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Juvenile Fitness for Trial: Lawyer and Youth Justice Officer Professional Survey

Bruce D. Watt[a], Jodie O'Leary[b] and Suzie O'Toole[c]

[a]*School of Psychology, Bond University, Queensland, Australia;* [b]*Faculty of Law, Bond University, Queensland, Australia;* [c]*School of Law, LaTrobe University, Victoria, Australia*

Fitness to stand trial is a necessary requisite for a fair trial in judicial proceedings. Research within Australia is limited regarding juvenile fitness for trial, though recent evidence indicates that juvenile offenders are half as likely to be found unfit to stand trial compared to adult offenders. The study surveys lawyers ($n = 20$) and youth justice workers ($n = 20$) about their experiences with juveniles in the Queensland youth justice system. Over the preceding 12 months, 133 juveniles were identified as potentially unfit. Intellectual impairment (37%), immaturity (28%), and mental illness (26%) were the most prevalent conditions. Indigenous Australians were rarely referred for mental health evaluation. In comparison, juveniles (mostly non-indigenous) with mental illness and intellectual impairment were significantly more likely to be referred for evaluation. Pragmatic and tactical reasons were most frequently given for non-referral to the Queensland Mental Health Court, which at the time decided fitness.

Keywords: adjudicative competence; competence to stand trial; fitness for trial; fitness to plead; juvenile offenders.

Introduction

In October 2010, the Law Reform Commission (2010) in the United Kingdom published a consultation paper entitled *Unfitness to Plead*. The commission noted that the legal test of competence to stand trial in that jurisdiction – the *Pritchard* test (*R v Pritchard,* 1836) – was a relic of the nineteenth century, declaring the test to be outdated and not 'in line with modern psychiatric thinking' (Law Reform Commission, 2010, p. 50). Specifically, the commission expressed that issues of competence were more acute for juvenile offenders than for adults. In doing so, the commission referred to the MacArthur Juvenile Competence Study from the United States.

The MacArthur Study investigated differences in adjudicative competence ability between 566 young adults and 927 youths aged between 11 and 17 years of age (Grisso et al., 2003). Approximately half of the sample comprised detained youths and adults; the remainder were selected as a community comparison. Children and adolescents below 16 years of age were significantly more likely to be evaluated as impaired in competence-related abilities compared to older adolescents and young adults. The finding was consistent across gender, detention/community status, ethnicity, and socio-economic background. Multiple studies have replicated the finding that younger juveniles are more likely

Correspondence: Dr Bruce Watt, Forensic and Clinical Psychologist, Assistant Professor, School of Psychology, Faculty of Society and Design, 14 University Drive, Bond University, Gold Coast, Queensland 4229, Australia. Phone: +617 5595 2653. Email: bwatt@bond.edu.au

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to have deficits in adjudicative competence compared to older adolescents (Baerger, Griffin, Lyons, & Simmons, 2003; Cowden & McKee, 1995; Kruh, Sullivan, Ellis, Lexcen, & McClellan, 2006; McKee & Shea, 1999).

Demographic factors generally provide little differentiation between competent and incompetent juveniles. Gender, ethnicity, and socio-economic background have been found to be unrelated to competence to stand trial (Cowden & McKee, 1995; Grisso et al., 2003; Kruh et al., 2006; McKee & Shea, 1999). Research examining the role of cognitive ability, however, has consistently found that youths with intellectual impairments are more likely to be deemed incompetent compared to youths without intellectual impairments. Kruh et al. (2006) examined mental health professional evaluations of 253 juvenile offenders referred for competence evaluations. Youths with lower levels of intellectual functioning and a history of special education placement are significantly more likely to be assessed as incompetent compared to other referred youths. Utilising a sample of 324 juveniles referred to a juvenile mental health court, Bath, Reba-Harrelson, Peace, Shen, and Liu (2015) found that juveniles with a diagnosis of intellectual disability or pervasive developmental disorder were more likely than other referred youths to be found incompetent to stand trial. Similarly, Grisso et al. (2003) found that deficits in competency are greatest for children below 14 years of age with below-average intellectual functioning. McLachlan, Roesch, Viljoen, and Douglas (2014) found that young offenders with foetal alcohol spectrum disorder (FASD) and co-occurring deficits in intellectual functioning and reading ability are more often assessed as incompetent compared to young offenders without FASD.

Research examining the association between other mental disorders and juvenile competence to stand trial has produced mixed results. Cowden and McKee (1995) found that juveniles referred for evaluation who have a severe psychiatric diagnosis are more likely to be found incompetent compared to juvenile offenders with a mild or moderate diagnosis. A severe diagnosis reflects a diverse array of disorders including intellectual impairment, organic brain syndromes, schizophrenia and mood disorders, and it is unclear which of these are most prevalent among juveniles found incompetent. Kruh et al. (2006) found that the presence of psychosis is a significant predictor of incompetence, while Bath et al. (2015) found that juveniles with psychotic disorders are less likely to be adjudicated as incompetent. McKee and Shea (1999) found that major mental illness is unrelated to juvenile competence to stand trial. It is important to note that the comparison groups in these studies were other juveniles referred for competence evaluation, as opposed to juvenile offenders without any disorder. The greater prevalence of intellectual impairment and fewer cases of mental illness among juvenile offenders stands in contrast to research with adults found incompetent to stand trial, wherein mental illness accounts for the majority of such cases (McGaha, Otto, McClaren, & Petrilla, 2001).

