is beneficial as there is currently no literature with respect to self-represented litigants accessing justice in Queensland child protection courts. This research will aid in highlighting and raising the profile of continuous issues that hinder litigants' access to justice. The research will use open ended interviews with self-represented litigants, judicial officers, Department of Child Safety and Disability Services ("DOCS") and legal aid grants officers, to obtain rich, in-depth information and experiences regarding the continued challenges faced in obtaining legal funding/representation. Issues to be addressed will include an inability to afford private representation, ineligibility for grants of funding assistance, and a distrust of practitioners and the judiciary.

1A.9 Define the risks, in either the short and/or long term, of participation in this project

(eg physical, psychological, social, economic or legal risks greater than inconvenience or discomfort.)

The potential risks for the participants include:

1. **A loss of time**
   The time needed to participate in the thesis (interviews/surveys) will be identified to the participant and will be worked around their schedules.
2. **Recalling traumatic or distressing events**
   Recalling traumatic/distressing events such as involvement with child protection may cause a period of flashbacks, nightmares, fears or unhappiness. Therefore, asking for participation will not be undertaken lightly. When engaging in such research, the participants will be provided with a list of free community resources that can help should counselling needs. Further, should the participant seek to stop at any time, this request will be granted.
3. **Conclusions/inferences drawn that they are deficient/undesirable**
   As an example, a low-income parent may not wish to participate in research which may conclude that being a single, unemployed parent is detrimental to obtaining legal assistance. The best solution to this is to be upfront with the participants as to the purpose of the research and provide them with an option to opt out of the interview/survey.
4. **Boredom/fatigue/embarrassment**
   These are common risks and should be identified in the consent statement as potential risks.
5. **Invasion of privacy**
   This may cause unnecessary discomfort to some subjects. However, unnecessary questions will not be used and a clear rational will be provided about the appropriate use of the information in the research as provided in the consent statement.

1A.10 Are all of these risks outlined in the Participant Information Sheet or within the explanatory statement at the beginning of a data collection instrument, and (where relevant) on the consent form?

☒ Yes ☐ No

If No, please explain why not.

1A.11 Outline the arrangements planned to minimise the risks involved in these procedures.

There will be an explanatory note on any survey/questionnaire/interview document that will advise the participants that the information collected will not be used for anything other than the thesis paper. Further, participants will be advised that no names or information will be collected during the interview/survey/questionnaire. The strategies to be used to ensure the participant's privacy include using pseudonyms, anonymous surveys, de-identified data (eg no addresses, participant descriptions, or identifying commentary).

1A.12 What will you do in cases where unexpected events or emergencies occur as a result of participation in this project?

For example, what facilities or services are available to deal with such incidents? *(eg an adverse drug reaction, revelation of child abuse, illegal activities, participant becomes distressed during or after data collection.)*

Is an appropriate list of referral services available with the Participant Information Sheet or explanatory statement?

Interviews will cease on interviewees request. Should they change their mind about involvement, the information will not be used.

1A.13 Outline the strategies that you have in place to reduce any risks to the researchers.

It is considered that there will be minimal risk to the researcher. However, dealing with litigants in relation to child protection matters can be potentially volatile based on the highly charged emotions of potential participants (eg parents). The researcher is a previous child protection solicitor who has experience in working/dealing with emotionally charged parents in child protection matters. Accordingly, it is believed that this experience has provided insight into working with minimal risk and developing a plan to monitor and manage each situation. Indicators of risk minimisation and management

provision will include whether the researcher has provided participants with full information, including the right to withdraw at any time.

1A.14 Type of research - 1

☒ Staff

☐ Student

- ☐ Honours
- ☐ Masters
- ☒ PhD
- ☐ Other

Degree program name

☐ Course project

Course code & course name

(For student research please provide confirmation of candidature or Head of School approval.)

1A.15 Type of research -2

- ☐ Action research
- ☐ Case study
- ☐ Clinical research
- ☐ Clinical trial / use of drug or therapeutic device
- ☐ Epidemiological
- ☐ Medical research
- ☐ Mental health
- ☐ Oral history / biographical
- ☐ Public health and safety
- ☒ Qualitative
- ☒ Quantitative
- ☐ Social science
- ☐ Other

If you chose 'Other', how would you describe it?

1A.16 Do any of the investigators have a personal or financial interest in the outcomes of this research, or in any of the organisations involved with, or funding this project?

☐ Yes ☒ No

If Yes, please explain what their role at the organisation(s) is and what measures have been implemented to reduce the possibility of coercion for participants.

1A.17 Has funding been obtained for this project?

☐ Yes ☒ No

If Yes, provide the name of the funding body or agency and the relevant project number.

Data access and security

1A.18 Describe the security arrangements for the storage of the data. Include details of where the data will be stored and who will have access to this information.

You should consult the University's Research Data Management Plan to ensure that your data is managed securely and effectively.

A Data Management Plan will be undertaken whereby key elements of the thesis data management will be securely stored. This includes ownership, data processing, storage and backup, retention and disposal, as well as secure access.

Ownership: The data will be identified as being owned by the research and copyright issues will be identified as/if required.

Data Processing: Information collected will be processed on computer hardware (software licence compliant), with password protection through network communication security – all provided through USQ.
Storage and Backup: USQ, as a member of the Queensland Cyber Infrastructure Foundation, researchers have free access data storage, large data file transfer, and research project management.
Data Storage: Digital date will be stored on USQ storage (eg Cloudstor or QRIScloud), as well as appropriate backups (eg USB (to be locked in a filing cabinet in the researcher's office on USQ campus)). All data will be updated on a regular basis (eg daily) or each time it is utilised.

Data sharing and re-use: Data will only be used for writing the thesis.

Data retention and disposal: The data collected will be archived for a period of 3 years to enable the researcher to complete the thesis paper. This information will be archived in the researcher's office at USQ (Room Q439) in a locked filing cabinet. At the end of the 3 year period, the researcher will shred the documentation and ensure that it is disposed of through confidential removal services (as currently utilised by the School of Law and Justice at USQ).

Participants will be informed as to the above information as part of this research project.

1A.19 Will a non-USQ third party have access to the data during this research?

☐ Yes ☒ No

If YES:

- please explain how the participants are informed about this and how you will ensure that their privacy is protected during the data transfer process to the third party.

1A.20 Will some or all of the research data be openly or publicly available at some time in the future?

Note: It is recommended that unless your data can not be shared for ethical, privacy or confidentiality matters, that you incorporate the future use of data in your research design and include a statement within the participant information sheet/explanatory statement to this effect.

☒ Yes ☐ No

If YES:

- please explain how and what will be shared.

Once the PhD is completed, it will be available for review. It is also anticipated that, during the writing of the research paper, journal articles may be written regarding the subject material, or conferences/symposiums may be attended in relation to the thesis material. However, at the date of writing this application, there have been no plans made in this regard.

If NO:

- please explain why the data will not be shared.

1A.21 Are the data access and security arrangements detailed in the participant information sheet or explanatory statement?

☒ Yes ☐ No

If NO:

- please explain why not.

1A.22 How will the data be disposed of if it is no longer required?

Note: Whilst there is a minimum retention period for all research data (refer Queensland State Archives University Sector Retention and Disposal Schedule) USQ encourages researchers to responsibly shore research data for future research use where possible.

Data retention and disposal: The data collected will be archived for a period of 3 years to enable the researcher to complete the thesis paper. The physical information will be archived in the researcher's office at USQ (Room Q439) in a locked filing cabinet. At the end of the 3 year period, the researcher will shred the documentation and ensure that it is disposed of through confidential removal services (as currently utilised by the School of Law and Justice at USQ).

Communication of research outcomes

1A.23 Please indicate the format/s in which the research will be published and/or communicated to participants or organisations:

- ☒ Thesis
- ☐ Journal article
- ☐ Book / book chapter
- ☐ Conference
- ☐ Other
- ☐ Dataset
- ☐ Report to participants
- ☐ Report to organisation
- ☐ Report to community or group

If Other checked, please provide details.

1A.24 Please describe how participants and/or other interested stakeholders will be able to access the results.

Participants and/or other interested stakeholders will be able to access the results of the thesis upon its completion. It is anticipated that the thesis will be made available online through scholarly sources and, upon request, the researcher will be able to provide an electronic copy where appropriate.

1A.25 In what format will the results be provided?

☒ In non-identifiable summary form *(i.e. no individual or organisation can be identified)*
☐ In re-identifiable summary form *(i.e. information has had identifiers removed but in a manner which may which may allow some individuals to be identified)*
☐ In identified form, or in a manner which may allow some participants to be identified
☐ Other

If Other checked, please describe the format in which you intend to provide others with the results.

1A.26 If participants will be subjected to any tests during this project, how will information about the results be communicated to participants and/or to their parents or guardians? What arrangements will be in place to deal with participant's distress in the case of adverse test results?

NA

OR ☒This question is not applicable to this project.

