



Juvenile Fitness for Trial in Queensland  
Formal Report

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## JUVENILE FITNESS FOR TRIAL IN QUEENSLAND

The Law Commission in the United Kingdom (2010) highlighted that issues of competence were more acute for juvenile offenders than for adults. The Commission referred to the MacArthur Juvenile Competence Study from the United States, which investigated differences in adjudicative competence ability between adults and adolescents (Grisso et al., 2003). That study determined that juveniles, aged below 16 years, are more likely to have competence-related impairments in comparison with older adolescents and young adults.

The law and procedure regarding fitness to stand trial for juveniles has also been the focus of recent consultation papers by law reform agencies in Australia (New South Wales Law Reform Commission 2010, Victorian Law Reform Commission 2013). However, little research has examined juvenile fitness for trial within the Australian context. The focus of the current study was on one Australian jurisdiction, Queensland.

The juvenile justice system in Queensland applies to juveniles below 17 years of age at the time of offending: *Youth Justice Act 1992* (Qld) Sch 4 definition of 'child'. Those charged with offences first appear before a Childrens Court Magistrate and those facing more serious indictable charges may be required to proceed to a Higher Court, usually the Childrens Court of Queensland. Youth Justice officers are involved in Childrens Court matters by way of supervising young people subject to sentence orders as well as being present in court for most Childrens Court matters.

In dealing with juveniles who may be unfit for trial, Magistrates do not have any statutory power to dispose of a matter on the ground of unfitness and hence there is little recourse to the court on fitness grounds for simple or less serious offences (see *R v AAM; ex parte A-G (Qld)* [2010] QCA 305). Instead lawyers who have concerns about fitness could make a submission to the police prosecutors to offer no evidence in relation to the matter. For more serious offences the Mental Health Court is generally required to make determinations of unfitness relating to children (O'Leary, O'Toole, & Watt, 2012). A matter only proceeds to the Mental Health Court upon referral, usually by the accused or their lawyer, who will obtain a supporting report from a mental health professional. Referrals can be made where there is reasonable cause to believe that a person is or was mentally ill or has an intellectual disability (*Mental Health Act 2000* (Qld) s 256). Referrals cannot be made where immaturity alone forms the basis for unfitness.

Following referral to the Mental Health Court, the Court will first consider whether the accused was of unsound mind at the time of the alleged offence. Once unsoundness of mind is excluded, the Mental Health Court will determine whether the person is fit for trial (*Mental Health Act 2000* (Qld) s 270). Fitness to stand trial means 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 2000* (Qld) Schedule Dictionary). Fitness to plead is not

further defined but is informed by the common law as outlined initially in *R v Presser* [1958] VR 45. To be fit the Presser test stipulates that accused persons must meet minimum standards of competence. An accused needs to be able to: understand the nature of the charge; plead to the charge; exercise the right to challenge the empanelling of jurors; make a defence or answer the charge; understand the nature of proceedings and be able to follow proceedings in a general sense, as well as the substantial effect of evidence led by the prosecution; and be able to instruct counsel.

Due to the lack of research on juvenile competence in Australia, the current study aimed to:

- Study the number of juveniles for whom unfitness was raised and who were found unfit, compared to adults in Queensland.
- Obtain information about the demographics of accused children in Queensland with potential fitness issues.
- Examine how frequently Queensland professionals (lawyers and Youth Justice officers) at the initial point of contact:
  - had concerns about juveniles' fitness,
  - for those young people of concern, which of the capacities outlined in the Presser test were of particular concern, and
  - if there was any relationship between those concerns and the juvenile's characteristics.
- Investigate the reasons that lawyers in Queensland did not raise issues of fitness.
- Explore the rate that mental health professionals made findings of unfitness.

The hypotheses of the study were that:

- Significantly less juveniles, as compared to adults, would have had unfitness raised as an issue.
- There would be a larger proportion of juveniles potentially lacking the necessary competencies to be fit for trial (but this was not raised), compared to those who were referred for expert assessment and those referred to the Mental Health Court.
- Intellectual impairment would be the most frequent basis for concern regarding unfitness, followed by mental illness, then immaturity.
- The reasons for not raising fitness for trial would be substantive, procedural and tactical.

## Methods

The study involved two parts. First, data from the Mental Health Court regarding the referrals received between 2006 and 2011 was obtained for analysis of the referral frequency and Court outcomes. Secondly, the aim was to complete 20 interviews with each of three professional groups, Youth Justice officers, mental health professionals and lawyers.

## Participants and Recruitment

A total of 24 Youth Justice centres, 75 psychologists and psychiatrists, and 36 lawyers were contacted via email and phone and provided with information regarding the study. Twenty Youth Justice officers (based in urban, regional and remote offices with working experience of participants ranging from 1.5 to 30 years –  $M = 8.56$ ,  $SD = 7.75$ ), 20 lawyers (based in urban, regional and remote offices with working experience of participants ranging from 1.5 to 30 years –  $M = 8.75$ ,  $SD = 7.39$ ) and eight mental health professionals (all based in urban offices with working experience of participants ranging from 8 to 30 years –  $M = 16.57$ ,  $SD = 7.87$ ) agreed to participate.