Following a review of competency literature, Grisso (1997) determined that ‘there is tentative evidence that younger adolescents may be at risk of difficulties in communication, as a consequence of developmental immaturity, that could interfere with their assistance to counsel’ (p. 17). This is consistent with Australian research into the language competence of young offenders (Snow & Powell, 2012). Viljoen and Roesch’s (2005) research identifies higher levels of intelligence, verbal ability, attention and executive functioning with increasing age during adolescence, supporting the notion that children and younger adolescents are at greatest risk of incompetence due to immaturity.

Deficits for younger adolescents in adjudicative competence are consistent with research regarding the adolescent brain and cognitive and psychosocial development indicating that such juveniles are immature

compared to older adolescents (Steinberg, 2009). Advances in developmental research have been cited in United States Supreme Court decisions, albeit not specifically regarding competence (*Graham v Florida,* 2011; *Miller v Alabama,* 2012; *Roper v Simmons,* 2005). In *Graham v Florida* (2011), the Supreme Court confirmed that juveniles have difficulty weighing long-term consequences and are impulsive. Justice Kennedy, delivering the court's opinion, stated:

> features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. (*Graham v Florida,* 2011, p. 2032)

O'Donnell and Gross (2012) reviewed laws from 31 states and the District of Columbia in the United States, which had formalised standards for evaluating juveniles believed to be incompetent to stand trial. They found that only 12 states explicitly deal with the issue of developmental immaturity in relation to competence. Among these states, 3 explicitly exclude developmental incompetence while 9 permit a finding of incompetence based upon developmental factors alone. Developmental immaturity is referred to as incomplete development in neurological, intellectual, social and/or emotional domains resulting in functional limitations in comparison to adults.

Research examining lawyers' observations of juvenile offenders who may be incompetent is limited. Viljoen, McLachlan, Wingrove, and Penner (2010) surveyed 214 attorneys experienced in dealing with adolescent offenders. The attorneys were recruited via two sources, with response rates of 30% and 10%. They were asked questions regarding juvenile defendants for whom they had concern regarding competence to stand trial. The majority of attorneys (90%) reported having been concerned about juvenile competence on at least one occasion. On average, the attorneys reported being concerned about 12.32 juveniles per year, though there was considerable variability from zero to every juvenile. The most common limitations with regard to legal capacities include difficulties in understanding the legal process, poor appreciation of the seriousness of charges, inadequate participation in legal decision-making, and failure to consider long-term consequences of conduct. The most commonly perceived causes of legal deficits are immaturity, followed by intellectual impairments, then mental disorder. Approximately half of the juveniles about whom the attorneys had concerns were referred for evaluation. Reasons for non-referral pertained to the offence being minor, youths and/or parents being opposed to referral, and concerns regarding delays in legal proceedings. Among the youths not referred for evaluation, attorneys described attempting to address perceived lack of competence via education and/or involving legal guardians in decision-making.

In addition to the United States and the United Kingdom, New Zealand has displayed an awareness of this issue. Klinger (2007) critiqued New Zealand's system of youth competence in light of proposed legislation to lower the age at which juveniles could be transferred from the Youth Court to the District or High Court. Additionally, the New Zealand Youth Court has considered immaturity as a basis for incompetence (*New Zealand Police v UP,* Unreported, New Zealand Youth Court, Fitzgerald AJ, 5 May 2011).

Despite this interest in other common law jurisdictions, Australia lags behind. The reason for the lack of interest in juvenile adjudicative competence in Australia (termed fitness for trial or fitness to plead) is unknown. Perhaps, until recently, the need to protect Australian juveniles with a competence threshold has been perceived as less pressing than in other jurisdictions. For example, juvenile justice reform in the United

States resulted in more punitive dispositions for young offenders, the stripping of confidentiality that had previously been attached to juvenile records, and amendment to and increased use of the provisions allowing juveniles to be transferred to adult criminal court with the same penalties as adults (see the discussion in Poythress, Lexcen, Grisso, & Steinberg, 2006; Redding, 2003; Scott & Grisso, 2005). In some instances, such penalties included the death penalty (prior to *Roper v Simmons,* 2005) and life imprisonment without the prospect of parole (prior to *Graham v Florida,* 2011; *Miller v Alabama,* 2012). This increasingly punitive focus in the United States prompted recognition that juveniles, like adults, should be provided with due process protections, among them a precondition of adjudicative competence (Grisso, 1999).

Such developments in juvenile justice have generally not transpired in Australia. The death penalty has not been available in Australia as punishment for any offender since 1973 (Death Penalty Abolition Act, 1973). Further, the separate juvenile justice regimes throughout Australia provide that juveniles are usually not subjected to the same level of punishment as adults.[1] However, Australia can no longer refute the need to protect juveniles who may be unfit for trial.

