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# Children in out-of-home care and the criminal justice system: A mixed-method study

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## Disclaimer

We acknowledge that terminology is contentious. In this report we use 'care-experienced' to describe children who are, or have been, in out-of-home care.

Further, we use 'Aboriginal and Torres Strait Islander' and 'Indigenous' interchangeably, acknowledging this language is contested.



# Acronyms and abbreviations

ALS	Aboriginal Legal Service
AVL	audiovisual link
AVO	apprehended violence order
DoCS	NSW Department of Community Services (now Department of Communities and Justice)
FACS	NSW Department of Family and Community Services (now Department of Communities and Justice)
JJ	Juvenile Justice
LAC	local area command
NGO	non-government organisation
OOHC	out-of-home care
TIC	trauma-informed care



# Abstract

Focused on the Children’s Court of New South Wales, the current study examines the factors underlying the criminalisation of children in out-of-home care. Using a mixed-method approach—court observations, file reviews and qualitative interviews—we found evidence of how histories of trauma and situational factors relating to the care environment interact to criminalise care-experienced children. Our findings from this unique methodology echo previous research on the criminalisation of children in care. These consistencies in research demonstrate the systemic nature of criminalisation and galvanise arguments for a cultural shift in our response to those with care experience. Care-experienced children have complex needs which require recognition and additional support at all stages in the care and criminal justice systems. Innovations observed in our United Kingdom based case study offer potential pathways to reduce criminalisation. However, any strategy needs to privilege Indigenous voices and take into account the contemporary impact of colonisation.





# Executive summary

Children in out-of-home care (OOHC) are over-represented in the criminal justice system in Australia (Legal Aid NSW 2011; McFarlane 2010; Wood 2008) and internationally (Stanley 2017; Ryan & Testa 2005). Despite this, there is a paucity of research on the drivers of over-representation and best practice in decriminalisation innovation.

The current study focused on the Children's Court of New South Wales and used a mixed-method approach, comprising Children's Court observations ( $n=150$  hours), Children's Court file reviews ( $n=107$ ) and stakeholder interviews ( $n=75$ ). To investigate international decriminalisation practice, a case study was conducted on developments in England and Wales ('the UK case study') through key informant interviews ( $n=11$ ). This report presents a rich understanding of the continuums of criminalisation experienced by children in OOHC and potential pathways to decriminalisation. We note that our international case study is from a jurisdiction that has not experienced the impacts of colonisation and that future comparative studies in this area should focus on jurisdictions that have also experienced colonisation. In addition, our research was undertaken before and after the commencement of the 2016 NSW Government's Joint Protocol to Reduce the Contact of Young People in Residential Care with the Criminal Justice System, prepared by the NSW Ombudsman alongside stakeholders.

## Trauma, abuse and care-experienced children in the criminal justice system

Consistent with previous research, our study found complex interactions between children with histories of abuse and trauma and the criminal justice system. In the court files we reviewed, clear evidence emerged that care-experienced children were more likely than non-care children to:

- encounter trauma and abuse (50.0% as opposed to 11.4%);
- have reports from Juvenile Justice or Justice Health on file, which we viewed as a proxy for more complex psychosocial needs (45.5% as opposed to 22.9%);
- experience mental health conditions (63.6% as opposed to 20%);
- experience homelessness (40.9% as opposed to 21.4%); and
- experience difficulties accessing education (54.5% as opposed to 27.1%).



Given the lack of information available on some files, it appears likely that some of these figures are underestimates.

The nexus between care, homelessness and criminalisation is explained by care-experienced children losing their placements as a result of court appearances and being placed in custody for longer periods due to the inability of agencies to locate suitable accommodation.

The way in which trauma exacerbated contact with the criminal justice system was demonstrated in our Children's Court observations and also pervaded the narratives of the criminal justice professionals we interviewed. Respondents interviewed recognised how a background of trauma shaped children's responses, underscoring the need for those working with children with care experience to apply trauma-informed approaches.

## Structural constraints impacting service provision

Echoing previous findings, our research showed that a key contributor to the criminalisation of care-experienced children is inadequate responses to challenging behaviour. Respondents expressed frustration about systemic issues—for example, OOHC workers being unable to implement plans, inconsistency in approaches to children or remedial action taken, a poor residential care environment, and a lack of training and experience among OOHC staff. The cultural safety of Aboriginal children in care was raised as a critical concern. Respondents also perceived a lack of oversight and accountability for service providers in the OOHC sector. Our study illustrated how contracting out OOHC services has failed to improve the stability and quality of care for children in OOHC in New South Wales.

Many respondents recognised the problematic combination of traumatised children and inexperienced and poorly trained staff as a key driver of criminalisation. If children's problematic behaviour were managed more effectively, the residential care environment would be safer for both staff and children.

## Policing children with care experience

Our study found police were more likely to come into contact with care-experienced children than those with no care experience, not only at the residential care facility but also in public spaces. Police respondents spoke about how the demanding operational expectations placed on police were not conducive to an effective response to each child or their situation.

Multiple stakeholders perceived that the interagency relationship between police and OOHC service providers was strained. The police respondents were critical of the OOHC service providers which repeatedly sought police attendance at residential care homes, yet also recognised the structural constraints posed by the residential care environment, such as inadequate staff training, inexperienced workers and resourcing issues. The overarching feeling among the police respondents was frustration at having to deal with care-experienced children and their carers.

Some respondents saw the use of police as a behaviour management tool for relatively minor offending as normalising care-experienced children's contact with police and making it routine. The frequency of police call-outs to residential care homes and the burden these placed on police resources meant that police often viewed children in OOHC as troublesome and thought they diverted them from what they saw as proper police work.

Our court observations and interviews with magistrates revealed negative consequences for children who went missing in care as they cycled through the court process. Our magistrate respondents observed that breaches of court orders and bail often resulted from children going missing or self-placing.

## Lawyers advising children with care experience

Lawyer respondents stated that they were aware of the key challenges facing care-experienced children and saw themselves as advocates and drivers of change. However, our research revealed several challenges:

- Court observation data showed a lack of advocacy related to care experience in court.
- File review data suggested that care-experienced children were more likely to have been charged (as opposed to cautioned) by police previously.
- Lawyer respondents reported that they had limited time to speak with their clients before representing them in court. There were also difficulties in receiving instructions from their clients via audiovisual link (AVL) or phone.
- Figures from our small sample size suggest that care-experienced children are more likely to receive a punitive policing approach.

Our data included examples of lawyers being involved in house-level negotiation as a successful means to de-escalate situations and reduce police involvement. The advocacy work described sought to manage the inconsistent approaches to children, ensure behavioural management plans existed and were implemented, and manage responses from some staff.

## Magistrates, children with care experience and the NSW Children's Court

Magistrate respondents stated care-experienced children frequently present in the Children's Court with obstacles before them not of their own making or in their control. This awareness did not correspond with the discussions of care-experienced children that we observed in the Children's Court. With few exceptions, the care experience and its impact were not discussed in court. We observed a number of instances where information on file indicating a history of care was not raised in court. In the court files, there was also evidence of considerable trauma which was not mentioned in proceedings.

The pace with which matters were handled in the Children's Court varied between courts and magistrates. Overall, matters were dealt with swiftly, and respondents consequently worried about how well children comprehended the matters.

We frequently observed magistrates cite attendance at court of family members or other support people as a positive factor in their sentencing remarks. We also observed family support to be a key feature of many defence submissions, although this was not the case in relation to the carers accompanying care-experienced children. Although our figures were not conclusive, the data from our observations and file reviews led us to conclude that, first, the presence of family support had some influence on sentencing decisions and, second, both the nature and amount of family support differed between those with and without care experience.

The magistrate respondents perceived that many care-experienced children in the criminal justice system were not accessing education. Our court file data also showed evidence of problems in accessing education.

There was common agreement among all stakeholders that bail determinations for care-experienced children were challenging. Offending by care-experienced children was often related to being in care and often occurred in their place of residence, making returning to their accommodation difficult. Lawyer respondents expressed that care-experienced children were also seen as posing an unacceptable risk because they were not in the care of their parents. A further problem identified as a challenge for care-experienced children who appeared frequently in the Children's Court concerned their inability to comply with different bail conditions, resulting in breaches. The magistrate respondents raised other criticisms of the accommodation provisions in section 28 of the *Bail Act 2013* (NSW).

The court observation data and stakeholder interviews with the lawyer and magistrate respondents revealed several benefits of, and concerns about, the operation of section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW)—magistrates' additional mechanisms for dealing with defendants with a mental health condition. While the provisions were seen as flexible, the primary concerns were that the orders were too short to enable effective treatment to occur. Magistrates felt that they had little power to monitor treatment plans and no ability to compel matters to come back before them.

## United Kingdom: An international comparative study

The United Kingdom, specifically England and Wales, was selected as a case study based on recent reforms introduced to reduce the involvement of those with care experience in the criminal justice system. Comparisons with countries that share a legacy of colonisation—for example, New Zealand—would have different advantages, compared with the UK case study, through shared experience.

Our study found that, in counties that have been trying to reduce the involvement of those with care experience in the criminal justice system, there has been considerable impact. Our key informants spoke about the significant work undertaken in one county in the UK to shift the culture within the residential care sector. The approach represented a commitment to recognising that the types of offences that were drawing children in care into the criminal justice system were arising from the care environment rather than occurring in the wider community. Part of this commitment involved a multi-agency approach to reviewing incidents where care-experienced children had been criminalised and to collaboratively developing new strategies or practices.

Key informants described a shift in the policing of ‘looked-after children’ in the UK, comprising a national policy framework, investment in cultural change, and the building of relationships at the local level to stop children being arrested and brought into custody. The use of restorative justice approaches has led to a significant decline in the number of children appearing in the courts. Such a shift has included the propensity to use diversion repeatedly for care-experienced children rather than escalate matters.

Several UK key informants spoke about the positive impact of leaders and ‘champions’ in identifying, promoting and responding to the needs of people with care experience at all stages in the criminal justice system. Increased guidance in, and understanding of, the impact of care on involvement in the criminal justice system equips criminal justice professionals with the skills to interpret both the criminalisation and vulnerability of young people differently.

## Policy implications

Our study is an acknowledgement of the strength and resilience of children in care and adult care leavers, who face continuums of criminalisation, at specific intervals, through their involvement with the care system. In summary:

- Our results indicate a need for transformative change in the OOHC and criminal justice systems.
- Aboriginal and Torres Strait Islander children in care have specific needs that are currently unmet.
- We add to the call to address deficiencies in data on the involvement of children in OOHC in the criminal justice system.
- Further examination is needed of legislative provisions that recognise mental health concerns and cognitive impairments and how these impact on offending.
- There is a persistent lack of alternatives to custody for children who are unable to access secure and safe accommodation.

The range of measures introduced in the UK sought to demonstrably move away from a sanction-based, punitive mode of responding to children and families in difficulty towards a restorative, relational approach that keeps children away from courts and police stations. A cultural shift can result in positive change. Australia needs to look to UK successes but also be alert to the legacies of colonisation.



# Introduction

Out-of-home care (OOHC) is the provision of temporary, medium- or long-term care by the state for children who have been found to be at risk of harm: where there is a substantiated child protection finding; where parents or primary carers are incapable of providing adequate care; or where family conflict means that alternative accommodation is necessary (Australian Institute of Health and Welfare [AIHW] 2018). In Australia in 2016–17, a total of 168,352 children aged 0–18 received child protection services (30.8 per 1,000 children), with 47,915 of those children residing in OOHC on 30 June 2017 (8.7 per 1,000 children). The largest number of children in OOHC was in New South Wales (NSW), with 17,879 (10.3 per 1,000), although the Northern Territory had the highest rate of OOHC, at 16.8 per 1,000 children. Most children in OOHC (93%) were in home-based care (ie placement in the home of a carer who is being reimbursed). Of these children in home-based care, 47 percent resided with relatives or kinship carers, 38 percent with foster carers, seven percent in third-party parental care (where a formal order has been made transferring parental responsibilities to a third party) and one percent in other home-based care (AIHW 2018). Five percent were in specialised residential care facilities designed for children with the most complex needs (AIHW 2018). While rates of admission to OOHC remained stable from 2012 to 2017, the increasing OOHC population suggests those admitted are spending longer in OOHC (AIHW 2018). This argument is based on the distinction between ‘stock’ and ‘flow’. ‘Stock’ refers to children already in OOHC, whereas ‘flow’ refers to children entering the system. The characteristics of these two groups are often different. According to this argument, if the children entering the system have more serious histories of trauma, for instance, they are likely to spend longer in OOHC, leading to an increasing population regardless of stable admission rates.

Approximately two-thirds of children in OOHC in 2016–17 were aged five to 14 years, although children in residential care facilities were older, with a median age of 14 compared with nine for children in home-based care. A small majority were boys (52%). Most children in OOHC (83%) had been in care for more than one year, with 41 percent in care for more than five years (AIHW 2018).

Perhaps the most salient feature of children in OOHC is the over-representation of Aboriginal and Torres Strait Islander children, who are in OOHC at a rate 10 times higher than that of the general population (58.7 per 1,000 children) (AIHW 2018). This over-representation is complex and related to multiple factors, including: the legacies of historical practices of forced removal that led to the Stolen Generations, intergenerational trauma, and cultural assumptions around child-rearing (Mendes, Saunders & Baidawi 2019; HREOC 1997). The Aboriginal and Torres Strait Islander Child Placement Principle, established in the late 1970s, has as its core aim the maintenance of the connection between Aboriginal and Torres Strait Islander children and culture, community, family and country (Tilbury 2013), a critical factor in children's wellbeing (Raman et al. 2017; Kiraly, James & Humphries 2015). Yet a narrow and inconsistent application of the principle has deeply affected its implementation (CYPP 2015; Tilbury 2013; McDowall 2016). The principle is often construed narrowly as referring to the preference for placement of Aboriginal and Torres Strait Islander children with: first, the child's extended family and kinship networks; second, the child's Indigenous community; and, third, other Indigenous people.

## OOHC and the criminal justice system

Most children in OOHC do not commit crime. However, research from both Australian and international jurisdictions shows that young people in OOHC, particularly those in residential care, are over-represented in the criminal justice system (Cashmore 2011). In Australia, a number of studies have found that placement in OOHC is associated with increased involvement with the criminal justice system (Malvaso & Delfabbro 2015; McFarlane 2010, 2017; Ringland, Weatherburn & Poynton 2015). Just over 30 percent of all children in detention in Australia between 2014 and 2015 had also been in the child protection system in the same year (AIHW 2017). Further, between 2014 and 2016, children in OOHC were 19 times more likely to be under Juvenile Justice supervision compared with children from the general population (AIHW 2017). In a study of 392 juvenile offenders under community supervision in New South Wales, 14.5 percent ( $n=57$ ) were found to have a history of placement in OOHC (Weatherburn, Cush & Saunders 2007). Kenny et al. (2007) identified that approximately a quarter of young people under both community and custodial supervision in New South Wales had previously been placed in care. In a recent study of 17,638 young people coming into contact with the criminal justice system in New South Wales, Ringland, Weatherburn and Poynton (2015) found that approximately 10 percent of their sample (9.1% of males and 12.5% of females) had had previous OOHC placements.