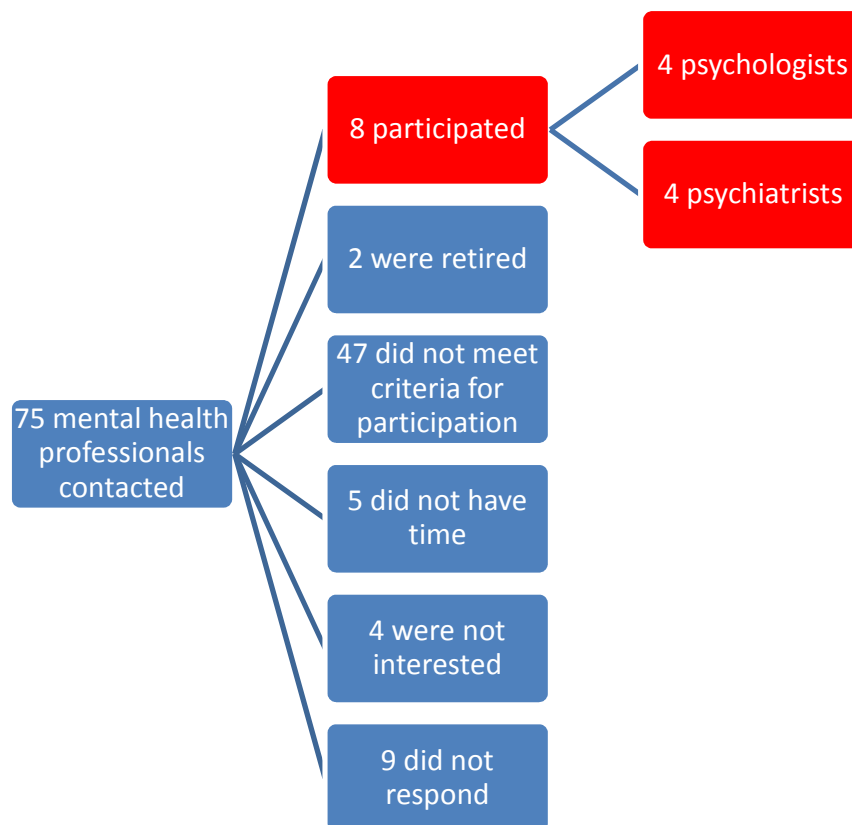


Figure 1. Distribution of mental health professionals contacted for interview



Figure 2. Distribution of Youth Justice officers contacted for interview

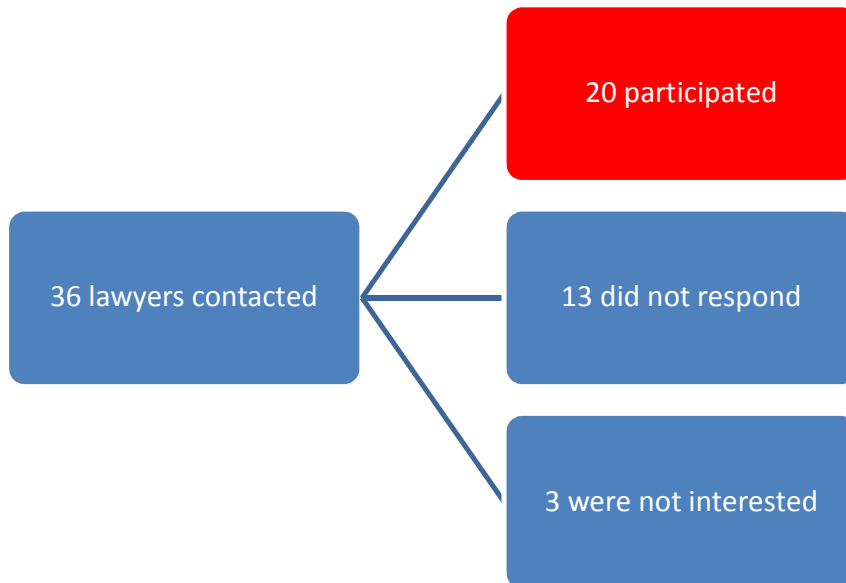


Figure 3. Distribution of lawyers contacted for interview

## Measure

A semi-structured interview was developed to evaluate professionals' experience of juveniles who were unfit or potentially unfit for trial. The components of the interview are shown in Figure 4.

Definitions provided	Profession specific questions	Observation of Queensland practice regarding trial fitness for juveniles
<ul style="list-style-type: none"><li>• Definition of fitness for trial</li><li>• Conditions focused on:<ul style="list-style-type: none"><li>• Mental illness</li><li>• Intellectual impairment</li><li>• Immaturity</li><li>• Acquired brain impairment</li></ul></li></ul>	<ul style="list-style-type: none"><li>• <b>For lawyers and Youth Justice officers</b></li><li>• Number of juveniles for whom they had concerns about fitness for trial in the preceding 12 months</li><li>• For each juvenile of concern<ul style="list-style-type: none"><li>• Age</li><li>• Relevant underlying condition</li><li>• Indigenous status</li><li>• Whether from a non-English speaking background</li><li>• Presser abilities of concern</li><li>• Number of expert reports requested<ul style="list-style-type: none"><li>• Diagnosis</li><li>• Appraisal of unfitness for trial</li></ul></li></ul></li><li>• Legal decisions made by lawyers<ul style="list-style-type: none"><li>• Discontinuance sought from prosecution</li><li>• Referral to Mental Health Court<ul style="list-style-type: none"><li>• Basis for non-referral</li></ul></li><li>• Relevant outcomes</li></ul></li><li>• <b>For mental health professionals</b></li><li>• Requests received for fitness for trial assessments for juveniles in preceding 12 months<ul style="list-style-type: none"><li>• Whether assessed as unfit</li><li>• Age</li><li>• Relevant condition</li><li>• Indigenous status</li><li>• Whether from a non-English speaking background</li><li>• Presser abilities of concern</li><li>• Referral to Mental Health Court and outcome</li></ul></li></ul>	<ul style="list-style-type: none"><li>• Five point Likert-type scale for potential non-referral reasons (strongly agree to strongly disagree)<ul style="list-style-type: none"><li>• substantive uncertainty</li><li>• procedural uncertainty</li><li>• pragmatic/tactical reasons</li><li>• lack of resources</li><li>• other reasons</li></ul></li><li>• Broader contextual factors<ul style="list-style-type: none"><li>• cultural issues</li><li>• foetal alcohol syndrome</li><li>• dual orders (child protection and juvenile justice)</li></ul></li><li>• Recommendations for dealing with potentially unfit juveniles in Queensland</li></ul>

Figure 4. Outline of semi-structured interview

## **Procedure**

The suitability of the questions was tested in an initial pilot involving three lawyers, three Youth Justice officers and two mental health professionals. Two research assistants were trained to conduct the interviews. The study hypotheses were not provided to the research assistants. At commencement of the study, the two research assistants conducted the interviews together, one asking the questions and both recording responses to establish inter-rater reliability.