Australia's approach to child offenders was initially one of welfarism (Cunneen & White, 2011). However, the separation of juvenile justice from welfare matters has been a feature of Australian juvenile justice for approximately 20 years. Although this separation accorded juvenile justice its own place, in most Australian juvenile justice systems the focus on rehabilitation or diversion from the system is legislated. However:

> in recent times it appears that the political pressure to introduce more 'law and order' style policies has resulted in a series of measures that seem philosophically opposed to the principles of diversion and court as last resort and detention as an option of last resort. (Fishwick & Bolito, 2010, p. 173).

In the Northern Territory, for example, there is a presumption that children's names can be published following appearance in court (*MCT v McKinney*, 2006). Legislative reform in Queensland expanded the opportunity to name juveniles, as well as expanding the instances when adult criminal courts can access juvenile criminal history and removed the principle that detention should be a last resort in sentencing a juvenile (Youth Justice and Other Legislation Amendment Act [QLD], 2014, §§8, 9, 21). Prior to this, the juvenile justice legislation in Queensland had been revised toward increased sentence length, including possible life sentences for violent, heinous offences (Youth Justice Act [QLD], 1992, §176(3)(b)). In Western Australia, the Young Offenders Act [WA] (1994 §§124–130) allows a court to make a special order of 18 months' imprisonment for young persons who repeatedly commit serious offences. Given these punitive developments in juvenile justice in Australia, juvenile fitness needs to become embedded on the Australian radar.

The Queensland System

Each Australian state and territory has a separate criminal justice system. Queensland's system is distinct from other states. Juvenile justice is no exception. Youths aged under 17 years come within the ambit of juvenile justice in Queensland, legislated for in the Youth Justice Act [QLD] (1992). Young people charged with offences initially appear before a children's court magistrate, and those facing more serious charges may be required to appear at a higher court, usually the Children's Court of Queensland. Youth justice officers who are involved in children's court matters such as youth justice services may be required to supervise young people sentenced in the youth justice system. Youth justice also has a right of audience in court (Youth Justice Act [QLD], 1992, §74), and as a matter of practice a youth justice officer is present at most children's court matters.

At the time that this research was conducted, Queensland had a unique legal framework for dealing with persons who may have been unfit, whether adults or children (Youth Justice Act [QLD], 1992, §61). Magistrates in the courts of first instance did not have any statutory power to dispose of a matter on the grounds of unfitness (see *R v AAM; ex parte A-G (Qld)*, 2010). In 2016, this lacuna in the law was rectified. The Mental Health Act [QLD] (2016, §22) provides magistrates with the power to dismiss complaints for simple offences if the offender is unfit for trial.[2]

For indictable offences there is theoretically a dual track system: concerns about fitness can be raised in the superior courts or through the mental health court (MHC). However, recently only the MHC has been required to make determinations of unfitness relating to children (O'Leary et al., 2013). At the time that this research was conducted, a matter only proceeded to the MHC upon referral, usually by the accused or his or her lawyer.[3] Practically, lawyers only made such a referral after obtaining a supporting report from a mental health professional. Referral to the MHC could only occur on the basis of reasonable cause to believe that a person is or was mentally ill or has an intellectual disability (Mental Health Act [QLD], 2000, §256). This excluded immaturity alone as a basis for being found unfit.[4]

At the time that this research was conducted, following referral the MHC would first consider whether the accused was of unsound mind at the time that he or she was alleged to have committed the offence. If not, the MHC would determine whether or not the person was 'fit for trial' (Mental Health Act [QLD], 2000, §270), defined as 'fit to plead at the person's trial and to instruct counsel and endure the person's trial, with serious adverse consequences to the person's mental condition unlikely' (Mental Health Act [QLD], 2000, schedule). The definition did not further define the term 'fit to plead' and the common law test outlined in *R v Presser* (1958) applied.[5] In *R v M* (2002) [QCA 464], the Queensland Court of Appeal considered the particular issues arising under the statutory definition of being fit for trial under the Mental Health Act, making reference to the *Presser* criteria. To be fit, the *Presser* test stipulates that the accused person must meet minimum standards. The accused needs to be able to do the following: understand the nature of the charge; plead to the charge and exercise the right to challenge the empanelling of jurors and to make a defence or answer the charge; understand the nature of the proceedings; follow the proceedings in a general sense; understand the substantial effect of the evidence led by the prosecution; and decide what defence to rely upon.

The Current Study

Due to the paucity of research on juvenile competence in Australia, the current study aims to provide an initial depiction of the youth justice landscape as it relates to fitness in Queensland. First, youths with potential fitness issues were examined to identify factors such as age, ethnicity, English-speaking background, and diagnostic characteristics. Consistent with international research, it was hypothesised that juveniles who may be perceived as unfit for trial would be younger, intellectually impaired and immature, as opposed to older offenders with mental illnesses. Based upon previous research by Viljoen et al. (2010), it was expected that approximately half of the potentially unfit juveniles would have been referred for mental health evaluation. It was also expected that a greater number of juveniles would be identified by lawyers and youth justice officers compared to the number of juveniles who had been referred to the MHC (O'Leary et al., 2013).