Declarations

USQ Principal Investigator Declaration

I the undersigned declare that I:

- have gained the appropriate approvals through my School or Research Centre to conduct this research project;

- have completed the peer review of this ethics application, in accordance with the USQ Statement on Peer Review;
- accept ultimate responsibility for the ethical conduct of this research project in accordance with the principles outlined in the University's Research Code of Conduct Policy, the Australian Code for the Responsible Conduct of Research (2007), and the National Statement on Ethical Conduct in Human Research (2007);
- have ensured that all people involved in this research project understand and accept their roles and responsibilities;
- undertake to conduct this research project in accordance with the protocols and procedures outlined in the proposal as approved by the University of Southern Queensland Human Research Ethics Committee (USQ HREC);
- inform the USQ HREC of any changes to the protocol after the approval of the Committee has been obtained using the USQ HREC Amendment Application procedure AND inform all people involved in this research project of the amended protocol;
- have read and agree to comply with the University of Southern Queensland Research Data Management Policy and pursuant policies and procedures and have a plan for managing and/or sharing Research Data securely; and
- understand and agree that project files, documents, research records, and data may be subject to inspection by the University of Southern Queensland, USQ HREC, a research integrity officer, the sponsor or an independent body for auditing and monitoring purposes.

Name (please print)	Signature	Date
Kathy Sue Reeves		

Participant Group Recruitment & Consent

1B.1 How many groups of participants will you be recruiting &/or observing for this research project?

Five (5) groups

1B.2 Group 1

1B2.1 Participant group working title (eg student focus group; teacher survey) (max 10 words).

Magistrates in Queensland Child Protection Courts

1B2.2 How many participants will be recruited in this group?

Approximately 3

1B2.3 Are the participants children and/or young people under 18 years of age?

☐ Yes ☒ No

If YES, please outline how you will obtain parental consent. If you are not seeking parental consent, please describe how you will determine the ability of the children to understand and voluntarily participate in this research.

Note: You may need to obtain a Working with Children Check (Blue Card)

1B2.4 Describe who the participants in this group are and where they will be recruited from.

The participants are Magistrates in the Darling Downs region (specifically Ipswich, Brisbane, and Toowoomba). As the researcher is a solicitor who has practiced in the Magistrates Courts (Ipswich/Brisbane/Toowoomba region), it is anticipated that the

recruitment process will be through professional networks via email and written corresponding providing information and requesting interviews.

1B2.5 Is there a pre-existing (unequal) relationship between the participants and anyone involved in recruiting and/or collecting data from this group of participants?

(eg teachers and/or lecturers/students, doctors/patients, employers/employees, etc.)

☒ Yes ☐ No

If YES, describe the nature of the relationship. Explain what special precautions will preserve the rights of such people to decline to participate or to withdraw from participation once the research has begun.

As a solicitor, I have previously had a working relationship with various judicial officers in the Ipswich, Brisbane, and Toowoomba region. Each participant will be advised that participation is voluntary and that they may decline involvement or may withdraw from participating at any time once the research has begun. In addition, it is noted that the researcher does not currently practice law and therefore ongoing contact is limited/obsolete.

1B2.6 Do these participants have any cultural needs?

(eg specific consent arrangements or sensitivities, etc.)

☐ Yes ☒ No

If YES, please outline the arrangements you have in place for managing these cultural needs.

1B2.7 Do you have any criteria for exclusion from this participant group?

(eg specific consent arrangements or sensitivities, etc.)

☐ Yes ☒ No

If YES, please describe and justify this exclusion.

1B2.8 Please indicate which method/s you will use to recruit these participants:

☒ Email ☒ Mail out

☐ Personal contacts ☐ Snowballing

☐ Telephone

☐ Advertisement

☐ Other

☐ Participants from another study

☐ Participants approached in person by research team

☐ Participants will NOT be actively recruited – they will be observed **without their knowledge**

If you chose 'Other', please clarify how you will recruit this group of participants?

1B2.9 Please indicate how you will obtain the contact details of these participants:

☒ From the participants themselves

☒ From a public domain source

☐ From a private or third party source

Please provide details about this source and its terms of use. *Please note that obtaining identifiable personal information without consent may constitute a breach of Queensland and Australian privacy legislation.*

☐ Other

Please clarify how you will obtain these contact details

1B2.10 Please explain how you will invite these participants to be involved in this project.

The participants will initially be contacted via email (judges will be contacted through their associates as this is the preferred method). The email will explain/detail the purpose of the research, the use of the data collected and assurances of confidentiality unless permission provided. If no response is received within approximately two weeks, a follow up email will be sent along with a formal letter seeking their participation. This letter will include a formal letter of acceptance/decline, along with a self-addressed stamped envelope for ease of response by the intended participant.

1B2.11 Will you be offering payment or any other incentives to this group of participants?

☐ Yes ☒ No

If YES, please explain how much and in what form the incentive will take. Justify why this will not be an inducement to participate in the research project.

1B2.12 Are these participants able to consent for themselves?

☒ Yes ☐ No

If NO, please explain how you intend to obtain informed consent and from whom. Outline how you will provide adequate information to those who will give consent on these participants' behalf.

1B2.13 Will you use a written Participant Information Sheet or Explanatory Statement to inform participants about this project?

☒ Yes ☐ No

If NO, please explain how the project will be explained to participants.

1B2.14 Will these participants be fully informed about the true nature of the research?

☒ Yes ☐ No

If NO, describe the procedure, and explain why the real purpose needs to be concealed.

AND All research involving deception requires that participants be advised of the true nature of the research after completing the procedures. Please explain how you will arrange this.

1B2.15 Please indicate how you will obtain informed consent from this group of participants:

☐ Implied consent *(eg return of an anonymous survey)*

☒ Consent form *(must be attached with this application)*

Please explain the process by which the participants will give consent and how they return the consent form to the researchers.

The initial contact with the participants will be via email and/or correspondence for initial agreement to participate. It is intended that the meeting with the participants (at a time conducive to them) will be on a one to one basis for data collection/interviews. A consent form will be provided and returned at the same time.

☐ Opt –out consent *(complete the "Opt-out consent justification form" and submit with this application)*

☐ Other

Please explain how you will obtain informed consent

1B.3 Group 2 *(if using more than one group of participants)*

1B3.1 Participant group working title (eg student focus group; teacher survey) (max 10 words).

Legal Practitioners

1B3.2 How many participants will be recruited in this group?

Approximately 6

1B3.3 Are the participants children and/or young people under 18 years of age?

☐ Yes ☒ No

If YES, please outline how you will obtain parental consent. If you are not seeking parental consent, please describe how you will determine the ability of the children to understand and voluntarily participate in this research.

1B3.4 Describe who the participants in this group are and where they will be recruited from.

The participants are legal practitioners with at least 5 years' experience working in Queensland child protection courts in the Ipswich, Brisbane, and Toowoomba regions.

1B3.5 Is there a pre-existing (unequal) relationship between the participants and anyone involved in recruiting and/or collecting data from this group of participants?

(eg teachers and/or lecturers/students, doctors/patients, employers/employees, etc.)

☒ Yes ☐ No

If YES, describe the nature of the relationship. Explain what special precautions will preserve the rights of such people to decline to participate or to withdraw from participation once the research has begun.

As a solicitor, I have previously had a working relationship with various practitioners in the Ipswich, Brisbane, and Toowoomba region. Each participant will be advised that participation is voluntary and that they may decline involvement or may withdraw from participating at any time once the research has begun. In addition, it is noted that the researcher currently does not practice law and therefore ongoing professional contact is limited.

1B3.6 Do these participants have any cultural needs?

(eg specific consent arrangements or sensitivities, etc.)

☐ Yes ☒ No

If YES, please outline the arrangements you have in place for managing these cultural needs.

1B3.7 Do you have any criteria for exclusion from this participant group?

(eg specific consent arrangements or sensitivities, etc.)

☐ Yes ☒ No

If YES, please describe and justify this exclusion.

1B3.8 Please indicate which method/s you will use to recruit these participants:

☒ Email ☒ Mail out

☐ Personal contacts ☐ Snowballing

☐ Telephone

☐ Advertisement

☐ Other

☐ Participants from another study

☐ Participants approached in person by research team

☐ Participants will NOT be actively recruited – they will be observed **without their knowledge**

If you chose 'Other', please clarify how you will recruit this group of participants?

1B3.9 Please indicate how you will obtain the contact details of these participants:

☒ From the participants themselves

☒ From a public domain source

☐ From a private or third party source

Please provide details about this source and its terms of use. *Please note that obtaining identifiable personal information without consent may constitute a breach of Queensland and Australian privacy legislation.*

☐ Other

Please clarify how you will obtain these contact details

1B3.10 Please explain how you will invite these participants to be involved in this project.

As there is a familiarity between practitioners in the geographical area, it is anticipated that the practitioners will be approached initially by written communication and/or email for initial agreement to participate. It is intended that the meeting with the participants (at a time conducive to them) will be on a one to one basis for data collection/interviews. A consent form will be provided and returned at the same time. However, if the data is to be collected by anonymous survey, then the consent will be returned via self-addressed stamped envelope with no identifying features.

1B3.11 Will you be offering payment or any other incentives to this group of participants?

☐ Yes ☒ No

If YES, please explain how much and in what form the incentive will take. Justify why this will not be an inducement to participate in the research project.

1B3.12 Are these participants able to consent for themselves?

☒ Yes ☐ No

If NO, please explain how you intend to obtain informed consent and from whom. Outline how you will provide adequate information to those who will give consent on these participants' behalf.

1B3.13 Will you use a written Participant Information Sheet or Explanatory Statement to inform participants about this project?