Subsequently, the research assistants completed the interviews independently. All interviews were conducted via telephone.



## Results

### Mental Health Court Data Analysis

There were 1223 references to the Mental Health Court between 2006 and 2011. This represents approximately 0.12% of all adult and juvenile defendants over the same time period. According to the Annual Magistrates Court Reports 973 132 defendants appeared before the Magistrates Court over that period and 54 756 appeared before the Childrens Court. As displayed in Figure 5, a large majority of the Mental Health Court references each year were for adults (average of 97.14%), as compared to persons under 17 years of age (average of 2.86%). Only 0.06% of the total accused juveniles were referred to the Mental Health Court, which is proportionately half of the total accused adults (0.12%).

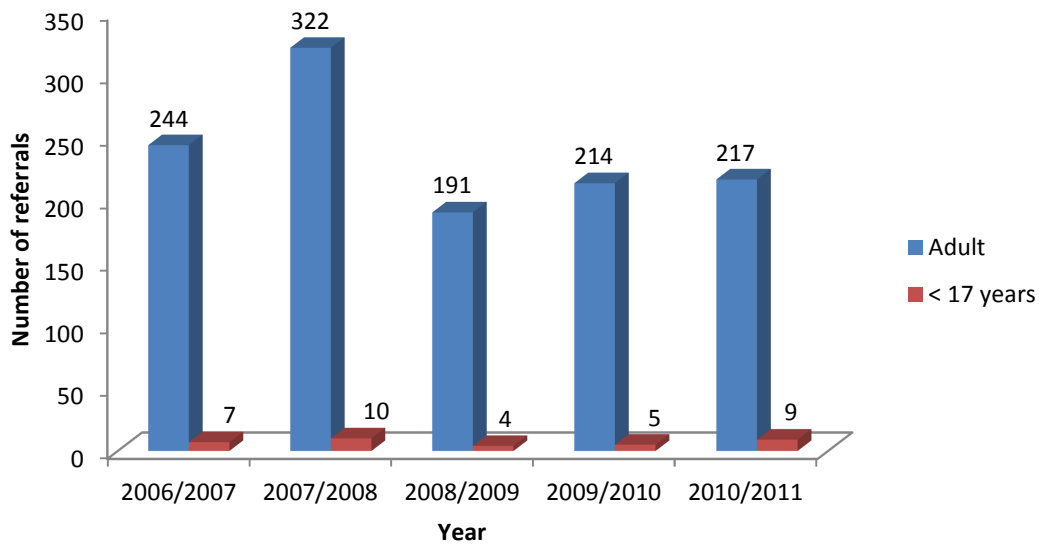


Figure 5. Referrals to the Mental Health Court between 2006 and 2011

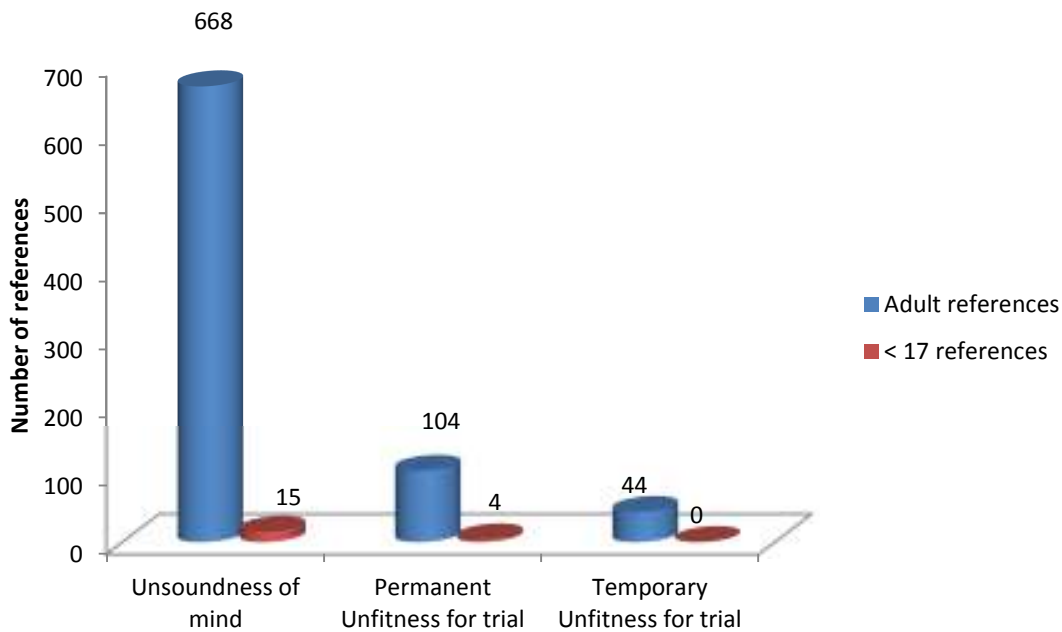
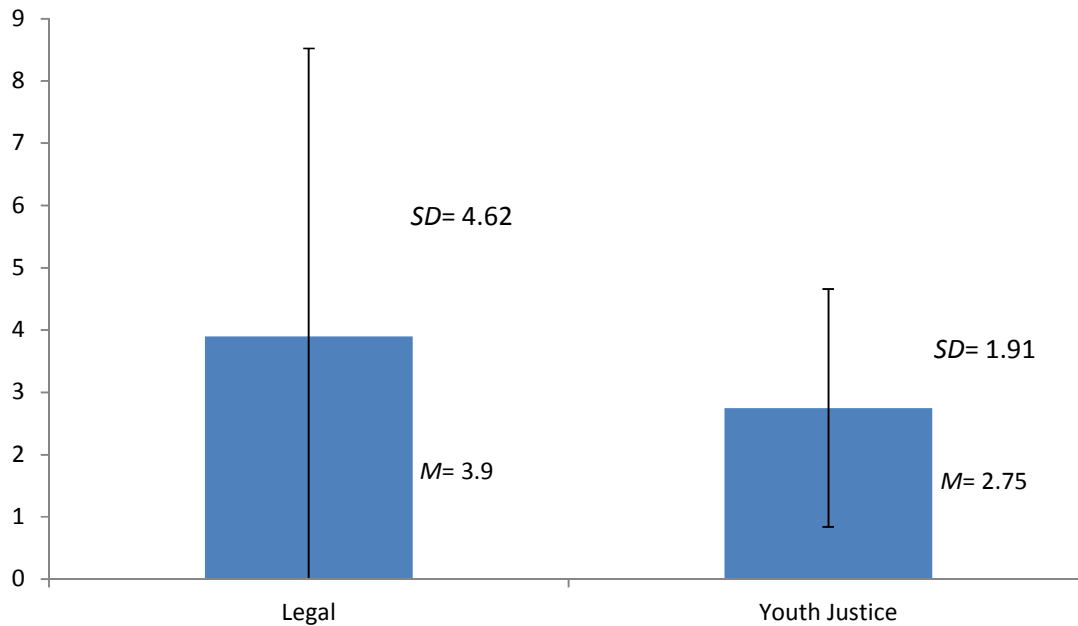