Secondly, the frequency that Queensland law professionals at the initial point of contact – that is, lawyers and youth justice officers – have concerns about juveniles' fitness was examined. If the instances when concerns arose, the focus was on which of the

capacities underlying the *Presser* test were of particular concern and if there is any relationship between those concerns and the juvenile's characteristics. The test of competence in the United States from *Dusky v United States* (1960) differs from the Australian test. However, aspects of understanding (comprehension of rights, court processes and roles of court actors) and reasoning (recognition of relevant information and the ability to process information in making decisions to instruct counsel) appear in some form in the test in both jurisdictions.

In addition to the capacities articulated in *Presser,* an appraisal was made of whether juveniles have problems making decisions in their best interests, examining features similar to Bonnie's (1992) construct of decisional competence. Grisso et al. (2003) found that '[a]dolescents are more likely than young adults to make choices that reflect a propensity to comply with authority figures, such as … accepting a prosecutor's offer of a plea agreement' (p. 357). Adolescents also less frequently recognise the risks in various options and the long-term consequences attached to a particular choice compared to adults. Based on the work of Grisso (Grisso, 1997, Grisso et al., 2003) and Viljoen et al. (2010), it was expected that the majority of potentially unfit juveniles would have deficits pertaining to decision-making, understanding the nature of proceedings, and difficulties in understanding and deciding pleas, elections and defences.

Thirdly, the reasons why lawyers in Queensland do not raise issues of fitness was examined. Grisso (1999) notes that, at the time of his study, 'no studies [had] been done to determine whether the competence question [was] being raised in [juvenile] cases in criminal court with any greater frequency – or even as often – as for adult defendants' (p. 374). O'Leary et al. (2013) confirmed that juveniles in Queensland were only being referred to the MHC at half the rate of adults, which translated into children being found unfit at half the rate. The reason for this anomaly was sought, drawing on Grisso's (1999) work, which stipulates potential reasons as including substantive and advocate uncertainty; Grisso explains these, respectively, as uncertainty as to whether or not competence *could* be raised and whether or not it *should* be raised. Consequently, it was hypothesised that the themes in relation to decisions to not raise unfitness despite concerns would include substantive, procedural and tactical reasons.

Method

The target sample was 20 participants from each of the professional groups of lawyers and youth justice officers.

From 13 youth justice service centres, 20 youth justice workers participated, consisting of seven team leaders, nine case workers/court officers and four other youth justice personnel. The participants were based in a range of locations, including urban, regional and remote offices. A wide range of experience working with young people was evident, ranging from 1.5 to 30 years' experience ($M = 8.56$, $SD = 7.75$).

A total of 36 lawyers were contacted, of which 13 did not respond to email/phone calls and 3 indicated non-interest, leaving 20 to participate in the study. Similar to the youth justice participants, the lawyers worked in a range of urban, regional and remote offices. There is considerable variation in years of experience working with juveniles, again ranging from 1.5 to 30 years ($M = 8.75$, $SD = 7.39$).

Measure

A semi-structured interview was developed for the current study to appraise the participants' experience of juveniles who are unfit or potentially unfit for trial. At the commencement of the interview, all participants were advised of the definition of 'fit for trial', and the conditions that were the focus of the study: mental illness, intellectual impairment, immaturity, and acquired brain injury (ABI).

The questions to the two professional groups largely aligned, but there are some differences according to their role in legal proceedings. All participants were asked about the bases of each identified juveniles' potential unfitness for trial. For illustrative purposes, Appendix 1 contains a copy of the lawyers' survey.

All participants were asked how many juveniles they had harboured concerns for regarding fitness for trial over the preceding 12 months. The juveniles were not necessarily found to be unfit for trial nor referred for assessment of fitness for trial. For each identified juvenile, the participants were asked to specify the juvenile's age, relevant condition, indigenous status, and whether or not the juvenile was of a non-English-speaking background (NESB). For each of the five *Presser* conditions (*R v Presser,* 1958), the participants indicated whether or not this was potentially in deficit. The participants were asked how many expert reports were requested for each juvenile, along with the findings of these assessments regarding diagnoses and whether or not the juvenile was appraised as being unfit for trial. The lawyers were asked about the decisions made for each participant, including whether or not a discontinuance was sought from the prosecution, whether or not a referral was made to the MHC, and the relevant outcomes. Where the identified juvenile was not referred to the MHC, all participants were asked the basis for non-referral.

All participants were asked generic questions regarding their observations as to the Queensland practice of referring juveniles who may be unfit for trial. They were asked to rate five potential reasons for non-referral on a five-point Likert-type scale ranging from *strongly agree* to *strongly disagree*. The five potential reasons are: uncertainty of the law on fitness to stand trial being applicable to the young person (substantive uncertainty); uncertainty of the procedure on raising fitness to stand trial as an issue (procedural uncertainty); consideration of the best interest of the client to finalise the matter quickly and obtain a desirable sentencing outcome by not raising fitness to stand trial as an issue (pragmatic/tactical reasons); lack of resources available to obtain an appropriate assessment; and any other reason not covered.