Similar findings have been observed in international jurisdictions. In New Zealand, Stanley (2017) explored the criminalising trajectory from care to custody based on a comprehensive review of 105 case files and interviews with participants. She concluded that children in state care are far more likely to progress into custody, as a result of maltreatment, multiple care placements, damaging institutional cultures, social disadvantage, psychological harms and differential treatment in the criminal justice system. Importantly, she found that children's involvement in the criminal justice system is closely associated with exposure to processes of both criminalisation and victimisation (Stanley 2017).



In the UK, the Howard League for Penal Reform found that children in residential care were over 15 times more likely to have been subject to a final warning or reprimand during the year compared with children in the general population. Children in other forms of care (such as foster or kinship) were about four times as likely to come to the attention of authorities compared with those in the general population (Howard League for Penal Reform 2017). Carnie and Broderick (2015), in a survey of Scottish prisoners, found that 26 percent of their prisoner respondents had been in OOHC and 16 percent had been in care at age 16. In the United States (US), Ryan and Testa (2005), in a sample of 18,676 children born in Cook County, Illinois, identified that children with a history of care had approximately twice the odds of engaging in offending behaviour between the ages of 14 and 16 compared with those not in care. They also found that placement instability was an important predictor of offending, with those in more unstable placements having higher odds of offending (Ryan & Testa 2005). Another important study of outcomes for children in OOHC from the US is the Midwest Evaluation of the Adult Functioning of Former Foster Youth (Courtney & Dworsky 2006; Courtney et al. 2001). In a longitudinal study of 603 children in care, 28 percent of the sample had been arrested and approximately 20 percent had spent at least one night in custody (Courtney & Dworsky 2006). Further, in a Swedish study of 700 young people with experience of OOHC who were placed in care for behavioural reasons, nearly 45 percent of females and 75 percent of males had committed a crime by the age of 24, compared with 3.2 percent and 15.7 percent of the general population, respectively (Vinnerljung & Sallnäs 2008). In summary, although estimates of the degree of over-representation vary according to jurisdiction, methodology and sample, it is clear that young people in OOHC comprise a sizable proportion of those coming into contact with the criminal justice system.

## What are the characteristics of children and young people in OOHC?

Children and young people in OOHC have a number of poor life outcomes compared with their peers not in care (Staines 2016). In Australia, the Young Offenders on Community Orders study found that young offenders with a history of OOHC (24%) differed from their non-care counterparts in a number of ways (Kenny et al. 2007). They were more likely to have relatives who had previously been incarcerated, to have experienced unstable living arrangements at the time of the interview, and to have received treatment for substance abuse. They were also more likely to be unemployed or receiving government benefits at the time of the interview (Kenny et al. 2007). In addition, there is evidence that young people in OOHC are more likely to experience mental health problems. Much of this evidence comes from the US and the UK, where a number of studies have found children and young people in OOHC to be more likely to have been diagnosed with a psychological disorder. The Howard League reported that some 50 percent of children in care were thought to have 'emotional and behavioural health that was of borderline or actual concern' (Howard League for Penal Reform 2017: 5), with nearly three-quarters of this subgroup having received a conviction or final warning. In the US, Jee et al. (2006), based on a sample of 727 children in long-term foster care taken from the National Survey of Child and Adolescent Well-Being (NSCAW), found that 30 percent had at least one chronic health condition and 55 percent had at least one mental health problem. Using a sample of 188 adolescents in long-term foster care taken from the NSCAW study, Woods, Farineau and McWey (2013) found that individuals with chronic health conditions were more likely to have both internalising and externalising disorders and were more likely to have involvement with the criminal justice system.



## Trauma, care and crime

It is well recognised that children in care are likely to have been exposed to traumatic childhood experiences, such as emotional abuse and neglect, sexual and physical assault, and witnessing interpersonal violence (AIHW 2018; Crosby et al. 2017; Staines 2016; Stinson, Quinn & Levenson 2016). Children who have been abused experience a range of symptomatology, including impaired attachment behaviours, mood regulation dysfunction, poor behavioural control and altered self-concept (Cook et al. 2017). It has been suggested that trauma in childhood is linked to changes in brain structure and function which in turn are related to a number of long-term mental and physical health conditions (Anda et al. 2006; Copeland et al. 2007; Felitti et al. 1998). In a study of 9,508 adults receiving a standardised medical evaluation in San Diego, US, Anda et al. (2006) found the presence of four or more types of childhood maltreatment in their participants to be related to higher rates of adult depression, alcoholism, drug abuse and suicide attempts. A history of trauma has also been linked to increased contact with the criminal justice system (Dierkhising et al. 2013; Dixon, Howie & Starling 2005; Widom 1989). Trauma experiences of Aboriginal and Torres Strait Islander children are further compounded by the OOHHC and criminal justice systems (Duthie et al. 2019; Hameed & Coade 2018).

Given the above, it might be expected that children in care, as a vulnerable and traumatised population, would be more likely to have mental health problems and more likely to be involved in the criminal justice system. A key question for research in this area is whether the experience of care results in criminalisation above and beyond the influence of the factors described here. A number of researchers have argued that this is indeed the case and that the care environment itself is criminalising (Carr & McAlister 2016; Shaw 2016; Staines 2016; Stanley 2017). In our previous research (Gerard et al. 2019) we identified a number of factors that criminal justice professional respondents perceived to result in the criminalisation of children in care. These included factors related to the care environment, including the use of police as behavioural management tools and deficiencies in staff training and experience. The current research aims to build on these findings by: (1) interviewing a wider range of legal professionals, most notably the judicial officers responsible for dealing with young offenders in court; (2) conducting a series of court observations to examine how children from a care background are dealt with in court; (3) reviewing the court files of a sample of children appearing before the court to investigate the factors pertinent to these children's backgrounds that may impact on their criminalisation and identify those factors that are not always raised in court, most notably care background; and (4) conducting an in-depth case study of an international jurisdiction with considerable expertise in OOHHC—the UK (focusing on England and Wales). Our multi-method approach aims to further elucidate the complex relationship between care and criminalisation and to inform future approaches to understanding how these vulnerable children are dealt with by criminal justice authorities.

## Method

Ethical approval for this study was obtained from the Charles Sturt University Human Research Ethics Committee, protocol H17141. We also obtained approval from the Children's Court of New South Wales. This research is informed by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) Guidelines for Ethical Research in Australian Indigenous Studies. We consulted with an Aboriginal adviser, a female academic with care experience and experience as a carer. We also engaged an Aboriginal researcher in the original phase of this study to advise on research design and methodology and to undertake some data collection.

Our research aimed to identify:

- the perceptions of frontline criminal justice professionals on the criminalisation processes that impact on children in residential OOHC placements;
- systems or processes that contribute to the criminalisation of children in OOHC;
- differential impacts of demographic characteristics: for example, age, gender, ethnicity and Aboriginality;
- disparities in representation rates of children in OOHC across regional and metropolitan areas; and
- international decriminalisation practice.

In this report, we have aimed to provide an overview of the processes through which children with care experience come into contact with the criminal justice system, starting with potential histories of trauma and concluding with contact with the court system. In each section we describe and analyse a discrete step in this process. Data supporting this were drawn from three sources: qualitative interviews with key stakeholders, court observations, and file reviews. Given this, we do not describe results from each part of the study in turn; rather, we interweave these in the overall findings of the report. The method pertaining to each part of the study will now be described.

### *Qualitative interviews*

This study draws on qualitative research undertaken with criminal justice and social welfare professionals working on the frontline of the care–criminalisation nexus. These stakeholders are OOHC services ( $n=17$ ), NSW Police Force representatives ( $n=10$ ), Juvenile Justice officers (Department of Justice employees supervising children on community-based sanctions) ( $n=19$ ), Department of Family and Community Services employees ( $n=5$ ), defence lawyers, community legal centre lawyers and lawyers working in the care jurisdiction of the NSW Children's Court ( $n=14$ ), and Children's Court magistrates ( $n=10$ ). In the UK case study, interviews were conducted with 11 key stakeholders. The *Appendix* sets out the interview respondent pseudonyms. Interviews were semi-structured, with a core set of questions that were followed up by open-ended prompts where necessary. We started by asking about the participants' general experience in the criminal justice system before moving to specific questions relating to care-experienced children.

Analyses were undertaken using the six phases described by Braun and Clarke (2006). We took a semantic approach, identifying themes with regard to the explicit, rather than latent, meaning of the data. All researchers read the interview transcripts, becoming familiar with the data and developing initial ideas to guide subsequent analyses. These ideas were then discussed collaboratively, and codes were developed based on these discussions. The interview data were then entered into NVivo by individual researchers, based on separate coding of each interview transcript undertaken independently by each researcher. Where obvious disagreements were observed, the research team discussed and resolved these to ensure consistency in coding across the dataset. A further meeting was then conducted where the codes were collated into themes using a thematic map. We understood a theme to represent a repeated pattern of meaning across the dataset, substantiated by suitable extracts. Rather than report these themes individually, we contextualise them in reference to the aspect of the interface between the care and criminal justice systems under discussion.

### *Court files*


We also reviewed a number of Children's Court files as part of our analyses. We accessed these through the court registry and later entered relevant details into a database. We reviewed 107 files, relating to 92 individuals: 65 males (70%) and 27 females (30%). For 22 (23%) of the files there was evidence of Indigenous status: 16 males (73%) and six females (27%). We also found evidence on file of a care background for 22 (23%) of the children whose matters we reviewed. Other variables coded were whether there were reports on file—for example, a Juvenile Justice pre-sentence report (28%)—evidence of a mental health condition (30%), homelessness (26%), abuse and neglect (20%), educational problems (33%), and a criminal history (32%). It is likely that these figures are underestimates, as only minimal information was provided in a number of files.

### *Court observations*

We observed a total of 150 hours of court proceedings, spread across three major outer metropolitan Children's Courts. These related to 134 separate matters, involving 83 males (62%), 41 females (31%) and 10 matters (7%) where the gender could not be determined, as there was no personal appearance by the young person. For 22 (16.4%) of these matters, there was clear evidence of Aboriginal status, determined by either the defendant's Aboriginal status being made known in court or representation by the Aboriginal Legal Service (ALS). Our approach was guided by previous court observation studies (Hannah-Moffat & Maurutto 2012; Booth 2012; Tait 2001). Court observation not only allows researchers to collect data on how processes and procedures play out in the court setting but also provides a deeper view of the power structures at play (Garapon 1997) and subtle influences on decision-making, such as the physical appearance of children and the presence of family member support in the courtroom (Booth 2012; Danziger, Levav & Avnaim-Pesso 2011; Tait 2001).

At least two researchers were present in court for each observation. Each took notes, concentrating on the type of matter being observed but also on other relevant factors, such as the demeanour of the child and magistrate, and the presence of support people in court. These notes were collated into a single document by all the researchers. From this document, we developed a series of vignettes that were mapped on to the broader themes relating to the cycle of care and criminalisation we were interested in investigating. Some quantitative information was also extracted and entered into a database. In particular, we coded for whether the child was supported in court. There was evidence in court of a care background for only six (4.5%) of the young people whose cases we observed. A total of 23 (17%) matters were for sentence, 70 (52%) were bail determinations or extensions, and the remaining 41 were apprehended violence order (AVO) matters. As with the file reviews, we developed more detailed accounts of the matters we found to be of particular interest or significance and, similarly, make no claim as to how generalisable these are.

This report starts with a brief literature review and methodology, then provides the analysis of our findings. The analysis sections commence with unpacking OOHC and trauma and the impact these have on children as they move through the criminal justice system. Next, we examine the training that people who interact with care-experienced children receive and evaluate where gaps in training contribute to criminalisation. Our analysis then tracks criminalisation issues through the criminal justice process, commencing with examining the police response to care-experienced children, legal advice provided, and care-experienced children in the court. We finish our analysis with our UK case study and then provide policy implications and conclusions from our research. We also signpost pathways for future research in this area.

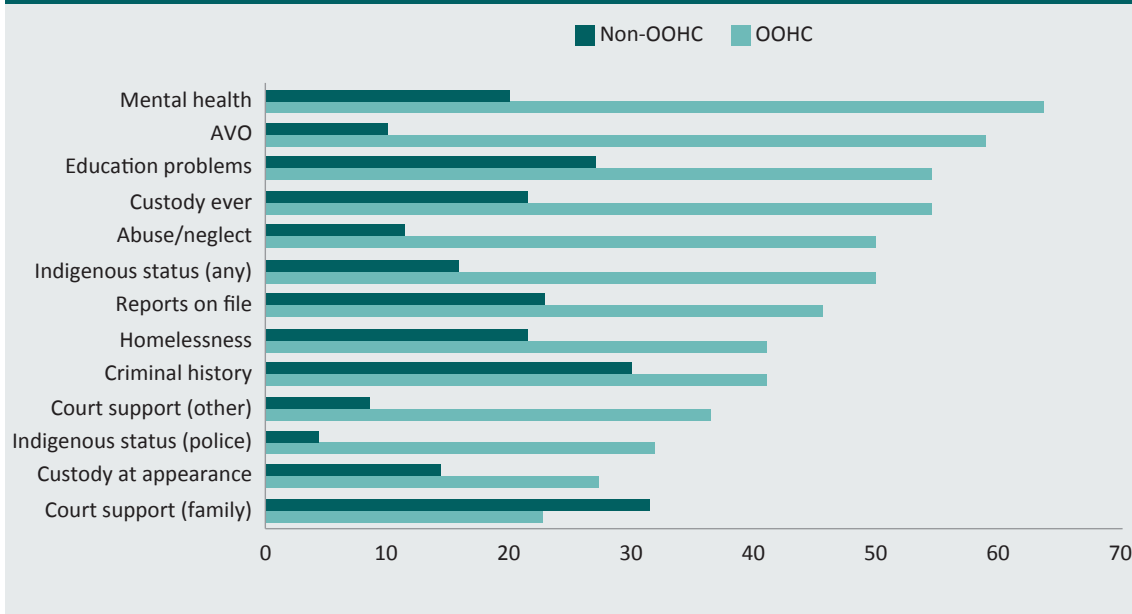


# Trauma, abuse and care-experienced children in the criminal justice system

In this section, we discuss the complex interactions between children with histories of abuse and trauma and the criminal justice system, focusing particularly on the types and level of trauma experienced by children in OOHC. Responsibility for this cohort is often shared between agencies—the Department of Family and Community Services (FACS), Juvenile Justice, OOHC and ancillary service providers—and may shift between agencies as children move through the criminal justice system.