☒ Yes ☐ No

If NO, please explain how the project will be explained to participants.

1B3.14 Will these participants be fully informed about the true nature of the research?

☒ Yes ☐ No

If NO, describe the procedure, and explain why the real purpose needs to be concealed.

AND All research involving deception requires that participants be advised of the true nature of the research after completing the procedures. Please explain how you will arrange this.

1B3.15 Please indicate how you will obtain informed consent from this group of participants:

☐ Implied consent *(eg return of an anonymous survey)*

☒ Consent form *(must be attached with this application)*

Please explain the process by which the participants will give consent and how they return the consent form to the researchers.

The initial contact with the participants will be via email and/or correspondence for initial agreement to participate. It is intended that the

meeting with the participants (at a time conducive to them) will be on a one to one basis for data collection/interviews. A consent form will be provided and returned at the same time.

☐ Opt –out consent *(complete the "Opt-out consent justification form" and submit with this application)*

☐ Other

Please explain how you will obtain informed consent

1B.4 Group 3 *(if using more than two groups of participants)*

1B4.1 Participant group working title (eg student focus group; teacher survey) (max 10 words).

Department of Communities – Child Safety

1B4.2 How many participants will be recruited in this group?

Approximately 6

1B4.3 Are the participants children and/or young people under 18 years of age?

☐ Yes ☒ No

If YES, please outline how you will obtain parental consent. If you are not seeking parental consent, please describe how you will determine the ability of the children to understand and voluntarily participate in this research.

Note: You may need to obtain a Working with Children Check (Blue Card)

1B4.4 Describe who the participants in this group are and where they will be recruited from.

The participants in this group will be recruited from Department of Communities, Child Safety and Disability Services (who service the North and South Darling Downs Regions). The researcher is aware of the address of this government department, however, due to confidentiality and staff safety reasons, it cannot be disclosed on this application. The participants sought are Child Safety Officers, who deal directly with the families from intake through to the court/trial process.

1B4.5 Is there a pre-existing (unequal) relationship between the participants and anyone involved in recruiting and/or collecting data from this group of participants?

(eg teachers and/or lecturers/students, doctors/patients, employers/employees, etc.)

☒ Yes ☐ No

If YES, describe the nature of the relationship. Explain what special precautions will preserve the rights of such people to decline to participate or to withdraw from participation once the research has begun.

As a legal practitioner, I have previously worked in the Child Protection Courts with the Department of Communities, Child Safety and Disabilities – having represented opposing litigants. Each participant will be advised that participation is voluntary and that they may decline involvement or may withdraw from participating at any time once the research has begun. In addition, it is noted that the researcher does not currently practice law and therefore ongoing professional contact is limited. It is not envisaged that this will deter any working relationships.

1B4.6 Do these participants have any cultural needs?

(eg specific consent arrangements or sensitivities, etc.)

☐ Yes ☒ No

If YES, please outline the arrangements you have in place for managing these cultural needs.

1B4.7 Do you have any criteria for exclusion from this participant group?

(eg specific consent arrangements or sensitivities, etc.)

☐ Yes ☒ No

If YES, please describe and justify this exclusion.

1B4.8 Please indicate which method/s you will use to recruit these participants:

☒ Email	☒ Mail out
☐ Personal contacts	☐ Snowballing
☐ Telephone	☐ Participants from another study

☐ Advertisement

☐ Other

☐ Participants approached in person by research team

☐ Participants will NOT be actively recruited – they will be observed **without their knowledge**

If you chose 'other', please clarify how you will recruit this group of participants?

1B4.9 Please indicate how you will obtain the contact details of these participants:

☐ From the participants themselves

☒ From a public domain source

☐ From a private or third party source

Please provide details about this source and its terms of use. *Please note that obtaining identifiable personal information without consent may constitute a breach of Queensland and Australian privacy legislation.*

☐ Other

Please clarify how you will obtain these contact details

1B4.10 Please explain how you will invite these participants to be involved in this project.

Although there is previous working relationship between the researcher and the Department of Communities, Child Safety, is anticipated that approval for contact with the Department will initially be sought from the State Government Office (Brisbane). This initial contact will be via email and/or correspondence for initial agreement to participate. If contact is confirmed, it is intended that the meeting with the participants (at a time conducive to them) will be on a one to one basis for data collection/interviews. A consent form will be provided and returned at the same time.

1B4.11 Will you be offering payment or any other incentives to this group of participants?

☐ Yes ☒ No

If YES, please explain how much and in what form the incentive will take. Justify why this will not be an inducement to participate in the research project.

1B4.12 Are these participants able to consent for themselves?

☒ Yes ☐ No

If NO, please explain how you intend to obtain informed consent and from whom. Outline how you will provide adequate information to those who will give consent on these participants' behalf.

1B4.13 Will you use a written Participant Information Sheet or Explanatory Statement to inform participants about this project?

☒ Yes ☐ No

If NO, please explain how the project will be explained to participants.

1B4.14 Will these participants be fully informed about the true nature of the research?

☒ Yes ☐ No

If NO, describe the procedure, and explain why the real purpose needs to be concealed.

AND All research involving deception requires that participants be advised of the true nature of the research after completing the procedures. Please explain how you will arrange this.

1B4.15 Please indicate how you will obtain informed consent from this group of participants:

☐ Implied consent *(eg return of an anonymous survey)*

☒ Consent form (*must be attached with this application)*

Please explain the process by which the participants will give consent and how they return the consent form to the researchers.

The initial contact with the participants will be via email and/or correspondence for initial agreement to participate. It is intended that the meeting with the participants (at a time conducive to them) will be on a one to one basis for data collection/interviews. A consent form will be provided and returned at the same time.

☐ Opt –out consent *(complete the "Opt-out consent justification form" and submit with this application)*

☐ Other

Please explain how you will obtain informed consent

1B.5 Additional Group (4)

1B5.1 Participant group working title (eg student focus group; teacher survey) (max 10 words).

Self-Represented Litigants in Queensland child protection matters

1B5.2 How many participants will be recruited in this group?

Approximately 12

1B5.3 Are the participants children and/or young people under 18 years of age?

☐ Yes ☒ No

If YES, please outline how you will obtain parental consent. If you are not seeking parental consent, please describe how you will determine the ability of the children to understand and voluntarily participate in this research.

Note: You may need to obtain a Working with Children Check (Blue Card)

1B5.4 Describe who the participants in this group are and where they will be recruited from.

The participants in this group will be recruited from the Child Protection Courts and/or Department of Communities, Child Safety and Disabilities (Ipswich, Brisbane, and Toowoomba). The participants will be a mix of litigants/parents who have been or are currently undergoing proceedings in child protection matters. These participants will have either been self-represented litigants, previously legally aided (up to trial phase), or privately funded. Further, it is anticipated that there will be a mix of age and race/nationalities represented.

1B5.5 Is there a pre-existing (unequal) relationship between the participants and anyone involved in recruiting and/or collecting data from this group of participants?

(eg teachers and/or lecturers/students, doctors/patients, employers/employees, etc.)

☐ Yes ☒ No

If YES, describe the nature of the relationship. Explain what special precautions will preserve the rights of such people to decline to participate or to withdraw from participation once the research has begun.

1B5.6 Do these participants have any cultural needs?

(eg specific consent arrangements or sensitivities, etc.)

☒ Yes ☐ No

If YES, please outline the arrangements you have in place for managing these cultural needs.

It is anticipated that there may be cultural needs on the basis that many self-represented litigants come from both Aboriginal and Torres Strait Islander Communities. (The researcher acknowledges that even though the Aboriginal and Torres Strait Island Legal Services (ATSILS) are not the specific focus of the research, it has been highlighted for the sake of giving thorough consideration to potential participation.) Having worked as a practitioner in the area of child protection and having defended numerous culturally sensitive individuals, it is anticipated that this will not be an issue. However, should the individual want an elder present, this will be acknowledged and undertaken.

1B5.7 Do you have any criteria for exclusion from this participant group?

(eg specific consent arrangements or sensitivities, etc.)

☐ Yes ☒ No

If YES, please describe and justify this exclusion.

1B5.8 Please indicate which method/s you will use to recruit these participants:

☐ Email	☒ Mail out
☒ Personal contacts	☐ Snowballing
☐ Telephone	☐ Participants from another study

☐ Advertisement

☒ Other

☐ Participants approached in person by research team

☐ Participants will NOT be actively recruited – they will be observed **without their knowledge**

If you chose 'Other', please clarify how you will recruit this group of participants?

The researcher anticipates approaching the participants by the use of other key informants/gatekeepers (eg solicitors, Legal Aid Queensland, and the Department of Communities and Child Safety Officers). The researcher will put together pamphlets about the research being undertaken and provide her contact email and phone number so that the litigant can contact the researcher directly either about engaging or asking further questions prior to engaging in interviews. Further, the researcher would seek permission from Legal Aid Queensland and the Department of Communities and Child Safety about presenting an information session to provide the litigants with further information about the research in an effort to engage for interviews.