Procedure

Semi-structured interviews were conducted over the telephone. Initially the interview protocols were piloted with three lawyers and three youth justice officers. All interviews for the study were completed by research assistants blind to the study hypotheses. Training for the research assistants involved the authors describing the interview protocol, demonstrating the administration of the interview, and mock interviews. Interviews were initially conducted by two research assistants, with one asking the questions and both recording responses. After complete agreement was obtained for recording responses, the research assistants completed the interviews independently. Recruitment and data collection were consistent with approval received from Bond University Human Research Ethics Committee.

Results

Youth Justice Officers and Lawyers

Across the 40 legal and youth justice professionals, 133 juveniles were identified as potentially unfit for trial over a 12-month period. As can be seen in Table 1, there is considerable variance for the number of juveniles considered potentially unfit, with the greatest variance found among lawyers compared to youth justice officers, Levene's test $F(38) = 6.51$, $p = .02$. The variance is evident in the standard deviation as well as the range of juveniles for respondents ranging from none up to 18 juveniles identified. There is, however, no difference between the two professional groups in the mean number of potentially unfit juveniles, $t(25.34) = 1.03$, $p = .31$, power $1 - \beta = .35$.

Table 1. Number of juveniles for whom professionals had concerns about fitness.

Profession	*n*	*M*	*SD*	Range
Legal	20	3.90	4.62	0–18
Youth justice	20	2.75	1.91	0–7
Total	40	3.00	3.40	0–18

Concern regarding juvenile fitness for trial was identified across the whole age span of the Youth Justice Act [QLD] (1992) (11 to 17 years, $M = 14.07$, $SD = 1.59$). A substantial proportion of potentially unfit juveniles were of Aboriginal and Torres Strait Islander (ATSI) background (54.5%), while 9.0% of the identified juveniles were of an NESB. Intellectual impairment was considered the most prevalent basis for potential unfitness (36.8%), followed by immaturity (27.8%), and mental illness (26.3%). A total of 9 juveniles were reported as having sustained an ABI (6.8%), and substance abuse was considered the basis of potential unfitness for a further 3 juveniles (2.3%).

Approximately half of the 133 juveniles were referred to a psychiatrist or psychologist for assessment regarding unfitness for trial (Table 2). With the majority of lawyers and youth justice officers reporting multiple potentially unfit juveniles, analyses were conducted using SPSS Complex Samples Version 20 (IBM Corp 2011). The sample of juveniles was clustered within the 40 participants. Statistical analysis involving the continuous variable of age was conducted using an analysis of variance (ANOVA) with a Wald test. For the remaining analyses, Rao–Scott chi-square tests with an adjusted F (F_{adj}) were conducted for statistical significance, and adjusted residuals were examined for significant difference between cells. Due to the complex samples analyses, power analyses and effect sizes were not available.

The underlying basis for potential unfitness was significantly different according to age, $F(3, 28) = 5.56$, $p = .004$, and ATSI background, $\chi^2 = 15.79$, $F_{adj}(2.30, 69) = 3.39$, $p = .033$, but not for NESB, $\chi^2 = 4.89$, $F_{adj}(2.53, 75.81) = 1.18$, $p = .32$. As presented in Table 2, immature juveniles were significantly younger compared to juveniles suffering from a mental illness. Intellectual impairment was less prevalent for ATSI juveniles compared to non-ATSI juveniles, while the opposite pattern was found for immaturity.

As anticipated, immature youth were significantly less likely to be referred for expert assessment compared to juveniles with suspected mental illness, intellectual impairment, and ABI/other juveniles, $\chi^2 = 38.16$, $F_{adj}(2.70, 81.15) = 7.29$, $p < .001$. In contrast to non-indigenous juveniles, ATSI youth were significantly less likely to be referred to a mental health professional for assessment, 33.3% vs 71.7%, $\chi^2 = 19.24$, $F_{adj}(1, 30) = 7.65$, $p = .01$. Referral rates were examined for differences between indigenous and non-indigenous youth within each condition. The difference was not statistically significant for mental illness, $\chi^2 = 0.20$,

Table 2. Demographics and mental health referral across bases for potential unfitness.

Condition	*n*	Age, *M* (*SD*)	ATSI %	NESB %	MHR %
Mental illness	35	14.91 (1.40)*	44.1	8.9	68.6*
Intellectual impairment	49	14.06 (1.53)	40.8*	11.1	69.4*
Immaturity	37	13.27 (1.39)*	81.1*	2.7	8.1*
ABI/other	12	14.08 (1.78)	58.3	0.0	50.0*
Total	133	14.07 (1.59)	54.5	7.9	50.4

Note: ABI = acquired brain injury; ATSI = Aboriginal and Torres Strait Islander; MHR = referred to mental health professional for assessment; NESB = non-English-speaking background. $^*p < .05$.

Table 3. Proportion of juveniles with potential *Presser* ability deficits by underlying condition.