Figure 6. Findings by the Mental Health Court between 2006 and 2011

As discussed earlier, referrals to the Mental Health Court are first considered for unsoundness of mind at the time of the alleged offence. Of those 1223 referred to the Mental Health Court, 56.2% of the adult referrals and 42.9% of the juvenile referrals were determined to be of unsound mind at the time of the offence. Of the remaining referrals, 152 were found to be unfit for trial, including 108 determined to be permanently unfit, with their matters discontinued with or without an accompanying forensic order. The remaining findings of unfitness were of a temporary nature (N=44) where the matter was stayed with an accompanying forensic order and pending later fitness reviews. These findings of unfitness were comparable for adult (12.46%) and juvenile (11.43%) defendants when considering the total adult and juvenile referrals to the Mental Health Court. However, about 30% of unfit adults were found temporarily unfit and no juveniles were found temporarily unfit.

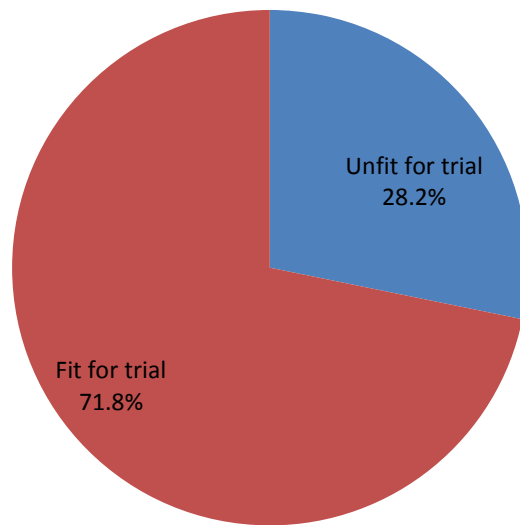
When considering the total number of adult and juvenile defendants respectively only 0.0073% of the 54756 juveniles were found unfit while the percentage for the 973 132 adults was more than double at 0.0152%. Juveniles are less than half as likely to be found unfit in Queensland as adults.

*Semi-structured interview*



*Figure 7.* Mean and standard deviation for the number of juveniles identified as potentially unfit for trial by legal and youth justice professional groups

Legal and Youth Justice personnel identified a total of 133 juveniles as potentially unfit for trial over a 12 month period. As seen in Figure 7, there was considerable variance between professionals as to the number of juveniles considered unfit, with greater variance found for lawyers compared to Youth Justice personnel (Levene's test  $F(38) = 6.51, p = .02$ ). This indicates that there is much larger discrepancy between lawyers as to the juveniles they considered potentially unfit trial, compared to Youth Justice personnel. There was, however, no significant difference between the two professional groups in the mean number of potentially unfit juveniles,  $t(25.43) = 1.03, p = .31$ . The age span of the juveniles identified by the legal and Youth Justice professionals was 11 to 17 years ( $M = 14.07; SD = 1.59$ ). Of those juveniles, more than half (54.5%) were of Aboriginal and Torres Strait Islander background and a small percentage (9%) came from a non-English speaking background (NESB).



*Figure 8.* Percentage of juveniles assessed by mental health professionals

As outlined in Figure 4, mental health professionals were asked about fitness assessments they had completed. The mental health professionals received a total of 39 referrals for fitness assessment over the preceding 12 months, with 11 juveniles assessed as unfit for trial (28.2%). Mental health professionals indicated that referrals typically involved conjoint assessment of unsoundness of mind and fitness for trial. Juveniles assessed by the mental health professionals were between 12 and 17 years ( $M= 14.79$ ,  $SD= 1.36$ ). 20.5% were indigenous and 2.6% were from a NESB.