## Histories of abuse and trauma

Consistent with the previous research discussed in the *Introduction*, our study confirmed that many children appearing in court have histories of abuse and/or trauma. In the files reviewed, there was clear evidence that care-experienced children had encountered more trauma and abuse than their non-care counterparts (50.0% as opposed to 11.4%). Care-experienced children were more likely to have reports from Juvenile Justice or Justice Health on file (which we viewed as a proxy for more complex psychosocial needs) by a margin of 45.5 percent to 22.9 percent. An even greater difference was observed in relation to evidence of mental health conditions; there was clear evidence of this on file for 63.6 percent of the care children compared with 20 percent of the non-care children. Other differences were observed in evidence of previous homelessness (40.9% of care children compared with 21.4% of non-care children) and educational problems (54.5% of care children and 27.1% of non-care children). See Figure 1.

**Figure 1: Differences between children with and without care experience (court files)(%)**

Note: OOHC=out-of-home care

Given the lack of information available on some files, it appears likely that some of these figures are underestimates.

## Involvement with the criminal justice system

Many of the respondents interviewed in our study perceived that, in their experience, care-experienced children were more likely to have histories of abuse and/or trauma and more contact with the criminal justice system. The following quotes illustrate the extent of some care-experienced children's trauma:

I had a horrific case of a kid who was abused from like seven or eight, and he was—he had like a dog choker chain put around him, and he was like—it was awful; bruising all around his neck. He self-reported the facts over two or three years, and it took like the third time before he got removed... It was horrific. And he's got a wealth of issues. His mum passed away, he was raised by a step-brother who was abusive, didn't feed him...all that stuff. He was five, I think, when his mum passed away. So that's so deep-seated. His earliest memories of life have been based around trauma and hurt... And so he's learned to survive through standing up for himself, being aggressive, being physical, but at the same time he doesn't even know—like his attachments are all over the place. (JJ1)

[O]ne young woman who I represented who was a child, she was 17, and she was with an out of care service provider, and I just remember having a conversation with her worker, and this is a young woman who just—I was at court waiting for her on a few occasions, but I kept adjourning it. She just wouldn't get out of bed because she was so depressed... This is a young woman who wouldn't get out of bed, she was so depressed. Her mother committed suicide when she was 11. She'd been all over the place since then in terms of foster carers and everything else. Who knows what happened to this young woman? (L5)

Childhood histories such as these were prevalent across the dataset (in over 80% of the Juvenile Justice and non-government organisation interviews and 50% of police interviews), leading us to conclude these reportedly 'extreme' cases were not unusual. The Juvenile Justice respondent highlighted how this background of trauma had shaped the child's responses, explaining that the child was now more likely to respond aggressively and physically as a survival mechanism.

Many of the criminal justice stakeholders we interviewed recognised that children who had experienced trauma and abuse required assistance. A police respondent reported that the mental health needs of children were beyond the scope of police:

Yeah, they definitely need ongoing counselling, and interaction with psychiatrists...because they're put in these homes, and they just—they go a bit stir-crazy, and then we're the last stop to help them, and we're not trained in mental health or that side of things. We're not social workers. We only deal with the criminal side of whatever they've done. So we only see them in a bad light; we can't help them with any psychological problems they've got. (P6)

This police respondent recognised the limitations of a policing response to trauma. Respondents argued that the residential care environment itself was not conducive to an effective response to trauma and was not suitable for vulnerable children—for example: 'I do think sort of the really complex trauma that these kids have suffered is something that the system still doesn't really cater for very well' (L4). As we explore further in the *OOHC training* section, some respondents characterised the residential care environment as dangerous and violent. In effect, respondents argued that the residential care environment often compounds existing trauma.



## The intersection of trauma, homelessness and care

We illustrate the intersection of trauma, homelessness and care through a vignette produced from our court observation data. This vignette concerns the case of 12-year-old 'Joel', whose court appearances were observed on three occasions (Day 3, Case 12; Day 4, Case 1; Day 6, Case 2). There were many notable things about this case, including the youth of the defendant and the fact that he had been remanded in custody and was living in residential care at the time of his interaction with the criminal justice system. Joel's case typified the process of 'care criminalisation' (McFarlane 2017), in that his first court appearance arose from an attempt to self-place by returning to his mother and he was recorded as a missing child. His subsequent matters included public transport-related and property damage offences, and offences against officers attending the scene. After the first court appearance, where bail was granted, we understand from observing his next matter that Joel was taken to the FACS office to find a new placement. He became upset while the FACS staff discussed his background and his mother in front of him. His subsequent appearances relate to charges of assault laid against him arising from his behaviour in the meeting. The following excerpt is from his second appearance:

Day 4, Case 1

Police Prosecutor (PP): My first reaction is I'm not going to oppose bail if a warning is given. It's a serious offence, endangering the community: I concede his tender age, and he's unlikely to receive a control order, but he committed offences not long after leaving court...

Magistrate: I'm not clear on the facts—who is the victim?

PP: [Mr X—FACS worker] is the victim and the facts are property damage. A [section 28 of the Bail Act 2013 (NSW)] may need to be made.

Defence lawyer: My concern is his age and...yesterday...he was acting out because he wants to be with his mum, he hasn't seen her for a few weeks, something was said at FACS and that made him act out. He threw a chair at [Mr X], it bounced on the ground and hit his leg...

It's an allegation of assault, it's not an unacceptable risk, it is reasonable to conclude his behaviour was reckless but not intentional. I submit [Joel] doesn't pose a risk, but there is no place for him to go. FACS needs to get involved to find a suitable place, keeping [Joel] in detention is not the right place.

At his third appearance, Joel had been remanded in custody pursuant to section 28 of the *Bail Act 2013* (NSW), which allows magistrates to impose an accommodation requirement that must be fulfilled before the defendant can be released on bail, and had spent some weeks in custody, during which time no progress had been made to secure him any suitable accommodation. Although the police prosecutor noted that a custodial sentence was unlikely, and the magistrate stated that he did not view custody as appropriate, Joel remained in detention because no suitable accommodation could be found for him.

As expected, in our study the nexus between care and homelessness was prominent. As exemplified above, care-experienced children lost their placements as a result of matters before the court, particularly if, for example, AVOs were imposed to protect children who were co-residing in a placement or to protect carers. Children on a section 28 order became 'homeless' while in custody, and sometimes spent lengthy periods in custody, while practically bailed on minor offences because of the lack of a suitable placement.

This was further illustrated by Karen's case on Day 5, Case 11, of our court observations. Karen's antecedents comprised just one caution. She was appearing this day in relation to a section 28 order, and the court was informed by the relevant Juvenile Justice worker that there had been no update from FACS in relation to accommodation for Karen. In the meantime she was being held in custody.

No accommodation could be found for Karen, so she remained in custody. Like the case of Joel cited above, this case provides an example of how official responses to offending by children with limited antecedents can result in the loss of accommodation and time in custody. Given the clear disparity in custodial experience between care and non-care children we highlighted previously, it is likely that these are not isolated incidents but rather demonstrate how relatively minor care-based incidents can lead to custody. Our file reviews showed that 54.5 percent of care children versus 21.4 percent of non-care children had previously been incarcerated (see Figure 1).

## Trauma exacerbated contact with the criminal justice system

A further example that illustrates the limitations of the criminal justice system's response to children's trauma involved a 13-year-old Aboriginal female whose file revealed multiple mental health diagnoses, an extensive medication regime, and a history of prolonged and extensive abuse. 'Chelsea' appeared twice during our court observations (Day 4, Case 3; Day 5, Case 2). At each court appearance she appeared floridly unwell and distressed—hiding her face, wringing her hands, talking to herself and agitatedly pleading with her lawyer and the court to stop talking. Charged with assault and intimidation, Chelsea was bailed to a new care placement. She appeared in court again on the following day, alleged to have breached her bail conditions. She was granted bail pursuant to section 28, after a placement in the country was deemed acceptable. As the following exchange reveals, the court's decision was based on advice from her carers that she may be less likely to breach bail while living in the country because her childhood trauma had left her with severe agoraphobia and she would be too scared to leave the placement:

### Day 5, Case 2

Chelsea gets upset (this is right after her past has been discussed in court), tries to talk, bangs the table.

Defence Lawyer: New address in country will be better suited than suburban place.

Chelsea hides from camera again.

Defence Lawyer: If in suburbia she would be a serious risk, the bush appears to be a sensible plan.

Chelsea: Fucking shut up.

Magistrate: Bail conditions to live at the new address, do as carers say, only leave with carer or approved adult, even for school.

Chelsea: I want to go home [starts wailing and crying].

Magistrate: [continues] Follow the instructions of FACS. I'm not going to try to explain this to her, someone with a better relationship with her can do this. Excused on [next occasion]—there'd need to be a good reason for her to come here. Good luck [to the carers].

We also observed that Chelsea's behaviour changed dramatically once her traumatic background was mentioned in court. Her level of discomfort and distress increased rapidly while her background and offence were being discussed in court without her input or, indeed, without regard to her presence in court. She became highly distressed—for instance, swearing, crying, threatening people in court and physically lashing out. On the first occasion we observed, she was removed from the court and placed in the cells two floors below, where her cries continued to be heard for over half an hour, to the magistrate's and Juvenile Justice workers' visible distress.



# OOHC training

Previous research has identified that inadequate responses to challenging behaviour are key contributors to the criminalisation of care-experienced children (Staines 2016; Stanley 2017). Based on the data from our study, this section explores how OOHC service providers respond to problematic behaviour.

## Structural constraints impacting service provision in OOHC

Reforms recommended by the Wood Special Commission of Inquiry into Child Protection Services in New South Wales (2008) resulted in the government accelerating the contracting out of OOHC service provision. These reforms were based on the assumption that the non-government sector was better equipped to deliver improved outcomes for children in more cost-effective ways, assumptions that have not materialised (NSW Legislative Council 2017). Children in residential care homes are looked after by staff from private and not-for-profit agencies contracted by FACS. Staff were perceived by our OOHC respondents to be low paid, with irregular working hours and a high staff turnover. As illustrated by the comments of one OOHC respondent:

Retention is a huge problem, because the majority—they're paying so low wages. For instance, I'll just use the organisation I was working for, I would have care workers who would come in and do eight-hour shifts in the house: morning shifts, afternoon shifts, and night shifts. They're going in to work with five young people who are going to constantly all day abuse them, spit at them, throw food at them, threaten to beat them up, you get no reward for trying to help them, and then you're paying them \$21 an hour. (OOHC1)

The problems identified by this OOHC respondent were echoed by the respondents from other stakeholders that dealt with OOHC service providers. A police respondent viewed that staff are not experienced and that children in care need role models and parenting figures, 'not people who are two or three years older...that have no life experience' (P5). A number of Juvenile Justice respondents commented that the perceived problems associated with staffing impacted on their ability to do their jobs effectively. Two respondents expressed frustration because the OOHC workers were not able to help implement plans that Juvenile Justice had developed for children under their supervision:

And, again, it's through inconsistency and mismanagement of staff, high turnover of staff at this placement, so plans not followed through. (JJ2)

They don't know what to do, and they are kind of—the strong ones kind of are resilient and they manage to pull through, but often, yeah, they are just really—they are just not well supported, I think. They are under-staffed, I think, for what the—like the intensity of the kids presenting behaviours, they probably can do with extra support. And then they just probably feel overwhelmed a lot of the time. (JJ1)

Perhaps of greater concern, the Juvenile Justice respondents noted how unsafe the residential care environment was for children and the poor remedial action by staff. For instance, one recounted:

We had a young girl...was consistently reporting was that she was unsafe in the [residential] home, there was [sic] other young people at the home that were assaulting her, on one occasion she'd reported a sexual assault and then withdrawn her allegation but a number of physical assaults, she [said] she reported this to one of the staff members and they had encouraged her not to make a complaint. She was then sexually assaulted again by another resident but not within that home and she did make a complaint and that young person is currently...on remand in relation to those offences. She was at the placement that burnt down, her room was set on fire after we returned her there. (JJ Focus Group)

We heard differing perspectives on these matters from our OOHC respondents. Several thought that the situation was ‘worse’ than had previously been the case in that staff quality and retention had both decreased recently:

...from what I can see there has been a slight drop in the quality of staff, so there’s less people with qualifications. I’m not saying that you need to have university or TAFE or whatever, but it is helpful. So there seems to be a drop in the quality of staff. And the burnout is higher and the turnover rate, I would say, is higher as well. (OOHC3)

Others, by contrast, perceived the quality of staff to have improved:

Oh, look, I think that it’s getting better compared to—and I think that I guess it’s not an easy position to be in. You’ve got kids that do come from a traumatised background. Your staff may not be—staff qualifications may not be up to scratch but it has gotten a lot better than what it was. (OOHC4)

These are, of course, only general impressions and it is difficult to assign a set timeframe to perceived improvements and/or deteriorations in staff training and retention from our respondents’ comments. A FACS respondent noted that the quality of service provision of contracted non-government organisations (NGOs) was variable, although again this was more of a snapshot than an indication of any trends over time:

I think we’ve got some providers that are very good and they’re getting there and that are therapeutic in their approach and their operations, again, we’re talking about that bell curve, I think most—I think people are trying to get there but I think it’s a difficult journey for them. (FACS2)

A report by the Auditor-General of New South Wales (2015) found it difficult to assess whether contracting out services to the non-government sector had resulted in improved outcomes for children. The NSW Legislative Council inquiry (2017) into OOHC highlighted the lack of accountability in the sector and the inability of the NSW Parliament to oversee the services it directly funds. It acknowledged the sector was failing children and families.

The cultural safety of Aboriginal and Torres Strait Islander children in care was raised as a critical concern (JJ Focus Group, L4, L5), drawing into question adherence to the Aboriginal and Torres Strait Islander Child Placement Principle, which emphasises prevention, partnership, placement, participation and connection (Tilbury 2013). The magistrate, lawyer and Juvenile Justice stakeholders all referred to the impact of transgenerational trauma and offending (JJ5, M1, M2, M4, L4, L5). As one lawyer respondent pointed out, the number of Aboriginal and Torres Strait Islander children in care aligns with the criminalisation statistic for Aboriginal and Torres Strait Islander people (L11). Access to cultural knowledge and family–cultural connection were highlighted as vitally important. One respondent told us:

So, just on the Aboriginal side of things culturally, out-of-home-care kids aren't getting their needs met. And in relation to what...was talking about there's not enough resources or Aboriginal workers to work with these kids. Just recently me and my colleague, another Aboriginal fellow, we went over to [juvenile detention] for Sorry Day activities last year. And we were just in there giving talks on what Sorry Day was about. And me talking about tribes and totems and kids were just all over me, just thirsty for knowledge. And that was just going in there for a day. So I don't think there's enough of that, I don't think JJ do enough of that either. But you're restricted with what you do with resources and everything else. If we don't do it, I doubt FACS would do it. (JJ9)

Although this quote refers to a visit to juvenile detention, the respondents also saw this as relevant to children in residential care. Indeed, the lawyer respondents felt that Aboriginal and Torres Strait Islander children in OOHC have complex needs that are going unaddressed. All self-identified Indigenous respondents (JJ9, JJ10, OOHC15, OOHC16, OOHC17) felt that there were not enough resources or Indigenous identified positions to meet children's needs.