		Presser rule (percentage)				
Condition	n	1	2	3	4	5
Mental illness	35	65.7	82.9	82.9*	88.6	80.0
Intellectual impairment	49	55.1	85.7	73.5	77.6*	71.4
Immaturity	37	29.7	89.2	45.9*	97.3*	94.6
ABI/other	12	83.3	100.0	91.7	100.0	50.0
Total	133	53.4	87.2	69.9	88.0	78.2

Note: ABI = acquired brain injury. *Presser* rules: 1 = nature of the charge; 2 = nature of the proceedings; 3 = communication with counsel; 4 = pleas, elections and defences; 5 = decisions in best interests. $^{*}p < .05$.

$F_{adj}(1, 20) = 0.16$, $p = .69$, ABI/other, $\chi^2 = 3.09$, $F_{adj}(1,3) = 3.12$, $p = .18$, or immaturity, $\chi^2 = 0.76$, $F_{adj}(1, 13) = 0.21$, $p = .65$. For intellectually impaired juveniles however, ATSI youth were less frequently referred for assessment (45.0%) compared to non-ATSI intellectually impaired juveniles (86.2%), $\chi^2 = 9.46$, $F_{adj}(1, 21) = 5.91$, $p = .024$.

Potential deficits in relevant *Presser* abilities (*R v Presser*, 1958) are presented in Table 3. Respondents could identify multiple abilities that may have been a deficit for each juvenile. Across all conditions, potentially unfit juveniles were primarily considered as being likely to have difficulties in: following the nature and course of legal proceedings; understanding and making decisions regarding pleas, elections and defences; and making decisions in their best interests. Difficulty understanding the nature of the charge was found to be a less frequent concern, though still a potential deficit for over half of the juveniles. Analyses were conducted to evaluate the differences between the underlying condition across the five *Presser* abilities. Due to the small sample size, ABI/other impaired youth were excluded from analyses. No significant difference was identified for the remaining three conditions for the *Presser* abilities of understanding charges, $\chi^2 = 10.04$, $F_{adj}(1.62, 48.60) = 1.92$, $p = .16$, understanding proceedings, $\chi^2 = 0.60$, $F_{adj}(1.97, 59.15) = 0.16$, $p = .85$, and decision-making, $\chi^2 = 7.38$, $F_{adj}(1.76, 52.82) = 2.25$, $p = .12$. The difference between the underlying conditions was statistically significant for understanding pleas, $\chi^2 = 7.30$, $F_{adj}(1.98, 59.49) = 3.29$, $p = .045$, and approached significance for communicating with counsel, $\chi^2 = 12.44$, $F_{adj}(1.51, 45.21) = 3.13$, $p = .067$. Adjusted residuals indicate that mentally ill youth are perceived as having significantly more problems in communicating with counsel compared to immature youth. Conversely, immature youth are described as having more difficulty in understanding pleas, elections and defences compared to juveniles with intellectual impairment.

Non-referral to the Mental Health Court

All survey respondents provided ratings for the extent to which they perceive substantive uncertainty, procedural uncertainty, pragmatic/tactical reasons, lack of resources, and other reasons as bases for failure to refer potentially unfit juveniles. The level of agreement for each prompt is presented in Table 4, with lower scores indicating the statement was considered a more important reason why juveniles were not referred to the MHC.

In evaluating the reasons for not referring a potentially unfit juvenile to the MHC, the difference between the professional groups by reason for non-referral was not statistically significant, $F(3, 36) = 1.04$, $p = .39$, $\eta^2 = .08$. Across both professional groups, juveniles were significantly more likely to not be

Table 4. Professional ratings for reasons for non-referral to mental health court.

	Legal	Youth justice	Total
n	20	20	44
Substantive uncertainty	2.75 (1.58)	2.40 (1.05)	2.57 (1.34)*
Procedural uncertainty	2.55 (1.28)	2.35 (1.09)	2.45 (1.18)*
Pragmatic/tactical reasons	1.85 (1.23)	1.80 (0.89)	1.83 (1.06)*
Lack of resources	2.10 (1.25)	2.55 (1.47)	2.33 (1.37)
Other	1.75 (1.00)	1.76 (0.83)	1.76 (0.90)

Note: $^{*}p < .05$.

referred for pragmatic/tactical reasons compared to substantive uncertainty and procedural uncertainty, $F(3, 36) = 3.25$, $p = .033$, $\eta^2 = .21$. Other reasons specified by the participants included professionals lacking competence and knowledge, professionals not being concerned about juvenile fitness, and the MHC process being too lengthy.

Discussion

Previous research based on data from the Queensland MHC revealed that over the five-year period from 2006 to 2011, the average number of children referred per year was only 7 (O'Leary et al., 2013). As hypothesised, over the 12-month period of this research, the legal and youth justice professionals surveyed identified a much larger number of children for whom they had concerns about unfitness. This suggests that there is a larger proportion of juvenile offenders who may be unfit for trial yet not ultimately referred to the MHC. These juveniles comprise the full age spectrum of juveniles involved in youth justice, not just younger adolescents as was expected based on previous research.

As hypothesised, intellectual impairment is the reason most frequently given about underlying concerns regarding fitness for trial for both groups. The relevance of intellectual impairment among juveniles found incompetent has been highlighted internationally by McKee and Shea (1999), Baerger et al. (2003), and McGaha et al. (2001). Immaturity is often identified in the current study as a potential basis for unfitness among juvenile defendants, consistent with Viljoen et al. (2010). While immaturity is increasingly recognised as a basis for incompetence internationally (O'Donnell & Gross, 2012), Australia has yet to consider immaturity regarding fitness for trial. Consequently juveniles, who by the manifestations of their current development, are not able to participate satisfactorily in legal proceedings, may nevertheless continue through the criminal justice system.