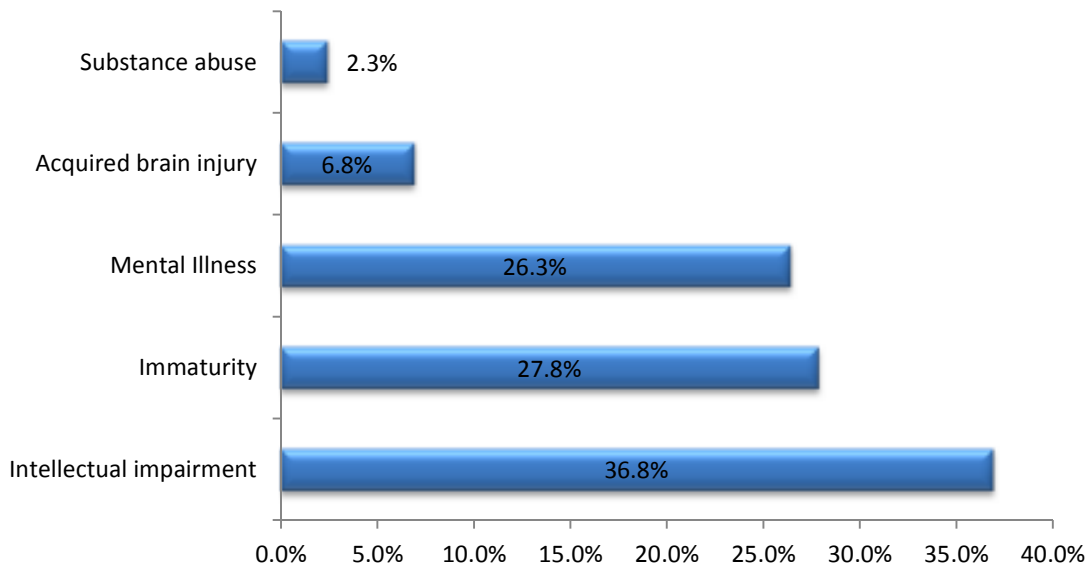


Figure 9. Conditions underlying potential unfitness as identified by lawyers and Youth Justice officers

As shown in Figure 9, legal and Youth Justice professionals identified intellectual impairment as the most prevalent reason for potential unfitness. This is followed by immaturity and mental illness. Comparatively, there were smaller percentages of young people identified as having an acquired brain injury or substance abuse (other) that impacted upon fitness.

As displayed in Table 1, the underlying basis for unfitness for trial differs significantly according to age,  $F(4, 128) = 6.33, p < .001, \eta = .16$ , and indigenous background,  $\chi^2(4, N=132) = 18.60, p = .001, \phi = .38$ , but not for NESB,  $\chi^2(4, N=133) = 4.89, p = .30, \phi = .19$ . Immaturity was more often cited as a source of potential unfitness among younger juveniles and those from an indigenous background as opposed to mental illness. On the other hand, intellectual impairment was less prevalent for indigenous juveniles compared to non-indigenous juveniles.

Approximately half (50.4%) of the 133 juveniles that the legal and Youth Justice professionals identified as potentially unfit were referred to a psychiatrist or psychologist for a fitness assessment. Those with a suspected intellectual impairment or mental illness were significantly more likely to be referred for expert assessment, compared to immature juveniles ( $\chi^2(1, N=133) = 42.16, p < .001, \phi = .56$ ). Significantly less indigenous juveniles (33.3%), as compared to non-indigenous juveniles (71.7%) were referred to a mental health professional for assessment,  $\chi^2(1, N=150) = 19.24, p < .001, \phi = .38$ . In particular, indigenous juveniles with intellectual impairment were less frequently referred for assessments (45.0%) compared to non-indigenous intellectually-impaired juveniles (86.2%),  $\chi^2(1, N=49) = 9.46, p = .002, \phi = .44$ .

Table 1

Age, ethnicity and English proficiency across different conditions underlying potential unfitness

Condition	N	Age M (SD)	Indigenous %	NESB %	MH Referral %
Mental Illness	35	14.91 (1.40) a	44.1	8.9	68.6 <sup>a</sup>
Intellectual Impairment	49	14.06 (1.53)	40.8 <sup>a</sup>	11.1	69.4 <sup>a</sup>
ABI	9	13.67 (1.87)	44.4	0.0	66.7
Immaturity	37	13.27 (1.39) <sup>b</sup>	81.1 <sup>b</sup>	2.7	8.1 <sup>b</sup>
Other	3	15.33 (0.58)	100.0	0.0	0.0
Total	133	14.07 (1.59)	54.5	7.9	50.4