1B5.9 Please indicate how you will obtain the contact details of these participants:

☒ From the participants themselves

☐ From a public domain source

☒ From a private or third party source

Please provide details about this source and its terms of use. *Please note that obtaining identifiable personal information without consent may constitute a breach of Queensland and Australian privacy legislation.*

It is anticipated that the majority of individuals will be recruited from contacts via Legal Aid Queensland or the Department of Communities and Child Safety. Key informants will be asked to act as gatekeepers with respect to identifying child protection cases involving self-represented litigants who wish to participate in the study. The researcher will put together pamphlets about the research being undertaken and provide her contact email and phone number so that the litigant can contact the researcher directly either about engaging or asking further questions prior to engaging in interviews. Further, the researcher would seek permission from Legal Aid Queensland and the Department of Communities and Child Safety about presenting an information session to provide the litigants with further information about the research in an effort to engage for interviews. This can also be undertaken by direct face to face contact with the self-represented litigant; providing the information on the study as well as the researcher's contact information to the self-represented litigant to discuss the participation further; and attending on the Child Protection Court to discuss the study and potential participation with the self-represented litigant.

☐ Other

Please clarify how you will obtain these contact details

1B5.10 Please explain how you will invite these participants to be involved in this project.

Once the self-represented litigants have provided their approval to be involved in the research, they will be sent letters explaining the purpose of the study, why they were contacted and that the researcher would like to meet with them face to face for an interview. The letters will also include a self-addressed stamped envelope and a refusal slip which they can use to "opt out" of the research. If the self-represented litigant is unable or unwilling to meet in person, telephone interviews will be offered. Approximately two weeks after the letters are sent out, the participants who have not provided refusal slips will be contacted to arrange interviews (face to face or telephone). During the interviews, the researcher will read/review the information with the participant again, as well as the consent form to ensure that there is full comprehension.

1B5.11 Will you be offering payment or any other incentives to this group of participants?

☐ Yes ☒ No

If YES, please explain how much and in what form the incentive will take. Justify why this will not be an inducement to participate in the research project.

1B5.12 Are these participants able to consent for themselves?

☒ Yes ☐ No

If NO, please explain how you intend to obtain informed consent and from whom. Outline how you will provide adequate information to those who will give consent on these participants' behalf.

1B5.13 Will you use a written Participant Information Sheet or Explanatory Statement to inform participants about this project?

☒ Yes ☐ No

If NO, please explain how the project will be explained to participants.

1B5.14 Will these participants be fully informed about the true nature of the research?

☒ Yes ☐ No

If NO, describe the procedure, and explain why the real purpose needs to be concealed.

AND All research involving deception requires that participants be advised of the true nature of the research after completing the procedures. Please explain how you will arrange this.

1B5.15 Please indicate how you will obtain informed consent from this group of participants:

☐ Implied consent *(eg return of an anonymous survey)*

☒ Consent form (*must be attached with this application)*

Please explain the process by which the participants will give consent and how they return the consent form to the researchers.

Self-represented litigants will have initial contact with a gatekeeper (as discussed previously) however, initial contact with the researcher will involve further information being provided and consent being read/reviewed prior to any request for interview. It is intended that the meeting with the participants (at a time conducive to them) will be on a one to one basis for data collection/interviews. A consent form will be provided and returned at the same time. However, if the data is to be collected by anonymous survey, then the consent will be returned via self-addressed stamped envelope with no identifying features.

☐ Opt –out consent *(complete the "Opt-out consent justification form" and submit with this application)*

☐ Other

Please explain how you will obtain informed consent

1B.6 Additional Group (5)

1B6.1 Participant group working title (eg student focus group; teacher survey) (max 10 words).

Legal Aid Queensland Grants Officers

1B6.2 How many participants will be recruited in this group?.

Approximately 6

1B6.3 Are the participants children and/or young people under 18 years of age?

☐ Yes ☒ No

If YES, please outline how you will obtain parental consent. If you are not seeking parental consent, please describe how you will determine the ability of the children to understand and voluntarily participate in this research.

Note: You may need to obtain a Working with Children Check (Blue Card)

1B6.4 Describe who the participants in this group are and where they will be recruited from.

The participants in this group will be recruited from Legal Aid Queensland offices in Ipswich, Brisbane and Toowoomba. The participants sought will include Grants Officers, who deal directly with the litigants when applications are made for legal aid funding for trial matters.

1B6.5 Is there a pre-existing (unequal) relationship between the participants and anyone involved in recruiting and/or collecting data from this group of participants?

(eg teachers and/or lecturers/students, doctors/patients, employers/employees, etc.)

☒ Yes ☐ No

If YES, describe the nature of the relationship. Explain what special precautions will preserve the rights of such people to decline to participate or to withdraw from participation once the research has begun.

As a legal practitioner, the researcher has previously worked with Legal Aid in both Family Law and Child Protection matters. Each participant will be advised that participation is voluntary and that they may decline involvement or may withdraw from participating at any time once the research has begun. In addition, it is noted that the researcher no longer practices law and therefore ongoing professional contact is limited. It is not envisaged that this will deter any working relationships.

1B6.6 Do these participants have any cultural needs?

(eg specific consent arrangements or sensitivities, etc.)

☐ Yes ☒ No

If YES, please outline the arrangements you have in place for managing these cultural needs.

1B6.7 Do you have any criteria for exclusion from this participant group?

(eg specific consent arrangements or sensitivities, etc.)

☐ Yes ☒ No

If YES, please describe and justify this exclusion.

1B6.8 Please indicate which method/s you will use to recruit these participants:

☒	Email	☒	Mail out
☐	Personal contacts	☐	Snowballing
☐	Telephone	☐	Participants from another study
☐	Advertisement	☐	Participants approached in person by research team
☐	Other	☐	Participants will NOT be actively recruited – they will be observed **without their knowledge**

If you chose 'Other', please clarify how you will recruit this group of participants?

1B6.9 Please indicate how you will obtain the contact details of these participants:

☒ From the participants themselves

☒ From a public domain source

☐ From a private or third party source

Please provide details about this source and its terms of use. *Please note that obtaining identifiable personal information without consent may constitute a breach of Queensland and Australian privacy legislation.*

☐ Other

Please clarify how you will obtain these contact details

1B6.10 Please explain how you will invite these participants to be involved in this project.

As there is previous working relationship between the researcher and Legal Aid Queensland (Toowoomba), it is anticipated that approval for contact will initially be sought from the Head Office (Brisbane). This initial contact will be via email and/or correspondence for initial agreement to participate. If contact is confirmed, it is intended that the meeting with the participants (at a time conducive to them) will be on a one to one basis for data collection/interviews. A consent form will be provided and returned at the same time.

1B6.11 Will you be offering payment or any other incentives to this group of participants?

☐ Yes ☒ No

If YES, please explain how much and in what form the incentive will take. Justify why this will not be an inducement to participate in the research project.

1B6.12 Are these participants able to consent for themselves?

☒ Yes ☐ No

If NO, please explain how you intend to obtain informed consent and from whom. Outline how you will provide adequate information to those who will give consent on these participants' behalf.

1B6.13 Will you use a written Participant Information Sheet or Explanatory Statement to inform participants about this project?

☒ Yes ☐ No

If NO, please explain how the project will be explained to participants.

1B6.14 Will these participants be fully informed about the true nature of the research?

☒ Yes ☐ No

If NO, describe the procedure, and explain why the real purpose needs to be concealed.

AND All research involving deception requires that participants be advised of the true nature of the research after completing the procedures. Please explain how you will arrange this.

1B6.15 Please indicate how you will obtain informed consent from this group of participants:

☐ Implied consent *(eg return of an anonymous survey)*

☒ Consent form (*must be attached with this application)*

Please explain the process by which the participants will give consent and how they return the consent form to the researchers.

The initial contact with the participants will be via email and/or correspondence for initial agreement to participate. It is intended that the meeting with the participants (at a time conducive to them) will be on a one to one basis for data collection/interviews. A consent form will be provided and returned at the same time. However, if the data is to be collected by anonymous survey, then the consent will be returned via self-addressed stamped envelope with no identifying features.

☐ Opt –out consent *(complete the "Opt-out consent justification form" and submit with this application)*

☐ Other

Please explain how you will obtain informed consent

Data Collection

1B.5 Will you collect data via questionnaires/surveys?

☒ Yes ☐ No

If YES, provide details about the **questionnaires / surveys**, including how these will be administered (eg paper based, online), how these will be returned, and the identifiability of the participants (eg fully identifiable, potentially identifiable (i.e. coded surveys), or can never be identified (anonymous). Attach a copy of your survey instrument with this application.

The surveys and interview questions are designed to answer specific research questions based on information stemming from literature review. They will consist of appropriately worded and logically flowing questions that are easy to understand. These will be provided either face to face and/or via telephone (dependent on what is beneficial to the participant). The participants will be reminded of the confidentiality of the information (as per the consent document). Further, any information that is via mail and/or email will be unidentifiable and coded where appropriate.

1B.6 Will you collect data via interviews or focus groups?

☒ Yes ☐ No

If YES, provide details about the **interviews or focus groups**. Will these include audio or video recordings? Include a list of topics or questions, either in this box, or as an attachment with this application.

It is anticipated that participants will be interviewed in person to in person to obtain rich and in-depth answers to both qualitative and quantitative questions. The participants will be asked if it is alright for the interviews to be recorded for later transcription (and review if requested). If the participants are not amenable to this, field notes will be taken by the researcher.

1B.7 Will you collect data via observation?

☒ Yes ☐ No

If YES, provide details about the **observations**. Will these be conducted with or without the knowledge of the participants? Will these involve audio or video recordings?