ATSI youth comprised approximately half of all juveniles about whom the participants had concerns regarding fitness for trial. Overrepresentation of ATSI youth in the Australian justice system is widely recognised. Indigenous juveniles are more likely than non-indigenous juveniles to be arrested, to be under community supervision, and to be held in youth detention (Allard, Chrzanowski, & Stewart, 2013). A census count of juveniles held in detention centres across Australia found that 54.7% of the youth population were indigenous (Richards, 2011). Though overrepresented within the justice system, the present findings are that ATSI juveniles are less likely to be referred for expert assessment compared to non-ATSI youth. This finding is most evident for intellectually impaired juvenile offenders. Failure to refer ATSI youth with intellectual impairments for expert assessment raises concern regarding the fairness of such legal proceedings, considering that these youths' ability to understand the

nature of the charge or proceedings, instruct counsel and plead to charges are compromised, thereby not fulfilling the *Presser* abilities needed to make decisions in their best interests (*R v Presser,* 1958).

The hypothesis that the themes for deciding not to raise unfitness would include substantive, procedural and tactical reasons is partially supported. Essentially, tactical and pragmatic reasons are most frequently identified by the participants as a basis for not referring juvenile defendants for evaluation of fitness for trial. This finding is consistent with Grisso's (1999) work highlighting advocate uncertainty as a potential reason for not raising competence concerns among juveniles. Comparably, Viljoen et al. (2010) identified pragmatic and tactical reasons among attorneys for not referring juveniles for evaluation. The importance of pragmatic and tactical reasons was particularly pertinent within the Queensland context at that time, as potentially unfit juveniles faced lengthy delays in legal proceedings, uncertainty of outcome, and an absence of facilities designed for juveniles found unfit for trial (O'Leary et al., 2013). While arguably some of these problems may now be lessened with the introduction of the new legislation, they are by no means solved.

Limitations of sample size, the retrospective nature of the study, and making enquiries about concepts potentially beyond the expertise of the respondents necessitates caution in the interpretation of this study's results. The small sample size of professionals recruited for the current study also limits the generalisability of the conclusions. This could have limited the power of the statistical analyses, although this could not be determined due to the complex nature of the data analyses. The interview required participants to recall juveniles encountered over the preceding 12 months. Further, participants were asked to respond to questions that may have been outside their field of expertise. Non-mental-health professionals were asked to identify relevant underlying conditions contributing to concerns regarding fitness for trial, and non-legal professionals were asked to identify the area of deficit regarding the legal competence of fitness for trial. The limitations of the response rate, retrospective recall, and possible varying interpretations across participants are not limited to the current study (Viljoen et al. 2010). Due to the design of the study, there is a possibility that some youths were double counted – that is, multiple professionals interviewed may have had concerns about the same individual. Conversely, the sample size of practitioners does not cover the field of those lawyers and youth justice officers who work in this area, and as such the possibility that there are *more* youths who have not been seen by one of the professionals that we surveyed cannot be discounted.

Notwithstanding the study's limitations, the findings highlight the need for further investigation of juvenile fitness for trial. There is a need to compare procedures for ascertaining juvenile fitness for trial across Australian jurisdictions. Limited research has compared mental health experts' methods for assessing juvenile fitness for trial to clarify both current practice and best practice for appraising fitness. No studies within Australia have utilised standardised measures of competencies relevant to fitness for trial in order to appraise prevalence rates of deficits among juvenile offenders. Further research is required to ensure that the fundamental tenets of a fair trial are maintained, especially for juveniles, who require more protection and guidance compared to their adult counterparts.

Notes

1. For example, at the time of writing, juveniles have a separate sentencing regime in Queensland (Youth Justice Act [QLD], 1992). Where imprisonment is considered, judges can only order the lesser of half the maximum term of imprisonment that an adult convicted of the offence could be ordered to serve or five years (Youth Justice Act [QLD], 1992, §175(1)(g)(ii)), or for relevant offences other than life offences a maximum of seven years (§176(2)), or for life offences the limit is generally ten years (§176(3)(a)). The exception, where a

juvenile may be liable to a maximum of life imprisonment – the same penalty as an adult offender – is only possible for life offences involving violence against a person if the court considers the offence to be particularly heinous (§176(3)(b)).
2. See also Mental Health Act [QLD] (2016, chapter 6, part 2, division 1). There have been other significant changes to the law since the advent of the Mental Health Act [QLD] (2016). Most of these changes are irrelevant for the purposes of this paper, and so are not further considered. If a change does bear on the discussion, it is articulated specifically.
3. Referrals can also be made by the attorney-general or the director of public prosecutions; if the individual is receiving treatment for mental illness, or receiving care under this act for an intellectual disability, then referral can be made by the director: Mental Health Act [QLD] (2000, §257). The Mental Health Act [QLD] (2016, §110(5)) also makes provision for courts to make referrals.
4. However, these threshold requirements of mental illness and intellectual disability have been removed under the Mental Health Bill [QLD] (2015, §110).
5. This is without doubt included in the Mental Health Bill [QLD] (2015), as the explanatory note states that the 'Bill does not define "fit for trial" but relies on the common law, as is the case in the criminal jurisdiction in Queensland' (clause 118).
6. The survey form has been condensed, with repeated items and interviewer instructions omitted.