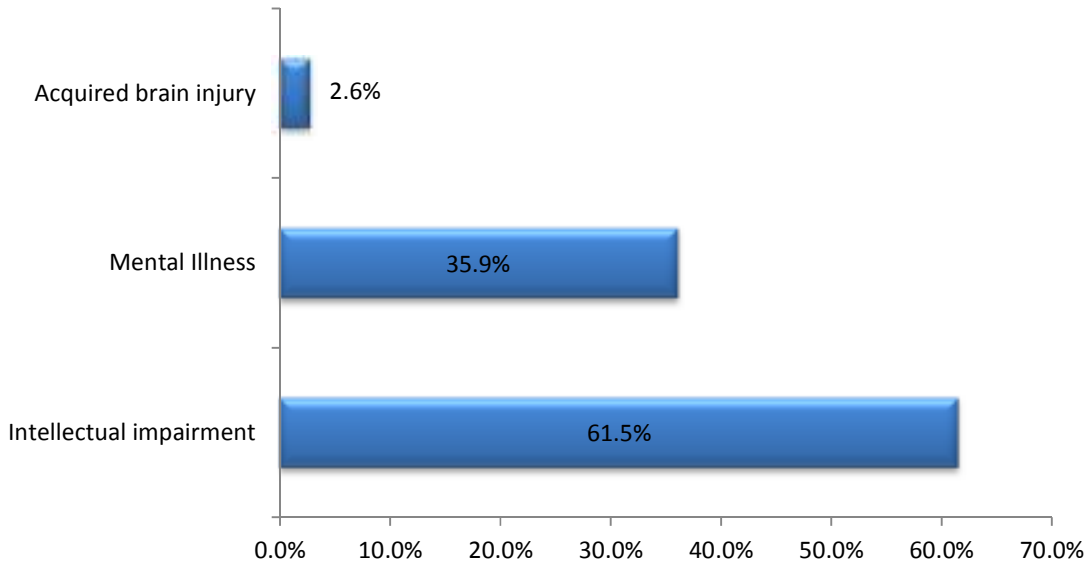


Figure 10. Diagnosed condition by mental health professionals

Among those young people assessed, mental health professionals diagnosed intellectual impairment most frequently as impacting upon fitness, as presented in Figure 10.

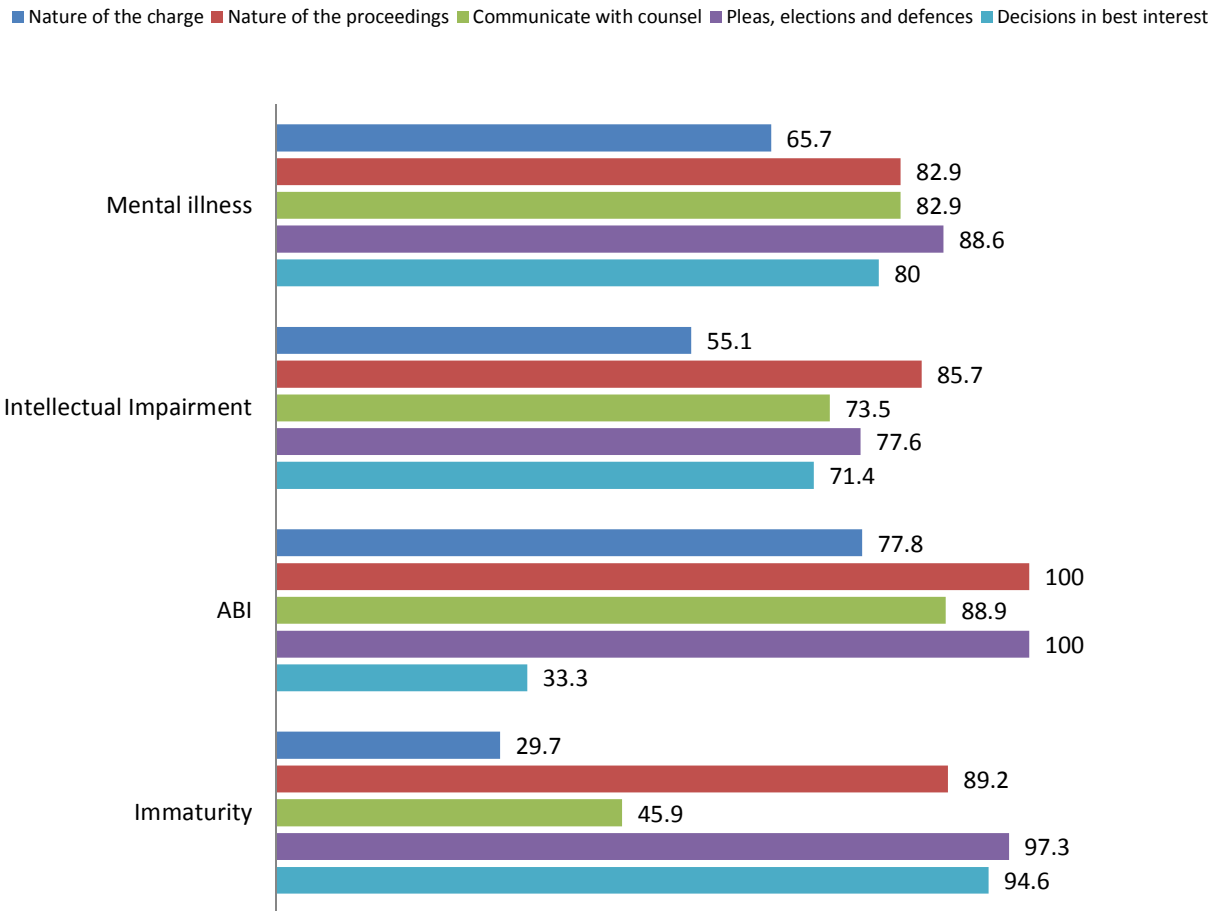


Figure 11. Potential deficits in relevant *Presser* abilities identified by the legal and Youth Justice professionals

Figure 11 presents the potential deficits in *Presser* abilities. Across all conditions, juveniles identified as potentially unfit were considered most 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. Immature juveniles were considered to have significantly more difficulty in understanding pleas, elections and defences,  $\chi^2(4, N=133) = 9.72, p = .045, \phi = .27$  and in making decisions in their best interests,  $\chi^2(4, N=133) = 18.68, p = .001$ , compared to mentally ill and intellectually impaired juveniles. In contrast, immature juveniles were considered to have a lower rate of impaired ability in understanding charges,  $\chi^2(4, N=133) = 15.29, p = .004, \phi = .34$ , and communicating with counsel,  $\chi^2(4, N=133) = 16.02, p = .003, \phi = .35$ , compared to juveniles with mental illness and intellectual impairment.