The researcher will use field notes to obtain information that cannot be recorded, including body language, emotional state, etc.

1B.8 Will you collect data via photography / videography?

☐ Yes ☒ No

If YES, provide details about the **photography / videography**. Will this be done with or without the knowledge of participants? Has this information been included in the Participant Information sheet?

1B.9 Will you collect data via psychological inventories or any other published, standardised test?

☐ Yes ☒ No

If YES, provide details about the **psychological inventories or published, standardised test**. Please include a copy of the inventory/test with this application.

1B.10 Will you collect data via collection of human biospecimens?

☐ Yes ☒ No

If YES, provide details about the collection of **human biospecimens,** including the specific protocol for the collection of the samples.

AND Outline how you will ensure that all biospecimen samples used in this research will be stored securely.

AND Describe how you will monitor the storage and use of the biospecimen samples.

AND Clarify if the biospecimen samples are to be destroyed or disposed of once this research project is complete.

☐ Yes ☒ No

If YES, explain how the samples will be safely destroyed or disposed of.

If NO, explain why the samples will not be destroyed, and clarify who will have access to the samples in the future.

1B.11 Will you collect data via responses to tasks, stimuli or simulations?

☐ Yes ☒ No

If YES, provide details about the **responses to tasks, stimuli or simulations**. Please provide a description of the tasks in this box or attach a copy of the Participant Task Sheet with this application.

1B.12 Will you collect data via administration of a substance?

☐ Yes ☒ No

If YES, provide details about the **administration of a substance**. Please also provide additional detail regarding the protocol for administration of a substance.

1B.13 Will you collect data via any other procedure not outlined above?

☐ Yes ☒ No

If YES, provide details about the **other procedure** that you have ticked above.

1B.14 Please list in the table below which method/s indicated above, will be used for each group of participants:

Participant group number	Group working title	Relevant data collection method/s
Group 1	Judicial Officers	Interview/Survey
Group 2	Legal Practitioners	Interview/Survey

Group 3	DOCS	Interview/Survey
Group 4	Self-represented Litigants	Interview/Survey/Observations
Group 5	Legal Aid Queensland	Interview/Survey

Note: Add additional lines for additional participant groups.

1B.15 Please provide details about what you are asking participants to do or what is to be done to them. Include a step-by-step description of what participants will experience if they choose to take part in this project.

1. The research project will be explained to the proposed participant in detail, with a full disclosure as to what the information is being used for and their confidentiality ensured.
2. The participant will be asked if the interview can be recorded
3. Participants will be asked to review and sign a consent form allowing the collection of data for the purpose of the research project.
4. Researcher will sit with the proposed participant (individually) and ask qualitative and quantitative questions.
5. Proposed participants will be encouraged to expand on their experiences within the child protection system.
6. At the end of the interview, the data will be collected and transcribed for analysis in the project.

1B.16 How much time are you asking of participants in this group and when will the time be required.

(eg 30 minutes after class)

Approximately 1-2 hours at a time that is conducive to the participant.

1B.17 Where will the data be collected and by whom.

(eg public library, university meeting room, etc.)

Data will be collected from interviews with participants at their offices or other places as agreed between the parties. The research will be carried out by the researcher, Kathy Reeves.

1B.18 Does the research involve the administration of any tests or procedures that require particular qualifications?

☐ Yes ☒ No

If YES, please provide details of the test or procedures, the qualifications required, the proposed administrator and their qualifications and experience with this technique.

1B.19 Does the research involve measures or procedures that are **diagnostic** or **indicative** of any **medical** or **clinical** condition, or any other situation of concern?

(eg anaemia, bulimia, anorexia, depression, anxiety, suicidal tendencies, aggressive behaviours, etc.

☐ Yes ☒ No ***(End of Form 1: Part B)***

If YES, describe the criteria you will use to assess when participants in your research have results indicating that they or others are 'at risk'.

AND, outline how you will deal with your duty of care to participants in your research identified as 'at risk'.

1B.19.1 Have you acquired the necessary competence to administer, score and interpret the proposed measures and procedures, with the type of participants that will be involved in this research?

☐ Yes ☐ No

1B. 19.2 Will you indicate the procedure proposed above to potential participants in your Participant Information Sheet?

☐ Yes ☐ No

Subject: [RIMS] USQ HRE - H18REA121 - Ethics Application Approval Notice (Expedited Review)

From: human.ethics@usq.edu.au
To: Q9921448@umail.usq.edu.au; Caroline.Hart@usq.edu.au
Date: Thursday, 26 July 2018, 1:47:03 pm AEST

Dear Kathy

I am pleased to confirm your Human Research Ethics (HRE) application has now been reviewed by the University's Expedited Review process. As your research proposal has been deemed to meet the requirements of the National Statement on Ethical Conduct in Human Research (2007), ethical approval is granted as follows.

Project Title: H18REA121 - Access to Justice: Why Litigants Self-Represent in Queensland Child Protection Courts.
Approval date: 26/07/2018
Expiry date: 26/07/2021
USQ HREC status: Approved with conditions

(a) responsibly conduct the project strictly in accordance with the proposal submitted and granted ethics approval, including any amendments made to the proposal;
(b) advise the University (email: ResearchIntegrity@usq.edu.au) immediately of any complaint pertaining to the conduct of the research or any other issues in relation to this project which may warrant review of the ethical approval of this project;
(c) promptly report any adverse events or unexpected outcomes to the University (email: ResearchIntegrity@usq.edu.au) and take prompt action to deal with any unexpected risks;
(d) make submission for any amendments to the project and obtain approval prior to implementing such changes;
(e) provide a progress 'milestone report' when requested and at least for every year of approval;
(f) provide a final 'milestone report' when the project is complete.
(g) promptly advise the University if the project has been discontinued, using a final 'milestone report'.

Additional conditionals of approval for this project are:

(a) Provide permissions once obtained (Legal Aid Queensland)

Provide interview questions once created

Please note that failure to comply with the conditions of this approval or requirements of the Australian Code for the Responsible Conduct of Research, 2018, and the National Statement on Ethical Conduct in Human Research, 2007 may result in withdrawal of approval for the project.

If you have any questions or concerns, please don't hesitate to make contact with an Ethics Officer.

Congratulations on your ethical approval! Wishing you all the best for success!

Kind regards,

Human Research Ethics

University of Southern Queensland
Toowoomba – Queensland – 4350 – Australia
Ph: 07 4687 5703 – Ph: 07 4631 2690 – Email: human.ethics@usq.edu.au

APPENDIX 5

Mr Michael Hogan
Director General
Office of the Director General
Department of Child Safety, Youth and Women
Locked Bag 3405
Brisbane Queensland 4001

UNIVERSITY OF SOUTHERN QUEENSLAND

1 August 2018

Dear Mr Hogan

RE: Doctor of Philosophy, University of Southern Queensland
Thesis Interview Topic - Access to Justice: Why Litigants Self-Represent in Queensland Child Protection Courts

I am a PhD student (and academic) with the University of Southern Queensland.

I am seeking permission to contact Department of Child Safety, Youth and Women (DCYM) staff in a telephone or face-to-face interview for the PhD research on why litigants self-represent in Queensland child protection courts. In particular, I would like to speak with DCYM Managers and Child Support Officers in the Toowoomba, Ipswich and Brisbane regions.

This access will also provide an opportunity to discuss utilising their services in a 'gatekeeper' capacity to organise a voluntary session with self-represented litigants in these regions to discuss my research. The goal will be to obtain contact with self-represented individuals in the hopes of obtaining interviews with those who are currently considering (or are in the process of) child protection hearings.

The PhD concerns why litigants self-represent in Queensland child protection courts, and their ability to access justice. I am conducting research into possible factors that may influence the litigant's decision to self-represent, including:

- Distrust of the legal profession;
- Faith in merits of their case ('no one knows my family better than me');
- Financial constraints (cannot afford representation);
- Legal support/representation refusal (Legal Aid, Community legal centres, etc); and
- Can advocate better unrepresented.

The purposes of this enquiry are to:

- examine reasons why litigants self-represent in Queensland child protection courts;
- investigate effects of limited access to funding; and
- identify impediments that self-represented litigants may face in obtaining timely and affordable justice.

The interviews will be open ended and will be with a sample of self-represented litigants, judicial officers, Department of Communities, Child Safety and Disability Services, and, with your permission, Legal Aid Queensland grants officers, regarding the continued challenges faced in obtaining legal funding/representation and access to justice.

If you are willing to allow participation in my research, I will send a one page bullet point summary of my PhD topic in anticipation of the interview. I expect the interview would take approximately 60 minutes. Should participants wish for a face-to-face interview, I am available to meet with them at a mutually agreeable time and place.

Even if DCYM staff participate in the interviews, they may withdraw at any time without any consequences. They would not need to give an explanation. Any material that they would have provided will be disposed of with the utmost regard to confidentially and privacy concerns. Any information they do provide in a completed interview will be treated confidentially and kept secure. Their privacy will be respected. Any data that is generated as a result of the study will be de-identified for all subsequent purposes.

I am very much looking forward to carrying out this research and meeting and speaking with as many participants as possible. I am anticipating there will be important outcomes for not only self-represented litigants, but also the legal profession and Department of Communities, Child Safety and Disability Services.