In summary, many respondents expressed that there were deficiencies in staff training and experience; this became a common theme. Although many of those in daily professional contact with the OOHC system expressed these concerns, it should be noted that care was taken not to criticise the individuals involved, who were often perceived to be motivated and well-meaning (see the comment above by JJ1). Our primary aim here is to identify deficiencies in the systems that allow under-qualified and poorly trained individuals to care for such vulnerable children and young people, something which, in the view of a number of our respondents, led to poorer outcomes, most notably, criminalisation.



## The link between staff training and criminalisation

Our OOHC respondents recognised how problems with staff retention, training and work conditions were factors leading to the criminalisation of children in their care. One noted that specific training was needed to manage the behaviour of children with complex needs (OOHC1). These deficiencies in training often resulted in police being called rather than the behaviour being de-escalated by the carers. As a Juvenile Justice respondent told us:

...the offences occur within the context of almost sibling relationships. If they've been in—like if I had a fight with my brother and I'd done something similar I would have been punished at home and that would have been the end of it. But because of the involvement of community services...then that behaviour is reported, and then if it's escalating then they'll call the police. (JJ Focus Group)

Some of the magistrate respondents noted how limited the behavioural management strategies of staff were and how often this resulted in police being called to homes:

Often there's an argument with another resident and the police are called, or there's an argument with a youth worker and the police are called, or there's a problem with behaviour from the child and the police are called. The problem I find is too many times the police are called as a first resort rather than a last resort—the question I have is, what strategies do these places have to deal with these problem kids, because they are problem kids, without resorting to the criminal justice system, dialling the police, et cetera? (Magistrate Focus Group)

A further complication resulting from police involvement in OOHC disciplinary infractions was the subsequent imposition of AVOs to protect staff:

Like they have a fight, and they breach an AVO. Things which would not be criminalised in a normal home situation are criminalised. And you see that probably because of everyone—like there's [sic] four or five workers in the house, so if there's an AVO in place and they scream and carry on, he's in breach of the AVO, and it's just—they are very messy. (JJ Focus Group)

A police respondent noted that, in care, the onus of addressing behavioural problems often fell to the child:

The carers...it's a job to them. I don't think they necessarily put in the hard—you know, like as if it's a parent or a family member, you're going to push them or help them get to where they want to go; whereas these kids don't have that. Unless the child themselves wants to take opportunities that are given to them, if given to them. It would be hard to self-motivate yourself as a kid, you know. (P4)

Many respondents recognised the problematic combination of traumatised children and inexperienced and poorly trained staff as a key driver of criminalisation, with relatively minor behaviours resulting in police involvement, subsequent court appearances and AVOs being imposed. That said, it is also important to note that our respondents reported that OOHC workers were the victims of assault by children in their care, ranging from being spat on to a stabbing in one instance (Magistrate Focus Group). Given this, it is understandable that in some instances staff would not hesitate to call the police. According to our respondents, if children's problematic behaviour were managed more effectively, the residential care environment would be safer for both staff and children.

## Oversight of training in OOHC

Standard 20 of the NSW Child Safe Standards for Permanent Care (Office of the Children's Guardian 2015) requires that 'people who work with and care for children and young people have appropriate training for their role and are provided with opportunities for professional development' but does not go beyond this to set specific minimum qualifications. FACS also has guidelines and requirements in relation to the required qualifications of OOHC staff—for example, the FACS Cultural Capability Framework sets out expectations for FACS staff to be culturally competent in their work with Indigenous children (NSW FACS 2017). We asked respondents about their perceptions of the current training expectations for OOHC staff and where training could be improved. Our FACS respondents stated the level of training required and supplied was the contractual responsibility of the care provider:

[W]e don't do direct carer training at all, that is definitely a sector industry thing, we don't ascribe—we say in our contracts and our modelling—to date we've said in our contracts and our modelling that agencies will have appropriately qualified people but have never specified what that qualification might look like. (FACS2)

FACS certainly appears to have clear guidelines governing the staff in residential care for which it has direct oversight, as one respondent reported:

[W]e subcontract through a personnel agency we work with and we say we want a Cert. III and a first aid certificate and then we buddy up our workers, we buddy them and we train them and we offer training, on the job training to them and we also do six to eight weekly group debriefing and training... Other agencies take a more mish mash melange approach, if it's a way I can describe it. (FACS2)

In our interviews, it was noted that FACS, in response to failures in the OOHHC residential sector (McFarlane et al. 2019), was in the process of implementing a therapeutic approach to residential care (NSW FACS 2017) alongside the state-wide joint protocol discussed in the next section. Because this is a relatively new initiative, it was acknowledged that many agencies would need additional training and support to enable their staff to implement it:

We would think they'd very much need additional training and support...what we are proposing is joint training around trauma and abuse, and that will touch on the therapeutic care. But, at the same time, when funded services go through the recommissioning process, they will need to demonstrate that all staff are going to be trained in therapeutic care. (FACS3)

Approaches that recognise and address the traumatic experiences of children in care, supported by frameworks such as the FACS Cultural Capability Framework, are widely viewed as best practice by many in the sector. This trauma-informed approach aims to repair and ameliorate trauma symptoms rather than to exacerbate the symptoms or re-traumatise the child through reactive and punitive disciplinary practices. The implementation of the NSW Therapeutic Care Framework (NSW FACS 2017) is, in our view, a worthwhile development but one that warrants ongoing observation and independent evaluation.

A key issue identified by many respondents was funding. One Juvenile Justice worker told us: 'if you had big budgets you could get staff who are probably better skilled. Because when they advertise positions, the position caps at a certain salary...so you get a certain skill set of workers' (JJ1). One lawyer went so far as to question the value of government outsourcing of OOHHC and the role of NGOs, stating, 'What used to happen before is that DoCS [Department of Community Services] would recruit and manage all the foster care situations. Since then, obviously to save money, it has been outsourced to non-government agencies' (L13). Another magistrate observed that 'the NGO [role in the] OOHHC system [is]...a real failure and...warped I think (Magistrate Focus Group). However, we are not able to independently verify these statements about funding.



# Policing children with care experience

Police perceptions of, and responses to, children in OOHC are significant factors in the criminalisation and subsequent over-representation of these children in the criminal justice system (Howard League for Penal Reform 2017; Prison Reform Trust 2016). First, this section explores what our police respondents characterised as their involvement with children in OOHC and OOHC service providers and how this influenced their perceptions and interagency relationships. Second, we examine our police respondents' and other stakeholders' understanding of children who go missing from care.

## Frequent police contact

The current study found police were more likely to come into contact with care-experienced children, not only at the residential care facility but also in public spaces, as many care-experienced children spend more time in public spaces compared with non-care-experienced children. Heightened interaction with children in residential care was exemplified by one police respondent's comment:

I chatted to one just the other day, because he wasn't at school. So not necessarily a victim or a witness, just was, that's how you come in contact with young people all the time. (P5)

Respondents reported that many children in residential care felt unsafe and did not want to spend time in the group home. Moreover, many of these children were not attending school and often elected to self-place with their family. As a result, they could come to the attention of police for matters not necessarily related to offending. Criminological theory argues increased exposure to police can intensify the risk of criminalisation, and this is certainly relevant to care-experienced children (Cunneen 2001; Lemert 1972).

Our police respondents reported being frequently called out to residential care facilities in response to incidents of alleged offending or concerns that a child had gone missing. Indeed, the police could be called to a residential care home multiple times in a 24-hour period (P1, P2, P5, P6). Police thus spent a significant part of their operational duties handling matters involving care-experienced children, specifically those in residential care. Furthermore, contact with OOHC service providers and care-experienced children often occurred on the very first day of work as a police officer:

Because even the most junior police officer has probably been out there very early on in their career...you're probably out there day one on the job, so you get a really good feel for them, right off the bat. (P5)

Despite the close familiarity and regular engagement with children in OOHC and OOHC service providers, our police respondents spoke about how the operational expectations placed on police, who were often busy with many competing priorities, were not conducive to an effective response to the child or their situation:

But a lot don't have a positive history with the police. And then along the police come, particularly busy commands, they've got a lot of work on, they're fairly abrupt, they're fairly impatient to get to the next, more pressing job, and yet they're supposed to sit down and reason with these children who have trained professionals, who have trouble dealing with it, so what chance does a second- or third-year constable, who doesn't have any of their own children, and might only be six or seven years older than the kid that they're talking to. It just is not a productive situation. (P1)

The policing task requires the sort of patience that is in short supply when more 'pressing' jobs await. In addition, police perceived themselves as ill-suited to negotiating and managing the behaviour of children in OOHC, in contrast to the capacity of 'trained professionals'. The police responding to the call-outs were often also young and, as the above respondent described, lacking the required ability or experience to appropriately resolve situations. Tensions emerged between the requirement for police to deal with situations in the context of competing operational priorities and the need to 'reason' with children whose behaviour police were called out to address.

## The impact of poor interagency relationships

Multiple stakeholders perceived that the interagency relationship between police and OOHC service providers was strained. The police respondents were critical of the OOHC service providers who repeatedly sought police attendance at residential care homes, yet also recognised the structural constraints posed by the residential care environment, such as inadequate staff training, inexperienced workers and resourcing issues (P1, P6).

The overarching feeling among the police respondents was frustration at having to deal with care-experienced children and their carers. These respondents were particularly annoyed about being called to residential care homes when no criminal offending had taken place:

As a copper, don't ring me and say, such-and-such has been naughty and you want me to chastise them as a parent or an authority figure. You're the carer, that is your job. If you want them charged ring me. I'll happily do my job. But as a parent, that is your job. (P5)

Juvenile Justice and lawyer respondents (JJ4, L7) also criticised the use of police as a behaviour management or 'parenting' tool by OOHC service providers:

Certainly there's been a history of some houses within our area that have used perhaps calling the police as a bit of a parenting tool as opposed to managing behaviours in the house. (JJ4)

Some respondents saw the use of police as a behaviour management tool as normalising care-experienced children's contact with police (JJ4)—it became routine to have contact with police through residential care homes.

Many of the incidents that prompted the police to be called were viewed as minor, yet bringing police into the residential care environment represented a significant escalation. As stated by P5 above, calling police often led to the series of familiar events of arrest and charges being laid. Furthermore, the consequences of police responding, often to very minor matters, are significant for children:

Because, you know, if they act up, and you've got fully grown police wrestling with trouble with the kids and they get injured or they get put into the back of the truck, they come into custody, they are high risk in custody for what would be a relatively minor matter, that at the end of the day the handlers or the managers aren't going to want to form an action, won't make statements or won't go to court or—and the court won't want them for those sorts of minor matters. (P1)

The dangers inherent in a typical police response are captured above by this respondent. A police response often leads to arrest, custody and finally the preparation of a brief and a court appearance. Each of these stages within the criminal justice cycle exposes care-experienced children to risk, for matters that may never end up in court or, if they do, may further enmesh children in the system.

The frequency of police call-outs to residential care homes and the burden these placed on police resources meant that police often viewed children in OOHC as troublesome. For instance, one police respondent in a focus group we conducted was quite explicit that the OOHC system placed ‘shit kids with shit kids’ (Police Focus Group), while another commented:

You find none of them have got any credibility... They’ll lie to get what they want. They’ll tell stories to get what they want. They will manipulate the system to get what they want. (P5)

This perception of children in OOHC as dishonest was compounded by what police respondents perceived as an inability of children in care to communicate and act in a considered way. While children were criticised, the police respondents also recognised the limiting nature of the residential care environment:

Some of [the children] are quite nice, but I think a lot of them just have no—they don’t care. They don’t care when they’re being spoken to; they probably don’t care much about themselves either, and what they’re doing. (P4)

If this is the last resort for those kids it needs to be structured; you must get out of bed and go to school, you have jobs to do each day in your home, you are to respect other people’s properties... They don’t know how to, they’re being babysat as opposed to nurtured and, in my opinion, it needs one-on-one care where the young person is taught manners, taught how to dress appropriately, taught how to talk to somebody face to face. (P2)

These responses illustrate the expectations police place on children to have qualities such as honesty, cooperation, listening, respect and direct communication. When interactions with children in OOHC fall short of these standards, the demands on police increase and the risk of escalation rises. Yet the police respondents also recognised the shortcomings of the residential care environment in babysitting rather than nurturing children. We observed that these tensions resulted in poor interagency relationships.



## Missing children and criminalisation

Our observations in the NSW Children's Court were informed by preliminary analysis from our pilot study, involving qualitative research with police, residential care providers and lawyers about the involvement of care-experienced children in the criminal justice system. In that study (Colvin et al. 2018), and consistent with previous research (McFarlane 2017), going missing was commonly described by the police and OOHC respondents as a typical 'offence' committed by care-experienced children. Yet this conflation of 'missing' with criminal offending is problematic and indicates the susceptibility of children in OOHC to criminalisation.

Evidence from UK inquiries into serious abuse occurring in Rotherham and Rochdale indicates that children in OOHC have come to serious harm, including death, as a result of inadequate agency responses to missing children (Jay 2014). In Australia, recent media coverage and successive inquiries have also identified a lack of police action in some cases where a child has gone missing from residential care (Royal Commission into the Detention and Protection of Children in the Northern Territory 2017; Begley 2018; Queensland Family and Child Commission 2016).

Our court observations and interviews with magistrates revealed the negative consequences for children who went missing in care as they cycled through the court process. This was demonstrated in the case of 14-year-old 'Lila', who went missing from her family home after an argument with her grandmother. We observed Lila's court appearance in Case 9, Day 5. After going missing, Lila was subsequently detained at the police station for over an hour, waiting on a family member to collect her. When she tried to leave, police refused to let her go. A verbal altercation with a police officer escalated, and Lila was ultimately charged with resisting arrest and assaulting a police officer. In an interaction in the Children's Court that we observed, the magistrate questioned the right of the police to detain Lila in the first place, given that no offence had been committed. The magistrate explained:

These charges originally came before the court because she was a missing person. She came into police custody, waited a long time and went to leave. Police stopped her. In effect I am being asked to detain her because of that charge alone and because her parents have not taken responsibility for her or allowed anyone else to give her accommodation... It's not a concern under the Bail Act, I'm not even sure there has been an offence. Did police have an entitlement to detain her? (Case 9, Day 5)

This case also illustrated the difficulties missing children can face when attempting to secure bail. Parental consent is needed for children under 16 years of age to be placed in a youth refuge. This consent is not required if formal steps are taken to place the child into OOHC. Lila's family wished to 'teach her a lesson' by refusing to let her return home and refused a placement in a youth refuge. Lila spent one night in custody after being refused police bail and was then effectively homeless, facing continued time in custody under section 28 of the *Bail Act 2013* (NSW) until appropriate accommodation could be found for her. When informed that FACS intervention would be limited, as the agency could do little in the two days before the matter would return to court, the magistrate's response was unequivocal:

That's crap, under the law they have a statutory responsibility, it's FACS' cheap way of getting out of situations... Because her parents failed her, I am granting unconditional bail. You are free to go. (Case 9, Day 5)

Police were responding to Lila as a missing child, but subsequent events resulted in her being charged with offences against police. The matter was adjourned to a later date and Lila was free to leave.