Also in relation to the *Presser* capacities mental health professionals found understanding proceedings (61.5%), making decisions (61.5%), and understanding pleas and defences (59.0%) were the most prevalent deficits of those assessed as unfit. Difficulties in communication with

counsel (48.7%) and understanding the charge (43.6%) were less prevalent though still quite common. The differences between conditions for the *Presser* rules were not statistically significant.

Referred to mental health expert?	Expert report juvenile as unfit?	Discontinuance requested from police?	Matter discontinued?	Fitness raised in Court?	Referred to Mental Health Court?
Yes 53.8%	Yes 19.2%	Yes 12.8%	Yes 5.1%	No 5.1%	No 5.1%
			No 7.7%	Yes 7.7%	Yes 7.7%
		No 6.4%	No 6.4%	Yes 6.4%	Yes 6.4%
	No 34.6%	Yes 9.0%	Yes 2.6%	No 2.6%	No 2.6%
			No 6.4%	Yes 6.4%	Yes 1.3%
			No 5.1%	No 5.1%	No 5.1%
		No 25.6%	Yes 2.6%	No 2.6%	No 2.6%
			Yes 10.3%	Yes 2.6%	Yes 2.6%
			No 7.7%	No 7.7%	No 7.7%
			No 12.8%	No 12.8%	No 12.8%

Figure 12. Legal decisions and referral pathways for juveniles referred to mental health professionals



Referred to mental health expert?	Discontinuance requested from police?	Matter discontinued?	Fitness raised in Court?	Referred to Mental Health Court?
No 46.2%	Yes 10.3%	Yes 1.3%	Yes 1.3%	No 1.3%
		No 9.0%	Yes 2.6%	Yes 1.3%
			No 6.4%	No 1.3%
			No 6.4%	No 6.4%
	No 35.9%	Yes 2.6%	No 2.6%	No 2.6%
		No 33.3%	Yes 5.1%	No 5.1%
			No 28.2%	No 28.2%
			No 28.2%	No 28.2%

Figure 13. Legal decisions and referral pathways for juveniles not referred to mental health professionals

Fourteen of the 20 lawyers interviewed identified 78 juveniles for whom they had concerns about fitness in the preceding 12 months. The legal decisions and referral pathways for those juveniles were evaluated. Just over half of the juveniles were referred for mental health evaluations (see Figure 12). Approximately one third of those juveniles were appraised by mental health experts as unfit, resulting in the matter either being discontinued by police or referred to the Mental Health Court. When juveniles were not appraised as unfit by mental health experts, requests for discontinuance were made in one quarter of these cases, though discontinuance often was not granted, resulting in fitness subsequently being raised in Court.

Where mental health reports were not sought most cases were not discontinued nor referred to the Mental Health Court (see Figure 13). While discontinuance requests were still made, the prosecution rarely offered no evidence.