Please do not hesitate to contact me on (07) 4631 1852 or by email on Kathy.reeves@usq.edu.au to discuss any of the matters I have outlined above. I look forward to speaking with you.

Kind regards

Kathy Reeves
PhD Student

Section 1. Applicant information	
Chief Researcher or Investigator	
Name:	Kathy Sue Reeves
Position and organisation:	PhD Student, Law Lecturer, University of Southern Queensland
Postal Address:	West Street, Toowoomba QLD 4350
Telephone and/or Mobile:	0481 584 388 / 07 4631 1852
Email:	Kathy.reeves@usq.edu.au
Research Supervisor (if applicable)	
Full name:	Caroline Hart
Position and organisation:	Associate Professor, University of Southern Queensland
Postal Address:	West Street, Toowoomba QLD 4350
Telephone and/or Mobile:	07 4631 1437
Email:	Caroline.hart@usq.edu.au
If this research is part of a degree requirement please specify the degree type and degree timeframe	

Section 2. Research proposal

Title of research project (10 words max)

Access to Justice: Why Litigants Self-Represent in Queensland Child Protection Courts

Briefly (max.200 words) outline the **rationale** for the research, addressing each of the following *(dots points preferred)*:

- Aims
- Research questions
- How the proposal fits with existing research and identified gaps in knowledge
  - *Please confirm that there are not existing systematic reviews on the topic.*
  - *If there are systematic reviews on the topic provide justification for further research.*

- The project concerns why litigants self-represent in Queensland child protection courts, and their ability to access justice. I am conducting research into possible factors that may influence the litigant's decision to self-represent, including:
  - Distrust of the legal profession;
  - Faith in merits of their case ('no one knows my family better than I);
  - Financial constraints (cannot afford representation);
  - Legal support/representation refusal (Legal Aid, Community legal centres, etc); and
  - Can advocate better unrepresented.
- The purposes of this enquiry are to:
  - examine reasons <u>why</u> litigants self-represent in Queensland child protection courts;
  - investigate <u>effects</u> of limited access to funding; and
  - identify <u>impediments</u> that self-represented litigants may face in obtaining timely and affordable justice.
- The aim is to add to current literature on improving access to justice by identifying reasons why litigants self-represent, by establishing a methodology to obtain important data in relation to litigants self-representing in child protection courts to determine if there is sufficiently adequate access to justice available. Research is beneficial as there are no literature information sources available with respect to self-represented litigants accessing justice in Queensland.

Briefly (max.200 words) outline the **research design** including participant recruitment, data collection methods, and data analysis methods *(dots points preferred)*.

- Participants will be recruited (via email) from Department of Communities, Child Safety, Youth and Women in Ipswich, Brisbane and Toowoomba. Participants sought will include Child Safety Officers who deal directly with the families from intake through to the court/trial process.

Application for conducting research

Information for researchers

The information you provide on this form and in supporting documents will become the basis for consideration of your research proposal, and will assist the Department of Child Safety, Youth and Women to decide whether or not to give approval for the research proposal.

The following will enable timely consideration of your application:

- clear, concise and sufficient information in each section of this application
- relevant supplementary documentation for ethical approval (see Section 3)
- letters of support for this research proposal from relevant departmental staff, where available.

Research Translation, Implementation and Impact

Lead researchers/research teams of all approved projects will also be required to complete a detailed Translation and Implementation Plan. Translation and Implementation planning will be informed by the Research Translation and Implementation Planning Guide and supported by the Research Projects and Partnerships Manager who will coordinate and facilitate engagement with relevant internal stakeholders.

Our priority is to ensure that research projects deliver outputs that engage decision-makers and increase the ability of research evidence to inform policy, program and practice decision making. The relevance of the research project to our policy, program and practice strategic priorities and the potential for the research findings to assist the department to achieve improved outcomes for young people, women and the broader community is central to research approval decision-making.

We require researchers to provide updates on a six monthly basis or as otherwise required and require a closure report to be completed at the end of the project. This may include attending meetings and/or giving presentations on progress.

Departmental processes

- Please submit an electronic copy of your research application form and supplementary documents, to the departmental research team via the email address researchandevaluation@csyw.qld.gov.au.
- If additional information is required to complete a review of your application, a member of the departmental research team will contact you to discuss.

Please note that the departmental assessment and approval process will require a minimum of 8 weeks.

This eight week timeframe does not include your initial engagement with us – this is the time from when a high quality completed Research Application form and all relevant documentation is provided that requires no further changes.

You must engage with us at least at 12 weeks, and preferably 24 weeks, prior to submitting a grant application that requires access to our clients, staff, service providers or data.

If you are approaching the department after you have already submitted and/or received a grant please note that there are no guarantees that the project will be approved. Please further note that approval may require redesign of the project and/or ethics approval.

If you have any queries about the information outlined and/or requested in this application, please contact the research team on researchandevaluation@csyw.qld.gov.au.

PRIVACY NOTICE: The information you provide on this application form will be used by the Department of Child Safety, Youth and Women to respond to and manage your research application. The information will be handled in accordance with the *Information Privacy Act 2009 (Qld)*. For more information, please visit the departmental privacy webpage at www.communities.qld.gov.au/gateway/site-information/privacy.

- Prior to the interview, participants will be asked to read an explanation of the study. It will describe the purpose, benefits, risks, discomforts and precautions of the program. They will be advised of their right to withdraw from the study at any time. An Informed Consent Form will be read and explained to the participant by the researcher, with opportunity for further explanation if required. No interview will be conducted without signed consent.
- The participant will be asked if the interview can be recorded. If not, the interviewer will take field notes.
- Participants will be asked to review and sign a consent form allowing data collection.
- The Researcher will sit with the participant (individually) and ask qualitative/quantitative questions regarding the research.
- Participants will be encouraged to expand on their experiences within the child protection system.
- The Researcher will be pro-active in providing details of support networks on interview conclusion if participants appear traumatised or upset.
- On conclusion, data will be collected and transcribed for analysis.

What is the proposed timeframe for the research (indicative start and finish dates if this information is available)?

The thesis is set as a 6 year, part time PhD research project. It is currently in the final stages of the 2nd year. For the purposes of the interviews, it is anticipated to take approximately one, dependent on availability of participants.

Does the research proposal involve any **other organisations** such as: collaborating organisations(s); sponsoring organisation(s); and/or other government agency; funding/grant organisation? ☒ Yes ☐ No
If Yes, please identify each organisation and briefly outline what it is contributing to this research.

Legal Aid Queensland (Brisbane, Ipswich and Toowoomba) has also been approached as a participating organisation on the same basis as DCYW (provided above).

Further, both organisations have been requested to acts in a 'gatekeeper' capacity to organise a voluntary session with self-represented litigants in these regions to discuss the research. The goal will be to contact self-represented individuals in the hope of obtaining interviews with those who are currently considering (or are in the process of) child protection hearings.

Section 3. Research proposal ethics

Before finalising research approvals, in most situations the department requires that a research proposal has relevant **Human Research Ethics Committee (HREC) approval**. In very specific circumstances, the department will consider a research proposal which has an exemption from ethics approval by a HREC. If you have such an exemption, briefly outline the reasons for the exemption and attach a letter from a HREC which endorses this exemption. The department will also need to ensure the research meets Queensland legislative requirements such as those in S 189B of the *Child Protection Act 2009 (Qld)* which relate to privacy and confidentiality.
Research involving Aboriginal and Torres Strait Islander participants will also need to comply with the Guidelines for Ethical Conduct in Aboriginal and Torres Strait Islander Health Research.

Please indicate in the check box below the status of HREC approval as it relates to this research proposal.

☒ research project has ethics approval from a HREC
☐ research project waiting for ethics approval from a HREC
☐ research project exempted from ethical approval
☐ research project waiting for exemption for ethical approval
☐ ethics application is being drafted and will be provided when available.

In some situations a Blue card may be required for researchers. The research team can provide advice in relation to this requirement.

Please attach the following to this application:

- *Ethics application form*
- *Ethics approval*
- *Ethics exemption (if applicable)*
- *Research data collection instruments such as surveys, interview schedules, standardised instruments*
- *Participant information materials and consent forms.*
- *Blue card/s (scanned copy) for all researchers having direct contact with children and young people (if available).*

Note: *If these documents are not yet available, forward this information as soon as they become available.*

Section 4. Strategic relevance and benefits to the department

Alignment with DCSYW Strategic Plan

Briefly describe the research proposal's alignment with the DCSYW Strategic Plan 2018-22 priorities *(dot points preferred)*.

While there is no direct alignment, this research will aid in highlighting and raising the profile of issues that hinder litigants' access to justice. Improving the wellbeing of children, especially those in child protection matters. Aligning with the DCSYW Strategic Plan priorities, the project is intended to:

- Provide information and support that is accessible and useful to Queensland families;
- Engage parents to work collaboratively with various organisations (including DCSYW and Legal Aid Queensland), as well as legal and judicial;
- Support families involved in the child protection system to overcome issues regarding distrust of the legal profession and child protection services;
- Improve integrated responses and support services for families;
- Ensure equality in access to justice for parents who are not legally represented;
- Improve performance through reviews, feedback and evaluations to deliver better quality outcomes for families; and
- Continually improve governance, financial, management and practices to ensure public confidence in the child protection system.