Our magistrate respondents observed that breaches of court orders and bail often resulted from children going missing. As one magistrate commented:

Most of the breach action that I take is for non-compliance with supervision orders. They...go missing and hence don't attend the appointments. (M3)

Children who left their residential care placement in an attempt to self-place with family or friends were seen as being without appropriate accommodation, leading to the court refusing bail or setting accommodation requirements pursuant to section 28 of the *Bail Act 2013* (NSW). In the absence of suitable accommodation being found, the child would remain in custody. This was illustrated by the case of 12-year-old 'Joel', as described above.

## Where is the NSW joint protocol?

Our research was undertaken before and after the commencement of the 2016 NSW Government's Joint Protocol to Reduce the Contact of Young People in Residential Care with the Criminal Justice System, prepared by the NSW Ombudsman alongside stakeholders. The joint protocol is designed to: reduce the frequency of police involvement in residential care; promote diversion; promote the safety, welfare and wellbeing of those in residential care; improve relationships, interagency communication and information sharing; promote an early intervention approach; and support victims in residential care (NSW Ombudsman 2016). The guiding principles of the joint protocol are to foster a trauma-informed approach and use law enforcement as a last resort. The joint protocol sets out joint and individual responsibilities of agencies—FACS, OOHC service providers and police—and establishes a state-wide governance process. FACS has responsibility for the implementation and training aspects of the protocol, and a comprehensive review is due in 2019.

We previously analysed some of the benefits and challenges of the joint protocol, based on respondent views from our pilot study (McFarlane et al. 2019). The impetus for the state-wide joint protocol came from the interagency work of the Western Sydney Residential Providers Forum, which included stakeholders from police, OOHC service providers, FACS and Legal Aid (NSW Ombudsman 2016). The iterative development of the joint protocol, its adaptation from a UK model that had reportedly reduced unnecessary criminalisation, and the momentum it provided augured well for reducing unnecessary police contact. Our interviews with police respondents, OOHC service providers, lawyers and FACS respondents, which took place before the joint protocol was announced, underscored the need for a joint protocol to reduce police contact. Later sections in this report return to the data collected after the joint protocol had commenced—our magistrate interviews, court observations and file reviews—which show limited discernible impact of the protocol.



# Advising children with care experience

In our interviews, the lawyer respondents stated that they were aware of the key challenges facing care-experienced children and saw themselves as advocates and drivers of change. However, our analysis of the court observation data and file reviews revealed situations where this sort of advocacy was not practised by the lawyers we saw in court. We note that none of the lawyer respondents we interviewed were those we observed in court. Lawyer respondents outlined how, based on their experience, they found it effective to incorporate elements of social work into their legal representation of clients, and we explore the benefits and limitations of this approach.

## Lawyers' understanding of care-experienced children

All of the lawyer respondents ( $n=14$ ) recognised that care-experienced children have experienced considerable trauma and disadvantage and that this likely leads to challenging behaviour:

So they have complex needs as a result of their exposure or their experience of very traumatic events in their life...it's symptomatic then through all these very difficult or challenging behaviours that arise from their traumatic experiences. So it's that continuum... It's going to impact on their ability to form relationships. They've all had significant uprooting and extreme transient experiences with their accommodation. They're then all pumped out together and placed in a house with other strangers and those strangers will happen to have the same sort of complex needs as they do or challenging behaviours and then you're stuck in this resi [residential] care system where you've got workers who may not be that skilled. You've got a sector that's not that developed in terms of a therapeutic care framework. (L1)

Our lawyer respondents provided many vivid examples of trauma experienced by their clients, including sexual and physical assault and drug and alcohol use (L6, L11). In addition, a high number of children had an intellectual disability (L6). As one lawyer said: 'It would be the exception that you saw a kid come in that didn't come from a background of horror' (L9).

Institutional abuse and a history of trauma were also reported to coincide. As one lawyer respondent observed, ‘The solutions [placing children in OOHC] have proved to be equally as damaging as the original trauma’ (L11). It was not uncommon for the children appearing in the Children’s Court to have several pages’ worth of criminal history arising out of their care experience:

It’s really common that when you get these kids, they might have five or six pages of criminal history, and their prior criminal history is stuff that’s occurred in and around this out-of-home care home. The whole—my whole experience of Children’s Court, generally, it’s really rare to get a client who comes from anything approaching a functional home. (L3)

Our review of the court files of care-experienced children revealed that these children are more likely to have been charged (as opposed to cautioned) by police previously. Of the 92 individuals whose files we reviewed, 36 percent of the care-experienced children had at least one previous charge, compared with 17 percent of the non-care-experienced children ( $p=0.057$ ). In relation to cautions, among the 92 cases, only 10 children (both with and without care experience) had previously been cautioned. Given the small sample size, any differences would be unlikely to reach statistical significance. However, it is worth noting that only one care-experienced child in the sample of files had been cautioned previously, compared with nine non-care-experienced children. Although it is difficult to draw any firm conclusion from this sample size, these figures suggest that care-experienced children are more likely to receive a punitive policing approach. Given the fact that offending is likely to be a consequence of the trauma and disadvantage common to many care-experienced children, this is a finding deserving of further investigation.

## Differential treatment of children with care experience

The lawyer respondents interviewed for this research perceived that additional burdens were placed on their care-experienced clients. Our lawyer respondents felt that neither the police nor residential care agencies took full responsibility for addressing the behaviour of care-experienced children. For example, police were seen as taking the ‘easier’ option of charging children in care. In this regard, one lawyer respondent reported:

I think it’s easier to charge. First of all, the police have a direction that they should be charging, but secondly, if the police do lay a charge, they’ve discharged an obligation that they’ve found, they’ve left in the hands of someone else, and the process is quite well-known. So they know, okay, we lay the charge, we’re going to get a specialist youth liaison officer to check the charge, it goes to court, assuming that they plead guilty, and they have little more involvement in it, and it’s in the magistrate’s and Juvenile Justice’s hands and it moves somewhere else. (L7)

The respondents pointed to variations in the charge rates for children in care across police local area commands (LACs) to support this claim:

We still see certain LAC regularly charging and it's not—every time I see a young person come through I can almost guess who the LAC will be... I [have] definitely seen a decrease and I can only say that it is a change in policy within the care home... I think that there's been more communication with the police and a change in maybe culture about charging kids within their care home. (L6)

The lawyer respondents observed that OOHC service providers used police to show care-experienced children that there were consequences for their behaviour, regardless of the inappropriateness of this approach. One such respondent cited the following example:

We had a matter in court where the house manager has gone on record saying, 'We wanted to teach her consequences. Like, she needs to know consequences', and...she has a cognitive impairment. She's got a moderate intellectual disability. This is not teaching her a lesson. She had no prior criminal history up until residing in this particular house and so it's stuff like that. So it's this idea that we're going to teach consequences. (L1)

It should be noted that this focus on individual responsibility is in direct contrast to the tenets of trauma-informed care, which many respondents viewed as best practice and indeed is currently being implemented as a specific response to the shortcomings of the OOHC system, as explained in the *OOHC training* section. This lawyer's experience reinforces the need for further evaluation of interventions targeted at care-experienced children.

## Lawyers as advocates for children with care experience

Our data included examples of lawyers being involved in house-level negotiation to de-escalate situations and reduce the need to involve police. For instance, in one case this informal approach was thought to be having a significant positive impact:

So this 13-year-old person I'm talking about—their [lawyer] worked directly with [their OOHC service provider] about how do carers respond to this young person when things happen with the LAC—so we set up a meeting with the LAC about this young person and the service provider about what's going on for him and how we can deal with him differently when things do arise in the care home. So you can imagine how significant an impact that would have. Then when he moved from—so that started to have an impact then he moved to the [suburban] LAC with [OOHC provider] and we started seeing him come back a few times because [suburb] wasn't aware of it, so then the [lawyer] started doing that all over again, you know—meet up with [suburban] LAC—talk to them about the young person—meet with the service provider—work on the big plan and you can really start seeing it having an effect. (L6)

We note this is an interventionist approach, which is not without its challenges. However, other respondents agreed that having an independent advocate for young people to assist them to negotiate the challenges that arise when living in these institutions is of considerable value:

I always think—and I thought it a lot when I was in criminal law...that young people, when dealing with these services, whether it's FACS or NGOs, they need an advocate...doesn't have to be a legal advocate, just someone reasonable on their side because...the young people are often really badly behaved and so forth, they're not angels, but, the way that they're treated, it's passive aggressive and just the institutional mucking you around—different providers saying different things, told you can go and see your family on the weekend and then it's cancelled at the last minute and then someone else says you can go and then someone's—different things being said at different times and just messing with their minds. (L3)



The advocacy work described sought to manage the inconsistent approaches to children, establish behavioural management plans to support each child and manage responses from some staff (L3). Another lawyer respondent reported a marked difference between the approach to a child's behaviour taken by regional managers of residential care services and that taken by house managers (L3). In particular, the regional managers, who were not involved with children at a day-to-day level, unlike house managers, tended to have a more theoretical understanding of behaviour management and reflect a more trauma-informed approach. Yet this was often not reflected in the approach adopted by house managers, who have responsibility for the day-to-day care of children.

### Advising at court

The lawyer respondents reported that they had limited time to speak with their clients before representing them in court and that this was not ideal:

I can only talk through ALS, we are pretty limited because of the [high] volume of work. Ideally, I'd love to go out and speak to kids in their house, in their home environment, with their mum, dad, uncle, auntie, around. Find out what's going on. But often it's on a list day, kid comes in, we have a chat for 10 minutes. (L2)

Our lawyer respondents also observed that children who attend court regularly become familiar with the processes and how to respond to magistrates:

The kids that are just in trouble...a lot of the time, they know how the system works, they know how to say, 'Yes, sir,' and 'No, sir,' and all that kind of stuff. (L2)

The lawyer respondents spoke about the difficulties of receiving instructions from their clients via AVL or phone and how this could affect a child's instructions (L9). As one commented:

I hate it (AVL), well, yeah, I really dislike it, a kid doesn't—it's difficult enough for a kid to really follow what's going on in a court when they're there so not being there is really problematic I think and then even worse having to get instructions from a kid on the phone in the morning is really bad, but there are obvious benefits to it, the kids often prefer it and that's because they don't have to come... if the kid's not needed on the screen, for example, if it's just an adjournment or something like that then I tell them it's not because the kid then has to sit in the AVL unit all day until court's done and on a busy Monday and you've seen—this Monday was great but last Monday court sat 'til 5:30 and so the kids have to—and some of the AVLs probably happened at 3 o'clock, 4 o'clock, the kids have to wait in the AVL room or AVL section all day so they're not in school and they're not doing all of the other things they'd be doing in custody. (L9)

This quote highlights how disruptive court processes can be for children. Our court observations revealed that the court often recognised this disruption and, where possible, children were excused from attending court. Further, our court file reviews showed that just over a quarter (27.3%) of care-experienced children were in custody at appearance, compared with 14.3 percent of non-care-experienced children, although this was not statistically significant. Care-experienced children who are in custody are more likely to be adversely impacted by the challenges of using AVL, as described by our lawyer respondent (L9), than other children.



# Magistrates, children with care experience and the Children's Court of New South Wales

This section provides findings that can be used to inform future practices for judicial officers to assist them in their work with care-experienced children. First, we examine the prevalence and significance of the care experience in the Children's Court. Second, we investigate the court experience for care-experienced children based on the perceptions of our interview respondents and our own observations. Third, we focus on what we identified as two aspects of the court process that are particularly problematic for care-experienced children: bail and the use of section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW).

## **Acknowledging the overlap between care and crime**

Our findings are consistent with previous research conducted with judicial officers in New South Wales regarding the 'overlap between care and crime' in the Children's Court (Fernandez et al. 2013). Our magistrate respondents stated that care-experienced children frequently present in the Children's Court with obstacles before them not of their own making or necessarily in their control (Magistrate Focus Group, M6). The magistrates we interviewed felt that they had too much contact with children in residential care (M1) and often dealt with matters originating in care, such as property offences and applications for AVOs, as also reported by our police and lawyer respondents. This view was supported by our file review data, which showed that 58 percent of care-experienced children were involved in AVO applications as the offender, compared with 10 percent of non-care-experienced children ( $p=0.001$ ).

Like our other respondents, magistrates indicated that they understood the trauma that care-experienced children endure and believed that this impacts on their behaviour (Magistrate Focus Group, M5, M6). Several magistrates noted that they were more likely to make allowances for care-experienced children when determining bail, including any conditions of bail, and when passing sentence, and were also more tolerant of breaches of bail or court orders by these children (Magistrate Focus Group, M2, M4). In contrast, the Juvenile Justice respondents interviewed were more cautious in their assessment of judicial tolerance, perceiving magistrates as being initially sympathetic to care-experienced children but adopting more punitive measures if children reappeared in court for the same types of offending (JJ Focus Group). Despite the prevalence of care-experienced children in the Children's Court, the magistrates spoke of only learning of the care–crime overlap through their experiences in court rather than through any initial judicial orientation training (Magistrate Focus Group). Several magistrate respondents cited a paper by former President of the Children's Court, Judge Mark Marien SC (2012), as providing valuable insights on the issues surrounding the overlap between crime and care experience for children in the criminal justice system (M1, Magistrate Focus Group).

The magistrates (M1, M2, M4, M6) noted the effects of intergenerational trauma and the cycles of poverty and trauma experienced by children who appeared before them on criminal matters. The magistrate respondents lamented the intergenerational trauma (Atkinson, Nelson & Atkinson 2010) caused by children's removal and the criminalisation they witnessed from the bench in both Indigenous and non-Indigenous families, but particularly in Aboriginal communities:

The transgenerational thing applies across the board, more so in the Aboriginal community because of the historical trauma that they've been exposed to, but...a vast, vast majority of the kids that we have before us, the first factor you would look at commonly is where they've been parented, how they've been parented. One of the great dreams I think of all magistrates is...the wheel that just keeps producing that transgenerational issue somehow is disrupted. (M1)

Our magistrate respondents eagerly awaited an end to these familiar yet devastating cycles of trauma and criminalisation. One magistrate raised that they wanted to be notified and reminded by children's lawyers of their client's Aboriginal status and the sentencing principles that ought to be applied (M5). They felt that lawyers sometimes assumed magistrates were aware of this information, yet magistrates needed to be reminded in a plea in mitigation to trigger consideration of the applicable sentencing principles relevant to Aboriginal and Torres Strait Islander offenders.

The magistrate respondents believed that care-experienced children have specific and complex needs that are distinct from those of the general child population. In this regard, it was the understanding of many magistrates that care-experienced children have multiple mental health diagnoses and cognitive impairments (Magistrate Focus Group, M6).

Despite the prevalence of mental health disorders, accessing treatment was perceived as difficult: 'As you can imagine, there's a huge waiting list. Asking these kids to wait three months for anything—their whole lives change in three months' (L13). The delay in accessing mental health services was seen as a particularly difficult problem for care-experienced children, whose lives are unstable and likely to change significantly while waiting to see a specialist.