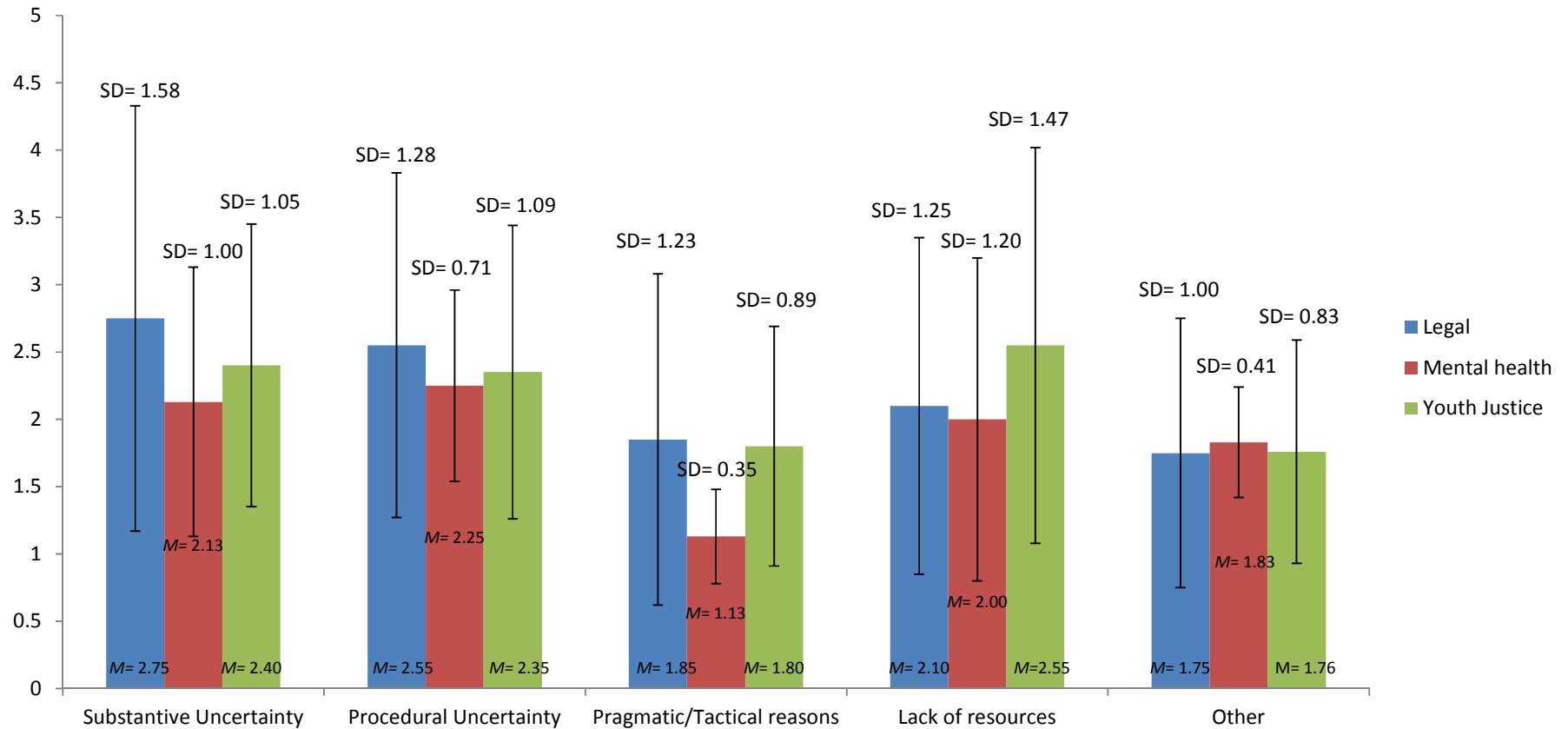


Figure 14. Professional ratings for reasons for non-referral to Mental Health Court

In evaluating the reasons for not referring potentially unfit juveniles to the Mental Health Court, the difference between the three professional groups was not statistically significant,  $F(2, 45) = 0.82, p = .45, \eta^2 = .04$ . As shown in Figure 14, across the three professional groups, juveniles were thought significantly more likely to not be referred for pragmatic/tactical reasons compared to substantive uncertainty (uncertainty as to the law) and procedural uncertainty (uncertainty as to the process),  $F(3, 135) = 6.25, p = .001, \eta^2 = .12$ . Other reasons specified by professionals included professionals lacking competence and knowledge, professionals not concerned about juvenile fitness, and the Mental Health Court process being too lengthy.

## Implications of study

Despite international research confirming that juvenile defendants, due to developmental characteristics, are more likely than adults to suffer from deficits in areas relevant to fitness to plead, Queensland juveniles are considerably less likely than adults to be found unfit, averaging seven children referred to the Mental Health Court per year. We have considered (O’Leary, O’Toole, & Watt, 2012) whether the comparatively low numbers of juvenile unfitness findings may be attributed to:

1. The practice of generally requiring legal practitioners to identify young people who are potentially unfit and the difficulties of doing so. Various factors, such as immaturity and oral language deficits may mask fitness issues. Difficulties in differentiating these issues from oppositional behaviours in youth also provide challenges for legal practitioners.
2. Tactical decisions by legal practitioners who decide against formally raising unfitness. Anticipation of lengthy delay and/or the possibility of a perceived less desirable Mental Health Court disposition than might be available by way of sentence in the juvenile justice system may provide sufficient disincentive to formally raising fitness concerns.
3. Mental health professionals not making fitness determinations. This may be due to the practice of requiring mental health professionals to undertake assessments for unfitness with an absence of a clear statutory definition of fitness for trial and the failure of the common law test to account for particular problems faced by juveniles.
4. Shortcomings and confusion surrounding the law and procedure in relation to trial fitness in Queensland.

To the first, as hypothesised at the commencement of the study, over the twelve month period of the research, the legal and Youth Justice professionals identified a much larger number of children (N = 133) for whom they had concerns about unfitness than the average number that were referred annually to the Mental Health Court. While it is not clear from our research that legal practitioners are adept at identifying fitness issues among children, they do identify many more than are ultimately referred to the Mental Health Court.

Intellectual impairment was hypothesised to be the most frequent condition underlying concern for fitness for trial. This was supported in the results. The prevalence of intellectual impairment highlights a currently unmet need in the options available for juveniles found unfit on this basis in Queensland. Further, immaturity was often identified in the current study as a potential basis for unfitness among juvenile defendants. While immaturity has been increasingly recognised as a basis for incompetence internationally (O’Donnell & Gross, 2012), Queensland is yet to recognise immaturity in this way. This is a current shortcoming in the law in Queensland, in need of reform.

Indigenous youth comprised approximately half of all juveniles for whom lawyers and Youth Justice personnel had concerns regarding fitness for trial. Though overrepresented within the justice system, indigenous juveniles in the current study were less likely to be referred for expert assessment, compared to non-indigenous youth. This finding was most evident for intellectually impaired juvenile offenders.

Mental health experts appraised approximately one third of referred juveniles as being unfit for trial. This finding is within the realms identified internationally for the prevalence of referred juveniles appraised as incompetent (Cowden & McKee, 1995; Kruh, Sullivan, Ellis, Lexcen, & McClellan, 2006; McKee & Shea, 1999). The rate of findings of unfitness by psychiatrists and psychologists within Queensland seems to undermine the idea that the reason for the low rates of referral to the Mental Health Court could be attributed to failure by mental health experts in finding unfitness. Rather, the issue is with the rate of referral to the mental health experts initially. Juveniles who have been identified as having fitness concerns are only referred for assessment by an expert half the time.

In examining why the decision is made not to raise fitness formally, the hypothesis that the reasons for not raising fitness for trial would be substantive, procedural and tactical reasons was partially supported. Essentially, tactical and pragmatic reasons were most frequently identified by professionals as a basis for not referring juvenile defendants for evaluation of fitness for trial. The importance of pragmatic and tactical reasons may be specific to the Queensland context, whereby potentially unfit juveniles face lengthy delays in legal proceedings (partly because of a legislative lacuna in the powers of Magistrates to deal with unfitness), uncertainty of outcome, and an absence of facilities designed for juveniles who are found unfit for trial.

Notwithstanding the study's limitations, the findings highlight the need for further investigation of juvenile fitness for trial in Queensland specifically and in Australia more generally.

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