Alignment with National Priorities

Briefly describe the research proposal's alignment with relevant national priorities such as *(dot points preferred)*.

- National Framework for Protecting Australia's Children 2009-2020
- National Plan to Reduce Violence against Women and their Children 2010-2022

- Literature reviewed, to date, has provided child protection surveys (related to funding) that have been held with all stakeholders, other than child protection parents. On the basis of equity, all stakeholders should be involved to determine whether there is a need for more funding, or if there is a need for improved services for the self-represented litigant, including:
    - Family Violence;
    - Services not only for legal needs of the family, but to also assist in rehabilitation programs; and
    - Building collaborative relationships between service organisations (and DCSYW) and parents.
- While the research will look at why litigants self-represent in Queensland child protection matters, it will open a discussion (and perhaps further thesis projects), based on the findings, as to whether there is a need to address how government funding is allocated to support the family unit.

Expected Outputs

Please briefly describe the expected outputs that will be produced and provided to DCSYW as a result of this project *(dot points preferred)*.

- *Please Note: The research team must provide all and any outputs arising from this project to the department for departmental review and reply prior to publication or other public release.*

The primary objectives of the thesis are to: a) examine reasons why litigants self-represent in Queensland child protection courts; b) investigate effects of limited access to funding; and c) identify impediments that self-represented litigants may face in obtaining timely and affordable justice.

Expected Outcomes and Benefits

Please briefly describe how you expect the findings to benefit DCSYW policy, program or practice outcomes *(dot points preferred)*.

- *I.e. how could the findings be used by DCSYW in policy, programs and practice development and decision-making and how will this lead to improved outcomes for children, young people and women?*

- While there is no immediate direct benefit, this research will aid in highlighting and raising the profile of issues that hinder litigants' access to justice. The research will use open ended interviews with self-represented litigants, judicial officers, Department of Child Safety and Disability Services ("DOCS") and legal aid grants officers, to obtain rich, in-depth information and experiences regarding the challenges faced in obtaining legal funding/representation. Issues to be addressed will include an inability to afford private representation, ineligibility for grants of funding assistance,[1] and a distrust of practitioners and the judiciary.
- The answers to these questions will be beneficial as it will aid in highlighting and raising the profile of issues that hinder litigants' access to justice. Further, if the outcomes are positive (as there is no current

literature to the contrary), it can assist in further projects relating to how funding can be utilised in assisting families in need.

Expected engagement and translation

Please briefly describe how you plan to engage with DCSYW throughout the life of the project and deliver outputs that can support DCSYW to use research findings to inform policy, program or practice decision-making to achieve the outcomes and benefits outlined above *(dot points preferred)*.

Participants and/or other interested stakeholders will be able to access the results of the research project upon its completion. It is anticipated that the research project will be made available online through scholarly sources and, upon request, the researcher will be able to provide an electronic copy of the PhD thesis where appropriate. Further, the research will also provide updates throughout the research project to allay any concerns held by the participants, which will also assist in making the experience more relaxed during the interview process, e.g. they will feel "part of the project" rather than just another statistic. "Updates being provided" means that should a participant seek to withdraw, and states their hesitation in the initial interview, should they seek an update as to where the researcher is in writing of the thesis, this will be communicated to the participant either by email or by phone communication. No personal information will ever be disclosed.

Section 5. Proposal to access departmental clients as research participants

Does the research proposal require access to departmental clients? Yes ☒ No ☐

If yes, complete the table below to indicate which departmental **clients** are to be involved in the proposal and also provide information relevant to recruitment and participation. Please complete all columns and use one row per client group type (if there is more than one type). A member of the departmental research team can discuss the most appropriate approach with you.

Department's **client group***	**Number** of clients in this client group	**Gender** breakdown of client numbers *e.g. M=20; F=20*	**Age range** of this client group *e.g. 0-18 years*	Length of **time** and **frequency** of contact required with this client group *e.g. 5 sessions @ 1hr/session over 3 month period*	Nature of **contact** required with the client group *E.g. Face to face interview, observational survey.*
Self-represented parents	12	NA	Over 18 years	1 x one hour session	Face to face interview

Briefly explain the reason/s for including the client group(s) as participants and briefly justify the number of clients who will be involved.

The Researcher seeks to talk to 12 self-represented litigants (4 from each region). The Researcher would like to use DCSYW as a "gatekeeper" to assist in obtaining clients in this group. It is envisaged (upon permission) to hold an information evening (through the use of DCSYW facilities) at each region, whereby the researcher can address a group of potential self-represented litigants as to the nature of the research, and obtain interviews. Due to the potential for these parents to be of limited education or literacy, the researcher believes that an information evening would be more beneficial in this regard. On permission being granted, the researcher would conduct interviews with the appropriate DCSYW staff and organise an information evening thereafter. Potential interviewees (parents) will be provided with the same consents, etc as per all other interviewees in the project. Further, they will be advised that the researcher cannot provide legal information.

Section 6. Proposal to access departmental staff as research participants

Does the research proposal require access to departmental staff as participants? Yes ☒ No ☐*

If yes, complete the table below.

Location(s) – if known	**Staff title/role** *e.g. Child Safety Officer*	**Number** of departmental staff as participants	Length of **time** and **frequency** of contact required with departmental staff as participants *e.g. 2 X 1 hour over 1 month*	Nature of **contact** required with departmental staff as participants E.g. *face to face interview, observations, survey.*

Ipswich, Springfield and Moreton	Child Safety Officer	6 (2 from each region)	One hour interview per participant at a time convenient to them.	Face to face interview

Briefly explain the reason/s for including departmental staff as participants and briefly justify the number of clients who will be involved.

These participants recruited from Department of Communities, Child Safety, Youth and Women (who service the North and South Darling Downs Regions) will be Child Safety Officers who deal directly with the families from intake through to the court/trial process in child protection matters. The reason for the number of participants is to encompass the volume of child protection matters that occur yearly. (These regions, for the past 5 years, have maintained a ranking within the top 6 regions in child protection.)

Section 7. Proposal to access departmental in-kind resources

Does the research proposal require access to departmental "in kind" resource(s) (eg, access to equipment, meeting rooms, other facilities, staff time – other than as research participants).**? Yes** ☒ **No** ☐*

If Yes, please complete table below

Location(s) - if known	**Departmental resource(s)** needed *(e.g. staff support for recruiting participants)*	**Proposed time period** for use of departmental resource(s) *(e.g. 2 hours per week for 1 month)*
Ipswich, Springfield and Moreton	Meeting room/facility	2 hours x 1 night (Information evening)

Section 8. Proposal to access departmental data

Does the research proposal require access to departmental data? Yes ☐ **No** ☒

If yes, please check whether your data requirements can be met through Open Data Queensland (https://data.qld.gov.au) or other government source.

If after checking Open Data Queensland, you find that some or all of your data needs will not be fully met there, you are encouraged to discuss your data requirement with the research team. This discussion will help to determine if the department holds, and/or is able to extract the data you require.

Briefly outline the data type, rationale for data needs and expected timeframes for access to departmental data (*dot points preferred*)

Secure management of departmental data

Please specify how departmental data is to be managed and include responses to the following (*dot points preferred*):

- Who will have access to the data?
- How will you receive, transfer, store, access and manipulate the data?
- What are the expected timeframes for access to the departmental data?
- What security measures will be in place, including what will happen in the event that the researchers or investigators leave the research proposal?
- How will the data be managed or destroyed at the conclusion of the research?
- What measures will be in place to ensure that the data is not accessed or used without future approvals from the department?

Please indicate how this aligns with your universities data management policy and the Australian Code for the Responsible Conduct of Research, 2018. The research team can also assist with this information. It is expected that information provided in this section will align with data management information as specified in the related ethics application for this project.

Section 9. Request for departmental financial resources

Does the research proposal include a request for departmental financial resources? Yes ☐ **No** ☒

If yes, please comple the table below

Total financial support requested from the department	Proposed **total time period** for financial support *(month/year – month/year)*	Proposed time scheduling of financial allocation *(frequency of payments – if known)*
Please provide the contact details of any departmental officer you have discussed this research proposal with		

Section 10. Declaration of Applicant

I, Kathy Sue Reeves, as the Principal Researcher of the project		
DECLARE THAT—		
	☒	The information contained in this application is true and correct to the best of my knowledge
Signature:		
Name:	Kathy Sue Reeves	
Date:	6/2/19	

Applicant's Academic Supervisor to Complete (if part of a degree requirement)	
I, REID MORTENSEN, DECLARE THAT:	
I have examined this application to conduct research and I am satisfied that the research proposal is sound, and that it is both relevant and necessary for the applicant's current research project.	
Signature:	
Name:	Reid Mortensen
Date:	6/2/19

Information Privacy Notice

CSYW is collecting the information on this form for the purpose of managing research involving CSYW information, clients and resources.

CSYW does not normally give any of this information to any person outside of the Department.

Please submit electronic copies of your completed research application and supplementary documents, to the department's research team via researchandevaluation@csyw.qld.gov.au .

[1] Attorney-General's Department, above n 10, 1.9.