Given the significance of care experience, one lawyer respondent told us that magistrates wanted to know about the lives of children appearing before them and their care status. Another observed that the first thing magistrates want to know about a child is whether they are in care (L13). This comment was also supported by other magistrates (Magistrate Focus Group, M6):

It is one of the very first pieces of information that the lawyers offer, is that this child is in care. Because that's the first thing that we want to know. What's going on for this child? Who are they living with? Who can they live with? Who's a responsible adult? Because that's what we do. When you've got a bail application, rather than are you guilty or not guilty, that's not the first thing that we worry about. We go, okay, you're in custody. How do we get you out and satisfy the court that there are conditions? The very first one is who are your carers? Who are you living with? I'm living with mum and dad. Will they take you back? Yes/no. Sometimes they won't. I'm in care. (L13)

However, the awareness of the care experience and its detrimental impact on the agency of the child that came through strongly in the magistrate respondent interviews did not correspond with the discussions of care-experienced children that we observed in the courts, among either the magistrates or the lawyers. With few exceptions, the care experience and its impact were not discussed in court, and we observed a number of instances where there was information on file indicating a history of care that was not raised in court. In eight of the cases where children with care experience had been previously charged, four of the children had been charged with offences of violence, ranging from sexual assaults committed against half-siblings in foster care to animal cruelty. There was also evidence of considerable trauma in these children, with one child having been abused while in OOHC and another, whose father had committed suicide, having a history of unsuccessful placements. Another child had previously been found not guilty because of mental illness. These findings again demonstrate the complex interplay between care experience, trauma and offending.

## Children's experience of court

I just think most of these kids' lives are just different degrees of chaos. From not knowing which couch you're sleeping on, losing documents. The police will say we served your client with the brief. I'm like the kid is couch surfing. The kid has got an intellectual delay. He doesn't quite get it. I think they get that they're in court, but they don't understand all the nuances. Like I said, there isn't that adult to say okay, we need to be at court. You can't be late. It is important if you miss it. A lot of these kids are ringing up for themselves in the morning and going, 'Oh, I'm not coming to court; I'm sick.' Well you need to—our response, which is what we're mandated to do, is to say well you need to get a medical certificate. They're not getting to the doctor's. These kids don't have Medicare cards. It's actually quite frightening how little they have. Even if they did, they would probably lose it. If it wasn't an app on their phone, they would probably lose it. So things like Medicare cards, proof of age, is a real problem for even their parents. A lot of their parents don't have driver's licences and Medicare cards—they've lost them. There tends to be a lot of chaos. And the stuff that we take as just—you know, your Medicare card is in your wallet and it's there. You shouldn't assume that they're functioning in any way that we are... But, yeah, a lot of these kids have got intellectual deficits. A lot of them have mental health problems. A lot of it is stress and anxiety, and post-traumatic stress disorder from having been in the care jurisdiction. I know when I see kids—because the kids come in to call over a lot of the time, especially when I've got to explain orders. They're not looking at you. They're shut down. You think oh—you almost go, I'll see you soon. But they're the ones that are on their own. Most of the time. Or if they're with someone, it's usually gran who—it's too much for gran. You can see gran is struggling. So that's what you see. You don't see these kids come in with mum and dad, and a lot of supports. (L13)

The above quote from a lawyer respondent aptly illustrates the context in which many care-experienced children operate in the Children's Court. Our study found that these experiences were mirrored in the file reviews, respondent interviews and court observations. Structural disadvantage and dysfunction are common for these children. As one respondent observed, children often present at court without having eaten or slept and are often without any adult support. In these circumstances, getting to court at all is an achievement (L13).

Several magistrates expressed their concern at the limited understanding children have of the court process (M3, M6). The pace with which matters were handled in the Children's Courts varied between courts and magistrates but, overall, all matters were dealt with swiftly. Indeed, during our observations we were struck by the fast pace with which matters were dealt. On one of our observation days there were 100 matters on the list and, prior to going into court, we observed the magistrate comment that this meant that an average of two minutes could be devoted to each matter in order to finish court on time. In talks with our lawyer respondents, it emerged that client interviews with lawyers were also conducted quickly and often immediately prior to matters appearing in court (L2). As a result, and perhaps unsurprisingly, the respondents worried about how well the child comprehended the matter. As one magistrate commented, 'all they want to know is am I getting out or am I going into custody. All the words in between, I think, go over their heads' (M3). In some courts, magistrates attempted to engage the children—for instance, by asking at the end of the hearing whether they had any questions—but no child in any matter we observed responded with a question. In one court proceeding we observed, Day 8, Case 20, the young person became angry, shaking his head, sighing and swearing audibly. The child then wanted to speak to the magistrate, but the lawyer advised him not to talk. The child then went to speak again before becoming frustrated and storming out of the court. The matter was held over until he calmed down.

It is also the case that magistrates often only see a sanitised version of the child in court, given that court design places them far from the magistrate during the hearing. In one lawyer respondent's view, this means that magistrates are not able to see the physical condition of some of the children appearing before them:

They can't smell, see, pick up that the kid is itching and there are sores. Stuff where I go what's going on there? We've had kids in the cells with staph—golden staph. That's really high-level neglect and medical problems. It's the first time they'll get antibiotic treatment, but we've got to wipe down the whole place and run off to the medical centres. The magistrate won't ever have to do that. They're not close enough to that. Like I said, everything is filtered through the lawyers, for the magistrate. It's something that I've learnt. (L13)

This respondent felt that magistrates are prevented from sensing the child's condition in court and that lawyers often filter out information that provides some insight into why the child is appearing in court. Yet the conditions children face are at times indicative of serious abuse and serious health problems resulting from their living conditions.



## Support at court

We frequently observed magistrates cite attendance at court of family members or other support people as a positive factor in their sentencing remarks. The magistrates' comments included: 'It's great you have family support' and 'This shows you have good prospects'. In four sentencing matters we observed clear evidence that the magistrate took family support into account when sentencing. In one case, where the child received a good behaviour bond with no conviction, the magistrate said: 'You have good prospects, a caring mother and father who are here in court' (Sentencing Hearing, Case 8, Day 1). In another sentencing matter, the magistrate was clear in relation to the impact family support had on the child's sentence:

The seriousness of the offence means a control order. However, there is a good prospect of rehabilitation, family support, [the defendant] works with his father. I will suspend the control order and give good behaviour bonds. (Sentencing Hearing, Case 4, Day 1)

We also observed family support to be a key feature of many defence submissions, although this was not the case in relation to the carers accompanying care-experienced children. Further, on two occasions when care-experienced children had friends or intimate partners with them at court, this was not noted by either the magistrate or the lawyer. To illustrate, on Day 1, Case 10, a care-experienced child was accompanied by a female support person in court, yet no one made mention of this person during the hearing.

In 40 (29.9%) of the cases we observed, the young person was supported by family members in court. In an additional 16 cases (11.9%), a residential care worker was present. In the cases we observed, male children appearing in the Children's Court were more likely to be supported by family than female children: 38.6 percent of male children had a family member present as opposed to 19.5 percent of female children, representing a statistically significant difference ( $p=0.009$ ). Further, Indigenous children were more likely to have family support in court (50% of Indigenous children compared with 25.9% of non-Indigenous children,  $p=0.024$ ). When the data were examined by care status, while some trends were evident, in most cases these were not statistically significant. Not surprisingly, care-experienced children were more likely to be accompanied by a carer and slightly less likely to be accompanied by a family member, although the latter difference was not statistically significant (22.6% for care-experienced children compared with 31.4% for non-care-experienced children). As previously noted, given the low numbers of court observations where there was evidence presented of a care background ( $n=6$ , 4.5%), we could make no meaningful comparisons based on these figures.

Although our figures were not conclusive, the data from our observations and file reviews led us to conclude that, first, the presence of family support had some influence on sentencing decisions and, second, both the nature and amount of family support differed between those with and without care experience. Those attending court to support care-experienced children consisted of grandparents, siblings, friends, OOH workers or partners.

Further, based on the differing OOHC prevalence rates in our court file reviews compared with the matters we observed in court, we suspect that care history was in many cases not raised in court. These findings, taken together, indicate that care-experienced children could be disadvantaged by their care history when being sentenced, and this may lead to harsher sentences. Although we cannot make a definitive conclusion in this regard, these findings should be of concern and are deserving of further inquiry.

## Education

The magistrate respondents perceived that many care-experienced children in the criminal justice system were not accessing education (Magistrate Focus Group, M1, M4). They were aware of how damaging a change of educational environment could be for these children (M4), but also of how devastating the impact of no education is for any child:

The problem that I see [for] all kids in care and in the criminal jurisdiction is education—so many of them don't go to school—they don't have any education at all, so it's a double whammy and they've got plenty of time on their hands and they don't also have all the advantages that going to school gives them...so many of them get kicked out of school and expelled.  
(Magistrate Focus Group)

Our court observation data revealed that magistrates placed importance on whether the child was in education in formulating their decisions relating to sentencing and bail and that education status was regularly raised in court proceedings. In one matter we observed, after submissions from the defence were heard, the magistrate explicitly referred to the child's education in their bail determination and made attendance at school a condition of bail being granted. We observed two matters where there was a Department of Education officer in court reporting on school attendance as part of sentencing hearings. In one of these cases, the child's attendance at school was confirmed and their matter was subsequently dismissed. In the other case, we observed that, even though the child was not yet in education or employment, lawyers used the prospect of this as part of their plea in mitigation. In this case, in the sentencing remarks, the magistrate explained that the 'court was willing to give the child the opportunity to do things the right way', so gave the child a community service order rather than a custodial sentence. In a matter where a custodial sentence was imposed on an Aboriginal defendant, the magistrate, when making sentencing remarks, noted that the defendant was 'not in education or employment'. It is certainly the case that care-experienced children face barriers to accessing education. For instance, our court file data showed evidence of problems in accessing education for more than half (54.5%) of the care-experienced children, compared with 27 percent of their non-care-experienced counterparts ( $p=0.018$ ). As discussed above, this impacts on how children are sentenced and bailed, again demonstrating how experience of care disadvantages vulnerable children when they come before the court.

## Bail

There was common agreement among all stakeholders that bail determinations for care-experienced children were challenging. Several of the magistrates described the decision-making process they undertook to determine whether a young person got bail (M12). One magistrate respondent said they applied the same process as if the person was living with their parents but, for children in care, the factors sought were less likely to be present:

The typical one is, where are they going to live? Usually FACS disappears off the planet with the more difficult children. Even though the minister might have the parental responsibility. It is then a matter of Juvenile Justice trying to negotiate, trying to drag FACS into the equation to find somewhere and/or getting refuge accommodation which is highly unstable and unsatisfactory. That's the major change between a child who's got mum and/or dad or family, can have some form of stable accommodation available. Those that are in out-of-home care struggle more and more with that the older they get. (M4)

Care-experienced children face significant barriers to accessing bail. Offending by care-experienced children is often related to being in care and often occurs in their place of residence. This makes returning children back to the same accommodation difficult—for instance, where an AVO restricts the child from returning (M6). One Juvenile Justice respondent described this as cyclical (JJ3): the care environment produces the offending and the child has no other option but to return there. Some magistrate respondents saw several of the OOH service providers running residential care facilities as having a strong commitment to kids in residential care and were impressed that these providers would repeatedly take children back into the same residential care facility (M1, M3, M6). However, often the child did not want to return to the same facility; indeed, one lawyer respondent told us that some children would prefer not to be bailed if it meant going back to residential care (L6). As a result, the child might abscond, breach bail and then potentially be returned to custody. Although the magistrate respondents did not acknowledge this explicitly, children's concern for their own safety in residential care has been identified as a reason why care-experienced children might not wish to return to an available placement (Colvin et al. 2018).

Lawyer respondents expressed that care-experienced children were also seen as posing an unacceptable risk because they were not in the care of their parents (L9). In some cases, the ‘responsible adult’ attending with the child to sign a bail acknowledgement would not receive the approval required to be an ‘appropriate person’, resulting in the child having to remain in custody (L13). Bail risk was magnified when there was a history of unsatisfactory and unstable placements in care, with the children therefore perceived to be more likely to self-place, particularly when they were older and on the verge of leaving care. Given that the court stipulates where a child should reside, if they refuse to return to residential care they are found to be in breach of their bail and must return to court (JJ4). It was a common perception that accessing suitable and stable housing to be bailed to was a challenge for care-experienced children. Difficulties in finding appropriate accommodation consistent with bail conditions were also thought to have a number of negative impacts. One such impact was young people being returned to the site of their offending:

We see young people frequently returning to these homes where they don’t want to be there, they’re at risk of harm themselves, they’re being assaulted by other residents and regardless of what happens within those residences they will always take them back. (JJ Focus Group)

One magistrate respondent said that, once a child has absconded from care, ‘there’s a difficulty with getting FACS involved again to actually look at them’, making finding suitable accommodation difficult. The result of this was often that the child would be remanded in custody (M5) (see case of ‘Joel’ above).

Concerns were raised about several other issues related to access to bail for care-experienced children. For example, the magistrates observed that children in OOHC struggle with having a curfew as part of their bail conditions (Magistrate Focus Group, M3):

I get many breaches of bail for breaches of curfew. So I don’t see a night time curfew as being all that useful in situations where you’ve got a defiant kid who’s not going to obey it anyway. (M3)

Breaches of these conditions can result in periods in custody. One magistrate commented that having access to the available reports on a child in custody—Justice Health and psychological reports, in this instance—can greatly assist decision-making, but this is not always possible due to resourcing constraints (Magistrate Focus Group).

A further problem identified as a challenge for care-experienced children who appeared frequently in the Children's Court was their ability to comply with different bail conditions. Managing these conditions can involve a fair amount of disentangling by the child's solicitor, as one lawyer respondent explained:

A lot of these kids have got—because they've got a lot of different matters, their bails sometimes don't match up. I try and go okay, what does all your bail look like? Is there an AVO? Let's make sure all the conditions look the same so you're not breaching one and unwittingly breaching something else. Because that bail says you can go back to Nan's, and this one says no. So that's the other thing, these kids tend to move around a lot. They do hop a train. So that's the other thing that we see. It's not unusual for them to have offences in different areas. (L13)

This lawyer respondent outlined how children might have different matters listed in courts across metropolitan and regional areas. This situation makes complying with bail conditions more challenging and ultimately more confusing for children. As became clear in the course of our research, the end result of these difficulties in relation to determining bail, setting appropriate conditions and managing breaches was young people being remanded in custody for extended periods, particularly in cases where alternative accommodation could not be found.

In this regard, a number of magistrates discussed the use of section 28 of the *Bail Act 2013* (NSW). According to one magistrate, section 28 is effective in that it places pressure on FACS and Juvenile Justice to respond to a child's accommodation needs (M5). Among our respondents, one Juvenile Justice respondent said that, if a section 28 is made and FACS has to find suitable accommodation, children are 'not going to get a speedy response' (JJ4). In other words, FACS are not able to source accommodation quickly. This respondent was of the view that 'kids who are actually in the care of the minister spend twice as long in custody under section 28 than those who are not in the care of the minister' (JJ4). In effect, therefore, the legislative changes have not reduced the time spent in custody for care-experienced children.