Disclosure Statement

No potential conflict of interest was reported by the authors. The content presented in this document results from Bond University, with access to data granted by the Queensland Government Justice and Attorney General. The content is not intended to create, does not create, and may not be relied upon to create any rights, substantive or procedural, enforceable by law by any party in any matter, civil or criminal. Opinions or points of view expressed in this document do not necessarily represent the official position or policies of the Queensland Government. The findings discussed in this document are presented for informational purposes only and do not constitute approval or necessary endorsement by the Queensland Government.

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Appendix 1

Lawyer Survey for Queensland Juvenile Fitness for Trial[6]

The Mental Health Act [QLD] (2000) Schedule 2 defines 'fit for trial' as fit to plead at the person's trial and to instruct counsel and endure the person's trial

We will be asking a series of questions about the different types of cognitive impairments related to unfitness:

- Mental illness: psychological syndrome or pattern that is associated with present distress, or disability.
- Intellectual impairment: originates before age 18, significant limitations in conceptual, social, and practical adaptive skills.
- Immaturity: less well developed traits and characteristics compared to adults being processed in the justice system.
- Acquired brain injury: brain damage caused by events after birth.
- Other: any other cognitive impairment that you consider relevant or important can be included/discussed in this interview.

In the preceding twelve months how many juveniles have you encountered in the juvenile justice system whom you considered may have been unfit/or for whom you had concerns about their fitness?

Of the relevant juveniles how many fall into each of the following categories of reasons for unfitness and what were their respective ages? Mental illness/intellectual impairment/acquired brain injury/immaturity/other 10__ 11__ 12__ 13__ 14__ 15__ 16__ 17__ years.

Questions regarding Each Juvenile Who May Have Been Unfit

Aboriginal or Torres Strait Islander descent. [Yes/No]

Non-English-speaking background. [Yes/No]

What abilities were of concern?

(a) Did you have concerns about the juvenile's ability to understand the nature of the charge? [Yes/No]
(b) Did you have concerns about the juvenile's ability to understand the nature of the proceedings, to follow the course of the proceedings and to understand the effect of evidence against them? [Yes/No]
(c) Did you have concerns about the juvenile's ability to communicate with counsel? [Yes/No]
(d) Did you have concerns about the juvenile's ability to understand and make decisions, related to pleas, elections and defences? [Yes/No]
(e) Did you have concerns about the juvenile's ability to make decisions in his or her best interests? [Yes/No]

How many expert reports were requested? [Number of psychiatrists/psychologists/other professionals]

If the juvenile was referred to a psychiatrist/psychologist for assessment in relation to unfitness due to mental illness, what was the diagnosis and what were the assessment findings?

[Diagnosis of Fit/Unfit for trial (non-permanent)/Unfit for trial (permanent)/Other]

For this juvenile, did you write to the prosecution seeking discontinuance on the basis of unfitness? [Yes/No] If yes, were the matters discontinued as a consequence? [Yes/No]

For this juvenile, were fitness issues raised in the court process? [Yes/No] If yes, was it referred to the Mental Health Court? [Yes/No]. If yes, what was the outcome from the Mental Health Court? [Unsound mind/Fit/unfit for trial (non-permanent)/Unfit for trial (permanent)/Ongoing]. If unfit for trial, was a forensic order made? [Yes/No]

If the juvenile was not referred to the Mental Health Court because the offence type was outside jurisdiction, what was the outcome? Was there another reason for the non-referral to the Mental Health Court?

General Questions regarding Juvenile Fitness for Trial

I will give you a number of potential reasons why in some instances professionals have concerns about unfitness but do not make referrals. Based on your observations of the juvenile justice system in Queensland (not limited to the last year), we ask you to rate on a 5-point scale how much you agree or disagree if each of the following statements are potential reasons for non-referral. 1 = *strongly agree*, 2 = *agree*, 3 = *neither agree nor disagree*, 4 = *disagree*, 5 = *strongly disagree*

(a) Substantive uncertainty (e.g. did not know the law/was not sure if the law relating to fitness would apply to the young person).
(b) Procedural uncertainty (e.g. did not know the procedure relating to how to raise fitness).
(c) Pragmatic/tactical reasons (e.g. relatively minor charge not justifying raising fitness, interests of client best served by finalising matter quickly and via desirable sentencing outcome).
(d) Lack of resources available to obtain an appropriate assessment.
(e) Other.

Do you have any recommendations you would make regarding procedures for dealing with juveniles who are potentially unfit for trial?

In what ways have you found cultural issues/foetal alcohol syndrome/dual order (child protection and juvenile justice) relevant regarding unfitness for trial?

Are there any other questions that we should have asked in this research?