The Honourable Dianne Farmer
Minister for Child Safety, Youth and Women and
Minister for the Prevention of Domestic and Family Violence
Locked Bag 3405
Brisbane Queensland 4001 childsafety@ministerial.qld.gov.au

UNIVERSITY OF SOUTHERN QUEENSLAND

17 April 2019

Dear Minister,

RE: Research project - Why litigants self-represent in Queensland child protection courts

I am a Lecturer in Law at the University of Southern Queensland (USQ), undertaking doctoral research on why litigants self-represent in child protection courts.

Request. I ask for the Department of Child Safety, Youth and Women (DCSYW) to reconsider its decision refusing me permission:

- To speak with DCSYW Child Support Officers in the Toowoomba, Ipswich and Brisbane regions; and
- To make available DCSYW services in a 'gatekeeper' capacity to organise a voluntary session with self-represented litigants in these regions.

A full record of correspondence between DCSYW and me is set out in the Appendix.

Summary. The project has all of the necessary ethics approvals required by USQ, and similar university research had been supported by DCSYW before. In August 2018, I applied to DCSYW to undertake telephone or face-to-face interviews on why litigants self-represent in Queensland child protection courts, and specifically to speak with the relevant Child Support Officers and arrange the 'gatekeeping service'. In working closely with DCSYW, I completed its Research Application Form and answered all requisitions for further details. Ipswich, Springfield and Moreton regions had endorsed the project, and no other region had rejected it. I was advised on 19 February 2019 that the Director had approved the application. However, I was advised on 12 March 2019 that the Executive Director had rejected the application because the project did not align with DCSWY priorities. Having asked for clarification, I was later advised that DSCWY considered that self-represented litigants who were approached might be hostile to DCSYW and so uptake might be low.

Submission. I ask for reconsideration of this decision because:

- Other participants (government and non-government) have approved and already participated in the project, including Legal Aid Queensland, Lawyers, and Magistrates.
- The reasons given on the Executive Director's behalf do not indicate why I have been refused permission to speak with Child Support Officers.
- DCSYW has not objected *per se* to assisting in contacting self-represented litigants. It has merely questioned, given its position in the child protection process, the *extent* to which litigants would take up the request to interview.
- The effect on the project's validity of the *extent* of self-represented litigants' participation is not a question for DCSYW to answer, but is a matter for my academic supervisors and, ultimately, for the examiners. The supervisors consider that even a small number of interviews would be valuable because: (a) no study in Queensland has yet interviewed *any* self-represented litigants; and (b) there is a range of information available from interviews with other actors in child protection courts that can validly strengthen the conclusions from even a small number of interviews.

I thank you for considering this request. Should you require any further information, documentation or seek to discuss any of the matters outlined above, I would be grateful for the opportunity to speak with you. I can be contacted on (07) 4631 1852 or by email on Kathy.reeves@usq.edu.au.

Yours sincerely,

Kathy Reeves, BCom, JD, Lawyer (Qld)
Lecturer in Law

Encl

Appendix

Date	Commentary
August 2018	Permission was sought from Mr Michael Hogan, Director General of the Department of Child Safety, Youth and Women (DCSYW) to undertake interviews (via telephone or face-to face interviews) for PhD research on why litigants self-represent in Queensland child protection courts. In particular, permission was sought to speak with DCSYW Child Support Officers in the Toowoomba, Ipswich and Brisbane regions. Access was sought to provide an opportunity to discuss utilising DCSYW services in a 'gatekeeper' capacity to organise a voluntary session with self-represented litigants in these regions to discuss the research. The goal was to obtain contact with self-represented individuals in the hopes of obtaining interviews with those who are currently considering (or are in the process of) child protection hearings. This would benefit the research as, from literature reviewed to date, no studies have canvassed these individuals to glean their views.
27 August 2018	Response received from the Acting-Director General's office advising that a member of the Research Projects and Partnerships team would be in contact to provide me with a copy of the Department's Research Application form for completion
30 August 2018	Contact made from member of research Projects and Partnerships team providing a copy of the Ethics Application. This was completed and submitted back to DCSYW.
23 November 2018	Telephone call received (and subsequent email) from DCSYW advising that they had received my application and that it was "an interesting research topic" and looked forward to working me to get it up and running. There were some questions raised by the cultural committee regarding non-representation of Aboriginal and Torres Strait Islander self-represented litigants. A copy of my USQ Confirmation document was provided for clarity and, in particular, noted that the thesis would not include an exploration of Aboriginal and Torres Strait Islander Legal Service (ATSILS) providers as it has been widely acknowledged that they are the preferred and most culturally appropriate providers of legal services to indigenous Australians. Thus, this aspect would not be dealt with due to high volume of information available, and thesis limitations.
6 February 2019	Communication received from DCSYW advising that Ipswich, Springfield and Moreton (Strathpine) regions had endorsed my project, but that, unfortunately, Darling Downs (Toowoomba) and Brisbane had not engaged. Suggestion was made, to avoid further delays in progressing my application, to submit it with the supported regions in the hopes of speeding up the approval process. The intention was that while the application was being reviewed up the line that work would continue toward making contact with Toowoomba and Brisbane. This approach was satisfactory and, as such, my application was amended (by request) to reflect the location change. This application change was made and submitted on the same day.

12 February 2019	Feedback was received from DCSYW that there was concern about the feasibility of the proposed recruitment strategy (i.e. the likelihood of eligible clients attending information evenings being quite low). The below options were provided for consideration by DCSYW: 1. Child Safety Officer (CSO) identifies eligible clients; 2. CSO will provide brochure/flyer promoting project, then: a. Option 1: CSO will obtain 'consent to contact' – this was the recommended option b. Option 2: Eligible client can contact research from details on brochure 3. Researcher contacts client to discuss project and arrange consent (if option 1 available) 4. Arrange 1 hour interview via phone or in person with client. The advice given was that this would avoid the issue of room availability for information evenings and the requirement of CSOs in-kind support to assist with the evening. The researcher confirmed that option 1 was amenable.
19 February 2019	Email correspondence received from DCSYW advising that the application had been approved by the Director and progressed to the Executive Director for review in anticipation of progression to the Deputy-Director General.
6 March 2019	Email correspondence received from DCSYW about concerns received from the Executive Director regarding the following (researcher responses provided to DCSYW are noted for consistency/clarity): **Are CSO's necessary?** Yes, they have to be interviewed in any study, and based on the historical nature of their appearance in court, and now working with the Office of the Child and Family Official Solicitor (OFCOS) and the Director of Child Protection Litigation (DCPL), their input is important. **How does this project align with DCSYW objectives (part 4 of the application)?** The application was reviewed and it was confirmed that it does not. DCSYW advised that there needed to be some alignment and the researcher provided that it was in line with self-represented litigants and why they self-represent, it wouldn't necessarily align. DCSYW and researcher went through the strategic document together and found objectives that correlated and incorporated these into the application. The purpose of the research was reiterated and found to not be an objective that would necessarily align with DCSYW, but it certainly would not disadvantageous. **Concern about gaining SRLs through CSOs and privacy issues.** DCSYW contact advised that she was happy to make contact with self-represented litigants on my behalf as she had already made a list available. The researcher advised that she would be happy with this course of action. There was a concern that the researcher was only seeking four (4) self-represented litigants from each region and DCSYW was advised that the research project was solely based on regional Queensland, and not statewide.

	hostility high. However, if they were approached from a third party (such as Family Inclusion Network), independent to child safety, it may increase your chances of participation, and can avoid a situation where departmental staff are at the receiving end of a hostile client. Further, the proposal does not align strongly enough with the current departmental priorities (refer Section 4 of the application).
18 March 2019	The researcher emailed DCSYW seeking further clarity, in particular, asking if it was still possible to interview DCSYW CSO's in Toowoomba, Ipswich and Brisbane regions.
22 March 2019	Response received from DCSYW advising that there was no approval for engaging litigants or staff. Further, if there was a resubmission with a new project design, DCSYW could again reach out to Toowoomba.

Office of the
Minister for Child Safety, Youth and Women
Minister for the Prevention of Domestic and Family Violence

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Telephone +61 7 3719 7330
Email childsafety@ministerial.qld.gov.au

Our reference: MO ID# 3555; CSYW 02694-2019

29 MAY 2019

Ms Kathy Reeves
University of Southern Queensland
West Street
TOOWOOMBA QLD 4350

Dear Ms Reeves

Thank you for your letter regarding your request for the Department of Child Safety, Youth and Women to reconsider its decision to not become a partner on your proposed *'Why Self Litigants Self-Represent in Child Protection Courts'* project. The Honourable Di Farmer MP, Minister for Child Safety, Youth and Women and Minister for the Prevention of Domestic and Family Violence, has asked me to respond to you on her behalf.

The proposed research project is an interesting topic, however the recruitment methodology is not within the scope of the services provided by the department.

Management of, or engagement with, self-representing litigants is not an activity facilitated by departmental frontline staff. It is for this reason we recommend you contact agencies (such as Family Inclusion Network or alike) that do have direct contact with self-representing litigants in order that you are better positioned to recruit respondents for your research.

Should you require any future information regarding the department's research proposal proccess, please contact Ms Lacey Atkins, Acting Manager, Research Projects and Partnerships, Department of Child Safety, Youth and Women on 3097 6165.

Thank you for writing to the Minister.

Yours sincerely

Fiona Ferguson
Senior Policy Advisor
Office of the Minister for Child Safety, Youth and Women and
Minister for the Prevention of Domestic and Family Violence