The magistrate respondents raised other criticisms of the accommodation provisions in section 28 of the *Bail Act 2013* (NSW). First, as one magistrate pointed out, the provisions were seen as diverting resources away from locating accommodation to bringing the child back to court at two-day intervals (M4). In the magistrate's experience, children became increasingly agitated when accommodation could not be found and they had to keep coming back to court or appearing through an AVL (M4). Further, in practice, section 28 has not hastened the provision of appropriate accommodation and places unnecessary strain on Juvenile Justice:

I don't think it moves it along any quicker, because I have high regard for Juvenile Justice's search powers. I have low regard for FACS assisting and since we've got no power to enforce the minister being involved, it's just using resources from Juvenile Justice unnecessarily. (M4)

Another magistrate agreed, claiming that the provision only highlights the schism between FACS and Juvenile Justice: ‘when FACS and JJ start working together, we tend to get a much faster outcome’ (M6). However, in the view of most magistrates interviewed in our study, this cooperation was not typical.

### **Use of section 32 of the *Mental Health (Forensic Provisions) Act 1990 (NSW)***

Section 32 of the *Mental Health (Forensic Provisions) Act 1990 (NSW)* applies to defendants in the Local Court and gives magistrates additional mechanisms for dealing with matters if the defendant had a mental illness, mental health condition or cognitive impairment at the time the offences were committed. The provision gives scope to magistrates to adjourn the matter, grant bail or make any other order under section 32(2). Additionally, under section 32(3), the magistrate can dismiss the charges and discharge the person into the care of a responsible person, on the condition that they are assessed or given treatment (or both). The matter can be relisted before the magistrate within six months if the magistrate suspects that there has been non-compliance with any condition under section 32(3).

The court observation data and stakeholder interviews with the lawyer and magistrate respondents revealed several benefits of, and concerns about, the operation of section 32. Some of the lawyers spoke about how section 32 was used in their clients’ cases. One respondent said that some magistrates repeatedly offered the use of the provision to manage children’s offending but that there were inconsistencies in how the provision was applied by magistrates (L9). The lawyer respondents saw one of the immediate benefits of this provision as ensuring the child would not be placed in custody. It is often the case that the children dealt with under section 32 struggle to comply with court orders, so not having to follow Juvenile Justice supervision orders, for instance, was seen as a clear advantage. Nevertheless, the lawyer respondents were unsure how effective section 32 was in enabling the child to access treatment (L9).

Several magistrates criticised the section 32 provision. Their primary concern was that the orders were too short to enable effective treatment to occur. They felt that they had little power to monitor treatment plans and no ability to compel matters to come back before them. Indeed, most magistrates reported that they had rarely seen these matters return to court. They were concerned that the police saw section 32 orders as the child ‘getting away with offending’, which meant that police often opposed them, particularly on the second use. In summary, the magistrates felt that section 32 was unclear and required revision. For instance, one commented:

It is of limited benefit to the court in that we make this Order and then are never told if it’s breached until the young person comes back with further offences. If we were told, say a month or two into the Order, that the young person wasn’t seeing the psychologist or the Mental Health Plan, et cetera, we could get involved and take further action. (M4)

This magistrate respondent felt that section 32 was particularly problematic for care-experienced children, as nobody was held responsible for children getting the help they needed. Another magistrate felt that perhaps a magistrate was the appropriate person to oversee any treatment plan to ensure it was implemented:

Sometimes it is good when somebody with more authority is there [so] that we ask that their medication be reviewed or they go back to find out exactly what is happening. (M5)

Even though a number of reservations about section 32 orders were expressed, these orders were also seen as useful for matters impacted by the child's trauma, and care-experienced children often benefited from these (M6). Magistrates saw these orders as useful in enabling these children to access more specialised treatment (M5).

Sometimes the provisions of sections 28 and 32 were seen to conflict. For instance, in one case described by a lawyer respondent, a child was not able to obtain a treatment plan for the purposes of a section 32 application, as he was in custody awaiting suitable accommodation to be found under section 28:

I don't think any of us can probably understand his situation, it comes from so much trauma...and so I did want to do a 32 with him, the problem was initially he kept breaching his bail, I got—we got him into rehab on two separate occasions but he breached that on both times and then the last bail application when we decided we wanted to do a 32, that's the catch 22 in that they couldn't develop a treatment plan for him while he was in custody and the treatment plan's an essential part of a section 32 so you can't get it without the treatment plan so he was pretty much stuck, he couldn't do a section 32 because...really his mental health conditions didn't allow him—made him struggle at liberty so he was really stuck there. (L9)

We saw this situation in at least one matter we observed (Case 5, Day 1). We believe that this issue needs to be addressed to enable section 28 and section 32 provisions to operate in support of rather than against each other.





# Reducing unnecessary criminalisation in the UK

This section presents the results of our UK case study, involving qualitative research with key informants from relevant criminal justice and social welfare agencies in England and Wales, including care leavers. Comparisons with countries that share a legacy of colonisation—for example, New Zealand—would have different advantages to the UK case study through shared experience of the over-representation of Indigenous peoples in the criminal justice system and in OOHHC (see Stanley 2017). The UK was selected as a case study based on what the respondents in our pilot study with NSW criminal justice professionals indicated: that the UK was actively pursuing arrangements to reduce the involvement of those with care experience in the criminal justice system. We met with representatives from 10 agencies in the UK that are developing, researching and implementing policies and practices to shift the culture and establish a shared understanding of how to reduce the over-representation of those with care experience in the criminal justice system. These agencies were engaged with both children and adults, so practices aimed at both cohorts were captured.

As the first part of this section details, the respondents stated that the ‘unnecessary criminalisation’ of care-experienced children—particularly those living in residential care, and regardless of whether that care was delivered by private agencies or the local authority—was a key driver of children’s involvement in the criminal justice system. ‘Unnecessary criminalisation’ was commonly explained as unwarranted police involvement in children’s lives in response to minor matters, such as property damage, swearing and minor assault. The key informants pointed to a series of recent UK inquiries that have identified that children in residential care are more likely to be involved in the criminal justice system than children in other forms of care or in the general population (Howard League for Penal Reform 2017; Taylor 2016; Narey 2016; Prison Reform Trust 2016). The respondents’ views largely coincided with the academic literature that has recognised that residential care in England is a potentially criminogenic environment (Fitzpatrick 2009; Hayden 2010; Shaw 2016).

The findings on the unnecessary criminalisation of those with care experience in the UK are familiar and consistent with the NSW context, as research has illustrated (Gerard et al. 2019; McFarlane 2017; Cashmore 2011; Wong, Bailey & Kenny 2009). Yet pockets of practice in the UK have seen a holistic and relational approach reinforced, and a shift away from a punitive approach, which has ostensibly reduced contact by all children with the criminal justice system (Department of Education 2018). This section looks briefly at the respondent views on the over-representation of care-experienced children in the criminal justice system in the UK, before moving to an analysis of the initiatives undertaken to arrest this trend at three sites: the residential care environment, policing and custodial settings.

## Care experience and criminalisation in the UK

Despite the data inadequacies, discussed further below, there was universal agreement among the respondents that care-experienced children are over-represented in the criminal justice system in England and Wales. It was repeatedly reported that traumatic childhood experiences were compounded by the limitations and poor performance of the care system itself. As one respondent observed, there was ‘concern that children in care are perhaps held to higher account maybe for their behaviour than children who live in private homes’ (UK1). The key informants argued that the care-experienced population faced aspects of the criminal justice system in a different, and more disadvantageous, way than other children. As a police respondent observed:

[T]he strongest advocate for a child is their parent, and so where their parent is missing because they are in the care system, you remove that advocate, so actually they tend to be the young people who are more likely to spend longer in police custody because there isn’t a parent there saying, ‘What are you doing? What’s going on with my child? Why are you doing this?’ And it changes the conversation because nobody seems to care about this child, so actually the police officers dealing with it don’t care either and so it replicates that whole forgotten, abandoned child, the behaviour is replicated by all those dealing with them which is terrible and a real indictment [of] our system...a young person in the care system is more likely to come in quicker I think because of that. (UK4)

Without an advocate, children were worse off in the criminal justice system, leading to longer terms in custody and often more police charges. The respondents estimated that care-experienced children were between six (UK2) and 12 (UK10) times more likely to be in the criminal justice system than other children. Care experience severely compounded the already considerable challenges facing children in the criminal justice system in the UK.

Part of the impetus for change was a recognition by the key stakeholders that incidents involving care-experienced children quickly escalated. As a respondent from one local authority explained, past practice involved relying heavily on the criminal justice system to manage challenging behaviour:

[W]e, as carers, as corporate parents, were calling on the criminal justice system to manage the behaviour too much, too often...where we were in the UK as a whole...10 years ago was, we were scooping up almost any child who kind of had any minor misdemeanour with the criminal justice system and getting a criminal record which stays with them for life. (UK10)

As we explore below, the prevalence of unnecessary criminalisation has been tempered by initiatives that have sought to change agency practice to reduce the habitual reliance on the police to manage behaviour.

In specific counties that have been trying to reduce the involvement of those with care experience in the criminal justice system, there has been considerable impact. In the Surrey County, for example, initiatives undertaken to ‘reinforce’ a holistic approach have meant that the number of young people entering the criminal justice system for the first time reduced by 92 percent in the 10 years between 2007–2008 and 2017–2018 (Department of Education 2018). In the past decade, across the UK, the number of first-time entrants in the youth justice system has reduced by 85 percent (Department of Education 2018). The respondents provided examples of successful or promising initiatives designed to reduce the involvement of those with care experience in the criminal justice system, as we now explore.

### **‘Getting ahead of the behaviour’—Care environments conducive to the wellbeing of children**

Our key informants spoke about the significant work undertaken in one county in the UK to shift the culture within the residential care sector and to collaborate with agencies in identifying new ways of becoming ‘more mindful of the experiences that children will have been through and that might help us to respond more appropriately’ (UK10). As one of our key informants noted, the strategy has iteratively developed (UK10) and is based on a rejection of the assumption that ‘looked-after children’ are necessarily more likely to commit crime. In place of this assumption, the aim was described to us as understanding offending as ‘an indicator of responsibility to protect, to see offending as a flag that we need to raise our game and see it as an indication of vulnerability’ (UK10). The approach has represented a commitment to recognising that the types of offences drawing children in care into the criminal justice system were arising from the care environment rather than occurring in the wider community (UK10).

One of the key focuses in shifting the culture was to build the skills of residential care staff. Carers were trained in ‘social pedagogy’ (UK10) theory and practice, which represents an intersection of the social work and education disciplines. One key informant outlined the goal as follows:

We need to create an environment for children where they are living which is going to be conducive to their wellbeing and is going to acknowledge the stuff they bring with them. (UK10)

The respondent stated that children are brought into care for a reason, and typically they have experienced trauma, and therefore the range of behaviours that are going to be challenging in the care environment should be anticipated. This means that staff have a ‘duty to get ahead of that behaviour and be as good as we can possibly be’ (UK10). This respondent also articulated that the type of care environment that adopted such an approach would not have to rely on law enforcement to respond to a child’s challenging behaviour. As this respondent outlined, calling the police set off a chain of events that resulted in criminalisation:

It was blue lights, it was drag the kid off, it was—and the train leaves the station in terms of the criminal justice process and it’s like, well you called the police so therefore this is what’s going to happen and we’re going to take control now. So it was about stopping the train leaving the station and recognising there might be cases where kids had to go and talk to the police. Where we might call the police to help us because there’s a riot in the home but that doesn’t mean we’d actually want them to prosecute every child in the home. (UK10)

The need for a partnership between residential care providers and the police to ensure that children are not placed on the train that arrives at criminalisation was identified as critical. An analysis of respondent perceptions of how this shift in policing has occurred is provided in the next section.

The key informants spoke about how the changes to the care environment needed to be more than 'words on paper' (UK10). Instead, the shift needed to be 'more about our hearts and minds and a culture thing around people doing the right things' (UK10). Changing the culture in a children's home was said to involve modelling that behaviour from the outset. The key informants involved in these initiatives told us that what they did not do was engage with the staff by blaming them for their poor behaviour and criticising their work:

What we didn't do, is go in...with a big stick and say, you're doing your job badly and we're here to tell you how to do it differently...because that's what they were doing to the kids. So what we did instead was to go in and model what it is we wanted them to do. So we went in and we gave them a damned good listening to. And we were interested in their ideas around how things could be better, how they could support one another as a group to be a more consistent parent. We encourage them to reflect on, you know, what are the things that they do well? What are the—what does contribute to the times when things are relatively calm and peaceful in their environments? What's their understanding about what makes that possible? ...I think by modelling, by helping them to see that they were affirmed and valued and by empowering them they were more able to see the value in them empowering the children and sharing responsibility, you know, helping them to—rather than be the people responsible for control and the social order in these environments and then a whole load of sanctions that they can call upon to achieve it, trading that with a kind of, you know, how can you help the children in their home to feel that this is their home and responsibility for wellbeing and safety and health and happiness, is the child's—is everybody's responsibility within that environment. So let's trust the kids, you know? (UK10)

Children ought to have a say in their own safety, health and wellbeing. As this respondent outlined, in order to shift the culture, they modelled the behaviour that they wanted staff to show children. The staff then developed skills that they could deploy to manage situations better and de-escalate conflict. In doing so, they sought to shift the narrative from one based on control and social order to one focused on sharing responsibility with children to achieve a safer care environment.

The number of care-experienced children in the UK that have been criminalised has reduced dramatically. One key informant referred to this as ‘something of a revolution in youth...for all children’, with a 65 percent reduction in the overall numbers of all children coming to police attention (UK10). As the police key informant told us during the 2017 interview:

Surrey county have managed for the last two years to not bring somebody new from the care system into the criminal justice system who wasn’t already there at all, so they’ve managed to get to zero of anybody entering the criminal justice system from the care system for the first time, so that’s a really good result. (UK4)

The use of physical restraints is also reported to have significantly decreased (UK10), so there have been other benefits alongside the reduction in criminalisation. While the impact in this county was significant, our respondents said that this was the result of the significant work undertaken in this location and was therefore not indicative of practice or statistics across the country. Perhaps it is more appropriate to talk about pockets of change in the UK rather than a national shift.

Monitoring and reflective practice have been introduced to evaluate the individual cases of children in residential care who are still being criminalised, despite the changes in the sector. As one of our key informants said:

Well the other thing we’ve done, I think, is...monitored, really quite forensically, you know, who are the children who we still continue to criminalise and lots of inquests about individual cases. We’ve just had this latest set of numbers for this year, overall, the looked-after children population has gone up but so with this year we’ve got 16 young people who have been formally dealt with by the criminal justice system. And we will now go through each one of those cases and review and think, you know, what could we have done differently to avoid that outcome? And we’ll do that with partners and there’s a whole infrastructure of forums and—that bring people together to do that work. So it’s like the—this stuff doesn’t happen by itself. You need more than ambition, you need to put the work in. (UK10)

This indicates a firm commitment to a multi-agency approach to reviewing incidents where care-experienced children are criminalised and to collaboratively developing new strategies or practices where required. While New South Wales and the UK share similar realities of the unnecessary criminalisation of those with care experience, the initiatives undertaken to address this issue are implemented differently. The focus on reducing criminalisation through active monitoring and reviewing is apparent. In the next section we return to the role of the police, who have formed partnerships to, in effect, prevent ‘the train from leaving the station’ (UK10).

## **‘Stopping the train leaving the station’: Policing care-experienced children and practices of non-arrest**

We start this section with an exploration of what key informants characterised as a shift in the policing of ‘looked-after children’ in the UK, comprising a national policy framework, investment in cultural change, and the building of relationships at the local level to stop children being arrested and brought into custody. We note that in talking only to key informants we have not been able to capture frontline perceptions as we did in our NSW study. This may have influenced the understanding of the issues raised by these respondents.

Our UK case study respondents spoke of the South-East Protocol to Reduce Offending and Criminalisation of Children in Care, a multi-agency protocol involving several local authorities and a number of corresponding police services. The protocol sets out a number of general key principles as well as specific principles governing police involvement, children placed outside their local authority and responses to incidents occurring outside the care placement. The protocol is aimed at reducing the prosecution of care-experienced children by using restorative justice approaches. As one key informant described, this was akin to committing to doing ‘something better than just sticking them on the escalator and hurtling them off towards court rooms and prisons’ (UK10). Instead, the protocol was designed to make people ‘stop and think about informal alternatives to formal criminal justice’ (UK10).

The UK police also developed a national strategy that heralded a new approach to managing children—in particular, care-experienced children. The National Strategy for the Policing of Children and Young People was endorsed by the National Police Chiefs’ Council in April 2015. It focused on four key areas, one of which was ‘looked-after children’ (children in care). The other key areas were: stop and search; detention, custody and criminalisation of children and young people; and the relationship between young people and the police. The strategy gives recognition to the over-representation of care-experienced children in the youth justice system and the impact of the trauma that many from this cohort have endured. Additionally, it states the need to minimise the risk to the significant proportion of care-experienced children who regularly go missing and to avoid the unnecessary criminalisation of care-experienced children. Again, the emphasis is on working with partners to ‘make every effort to avoid the unnecessary criminalisation of children in care, making sure that the criminal justice system is not used for resolving issues that would ordinarily fit under the umbrella of parenting’ (National Police Chiefs’ Council 2015: 11).

According to the police key informant, this framework has formed the basis of a child-centred policing strategy for the UK (UK4). The focus on ‘looked-after children’ spoke directly to many of the concerns police had already been raising for some time. As our police key informant respondent explained:



So [the national strategy] set us off on this journey of focusing on looked-after children and within our own force...we then started to look at what we knew about children's homes and children in the care system because officers on the ground would be constantly moaning about children's homes, children in care and the amount of calls, them always going missing, but we had no evidence, no data to support that actually this was an issue, because our system was not focusing on recording it in such a way that you could pull that out quite easily. (UK7)

When the data were collected, the results were staggering. The almost 50 children's residential homes in one county had placed over 3,500 calls to police in a one-year period (UK7). Of this huge number of calls, only 10 percent were related to criminal offending, while the rest pertained to missing or welfare issues (UK7).

Exposure of the police workload in this area coincided with the Lord Laming review (Prison Reform Trust 2016) into the unnecessary criminalisation of children in care and at the same time the lived experience of children placed in juvenile detention, for what would not be considered offending in the home environment increased in visibility in the public domain. This was characterised by the police key informant as the perfect storm in which to bring about change. The need for central coordination of such change became a focus of the UK police (UK4). The police recognised that, without a national protocol, the uptake and impact of changes would be uneven across the UK. A national protocol was signed in November 2018.

The child-centred strategy developed by the police was targeted at shifting police perceptions of, and responses to, 'looked-after children'. Our police respondent spoke about how understanding the vulnerability of the children police come across can influence and shape police responses:

Our child-centred policing strategy is all about how actually the young people that the police come across are vulnerable by the very nature of the fact that the police have come across them. And if you start thinking about the fact that this young person is a vulnerable young person and they are a child, then actually as a police officer you treat them differently than if you just looked at the stropky, difficult, abusive, threatening language...because that's their defence mechanism... So understanding the impact of trauma on a young person and how it contributes to their behaviour and how as a police officer you can defuse that and help them and support them, if you start to put that lens into your conversation it's a very different conversation and it's just that shift in attitude that we're trying to get officers to take on board and think differently about young people [rather] than just see them as a pain. (UK4)

In this regard, the strategy included training for police members on the vulnerability of care-experienced children. The police key informant was also eager to highlight that, while training was important, a shift in attitude was also required. This shift required police to ask: 'Why is this person here in this position and what can I do about it?' (UK4)

A critical way of shifting police attitudes was said to be learning from the lived experience of those with care experience. The UK police sought to draw out the lived experience of children in care and hear directly from people with care experience at conferences, seminars and training, reportedly to great effect:

So what we've done to address that is get the voice of the young people out there...we've...run several conferences where we've had young people talking about their experience of the care system and how they were treated by the police and how they've been arrested for basically some very minor type offences and when they describe the whole situation from their perspective it sounds ridiculous that the police have turned up. One young woman was—had a spat with her carer because the carer put tomatoes in her shepherd's pie, she doesn't like tomato, she wouldn't let her cook it herself, they ended up having a row and she got really cross and angry and threw a plate across the room and so the carer called the police and basically said she was being threatened by this young woman with a knife, so the police turn up with their Tasers, she almost got—was Tasered, yet this young woman sitting on a table with her head in her arms sobbing because she had tomato in her shepherd's pie. Now, when you tell that story, that young woman tells that story to an audience of police officers I don't think there was a dry eye in the room actually and those police officers then resolved to go and do something about it because actually you're not just saying this isn't just one young person, there are countless other stories of young people talking about their experience and so we put these young people in front of a police audience and they told their stories and they said that was really, really powerful to the point one officer just stood up and said, 'Would you give us another chance, we've got this so badly wrong, we need to get—we need to do this better, will you give us another chance to get this right?' And that's when you—because this is about—it's about a shift in attitude not in practice really, it's about the officers thinking differently about the young people they're dealing with. (UK4)

While this key informant was seeking a shift in the attitudes of police, they were also mindful that the nature of the police organisation meant that this message might best be communicated utilising the hierarchical structure of the organisation. As the UK police respondent went on to outline:

Policing works with a carrot and stick approach I think for lots of things in that police officers are very good at basically doing as they're told so you need to find the carrot and stick to make them do what you want them to do and encourage them to do it but if they don't do it make them do it, so it's things like that you're making it really clear that actually we don't want to be arresting young people. I get told very grumpily by some officers, 'Well, apparently we're not meant to arrest kids anymore.' Well, that's fine, you've got the message, it might not be getting back in the right way but you have got the message so actually what that officer is now doing is thinking, well, I can't arrest this young person so I'll have to deal with them differently, they're grumpy about it but they're getting to the point we want them to get to. (UK4)

With the introduction of the new strategy, this respondent perceives that police have received the message that custody is not the right place for children and that the arrest of children is inappropriate. This shift has seen the police engaging in restorative interventions that would divert children from the criminal justice system (UK4). Further research is required to know how restorative justice operates where co-residents are the relevant parties, or staff and the child in residential care are the key stakeholders involved.

For care-experienced children who 'go missing', different counties in the UK have experimented with initiatives. One initiative involved collaboration between non-government agencies and the police in talking to children about their situation. Whereas police might only do a welfare check that involves asking children if they are okay, an agency experienced in the delivery of social welfare would talk to a child more openly and provide them with some support (UK4). In another county, specialist police officers were focusing on missing children and working within agency forums to address any identified issues. In one instance this led to police temporarily removing all children from a residential care home for their protection, as the level of services being provided to those children was so poor (UK5). In the view of one non-policing key informant: 'This is what good policing should look like' (UK5).

Where the offending of care-experienced children took place in the community, a consistent policing response was sought. Our key informants in the UK spoke about the need to ‘build in a pause’ to repress the ‘urge’ of criminal justice agencies to continually default to criminalisation:

We then also have to have a strategy for when they offend in the community which is particularly important when we come in with our police partners to say, okay, you’ve picked a kid up in the community who’s offended, what responsibility—who have we got as professionals to ensure that the right responses are followed? And I think we talked about, earlier, about the pause and it was just—tactically it’s a really important thing because the urge for criminal justice agencies is to make a decision, to react. And that informed decision-making is, I think, just such an important aspect. (UK10)

This approach meant that, even if the offending took place outside the residential care home, the same processes and practices could be considered to ensure that criminalisation was not the default response.

The measures adopted in the UK aimed at reducing the involvement in the criminal justice system of those with care experience have introduced many opportunities to divert a matter before a child is placed before a judge or magistrate (UK6). This is said to be supported by magistrates, who were reportedly frustrated that children kept appearing before them on minor charges that, in their view, reflected poor corporate parenting (UK10). This echoed the concerns of the magistrates interviewed in our NSW study. In this regard, a key informant explained that the narrative ‘that unless we round them up and put them in front of a court then we’re not going to get them the help they need’ (UK10) is consciously rejected. In their view, therapeutic approaches needed to happen outside the criminal justice system, before the child gets to court. One key informant said that a child could be remanded in custody only for a ‘very serious risk to the public’ or ‘very prolific offending’ and that welfare needs or homelessness could not be used as a reason to remand a child (UK10).

The use of restorative justice approaches has led to a significant decline in the number of children appearing in the courts. One of our key informants stated that the youth restorative intervention, a multi-agency partnership, seeks to address both the offence and the young person responsible. Characterised as ‘not a light touch’, it can be used for serious offending and has become the default practice, according to one respondent:

It’s what we do, so long as we’ve got an admission... We had four courts, we’ve now got one quiet court. So, you know, we’ve really moved away from the use of formal cautioning and lots of that sort of stuff. And much more relational—we’re much more inclined now, to listen, to try and understand and to empower people to take responsibility. (UK10)

This respondent also stated that they were more inclined to use diversion repeatedly for care-experienced children rather than escalate matters, even though the child might frequently have matters in the criminal justice system (UK10). Restorative justice, which emphasises a relational as opposed to punitive approach, has reportedly become the default practice in some parts of the UK. Further research is required to evaluate how this approach withstands the criticisms often levelled at restorative justice in the Australian context—that it is no more effective at reducing reoffending (Smith & Weatherburn 2012). Indigenous children have not received the benefits of diversionary approaches (Cunneen 2015). This poses the question whether the specific case of care is more conducive to a restorative approach.

## Care experience and custodial settings

Several UK key informants spoke about the positive impact of leaders and ‘champions’ in identifying, promoting and responding to the needs of people with care experience at all stages in the criminal justice system. The Ministry of Justice made a commitment to the Care Leavers Champion initiative and a respondent we interviewed was adamant that, through its focus on care leavers, it was pitched at the right level (UK7). This cohort was identified as receiving little support, whereas young people aged 15–18 were seen to benefit from more resources (UK7). One respondent stated that the Care Leavers Champion initiative drove advocacy in recognising the complex and unique needs of care leavers within the criminal justice system and implementing strategies to identify and support this cohort. Before we discuss some of the related initiatives, it is noteworthy that a key informant characterised these initiatives as the exception rather than a reflection of the national setting (UK6). Notwithstanding this, prisoner numbers have fallen in the UK (UK6), and many respondents saw the changes discussed below as having a positive impact.

One key informant from the UK case study spoke about the Care Leavers Champion initiative as driving effective change (UK7). This initiative formed part of the UK Government’s 2013 Care Leaver Strategy, which was designed to ensure that care leavers received the same level of care and support as other young people receive from their parents. The strategy outlined the work being undertaken ‘to reflect the needs of care leavers’ (HM Government 2013: 5) and the work to be pursued in the key government departments relating to education, health, employment, financial support, housing, ongoing support and the justice system. Under the strategy, the Care Leavers Champion was tasked with advocacy for care leavers within government and with ensuring that staff were provided with guidance (HM Government 2013).

Increased guidance in, and understanding of, the impact of care on involvement in the criminal justice system equips criminal justice professionals with the skills to interpret both the criminalisation and vulnerability of young people differently. The following quote from a senior manager within the criminal justice system discusses the impact of a deeper understanding of care experience:

When I was [in a senior position] and we had juveniles, we had that 15- to 18-year-old cohort, I used to look at their previous convictions sometimes and think, blimey, for a 15 or 16 year old you've done an awful lot. Gosh, look at all this criminal damage and look at all this threatening and abusive behaviour, in terms of convictions. Well, looking back on that now I think to myself, well, what was the criminal damage? Was that kicking a door in a care home, was that threatening and abusive—the sort of thing I get off my son occasionally? What are we talking here? It's made me think about that. So I think, after all, having a better understanding of what that criminalisation does in terms of—even things like previous convictions would be really helpful because looking back I really do wonder how many of those young men who had terrible criminal records as far as I could see didn't actually have terrible criminal records in a sense I would understand normally, that their criminal damage and their threatening behaviour was actually pretty minor, but because they were in a care home, the police were called. (UK7)

This respondent thus reflects on how they would now interpret the child's criminal record differently, understood in the context of that child's care experience. Instead of assuming that the presence of a significant criminal record means that the person has committed many criminal acts, one would instead check how this offending had occurred in the context of a care environment and how the response to this challenging behaviour was law enforcement.

A focus within custody was on better identification of those with care experience and the resources to which they were entitled (UK7). The care leaver respondents from the UK whom we interviewed stated that there was a lack of awareness among care leavers of what entitlements and support services they could access, which reinforced the need for coordination among agencies (UK8, UK9). As these respondents informed us, 'most [care leavers] don't know that [what is available]' and are therefore not receiving their entitlements. An obstacle to achieving this coordination was the IT systems used within the justice system, which at that stage had no facility to record whether someone had been in care, so the IT systems were rebuilt to accommodate and record care experience. Identification on its own, however, was not enough. It had to be accompanied by an understanding of why this information was important and what services or entitlements were available to care leavers.

The limitations on the provision of support for care-experienced children were felt to impact on their chances of successfully re-entering society on release from custody. This was regarded as fundamentally important ‘because [there’s] a very high reoffending rate of young people coming out of custody. It’s nearly 70 percent of any year, so it’s really high’ (UK1). As one respondent with responsibility for reviewing children’s custodial arrangements observed:

[I]t’s almost unheard of for children to go out [of custody] without accommodation in England [but] it is something that definitely disproportionately impacts on looked-after children, and we have seen people going out to bed and breakfasts, we’ve seen them going out to hostel-type accommodation as well. (UK6)

The poor accommodation options available to children leaving custody were thought to contribute to the high rates of reoffending among care-experienced children. These children were being placed in unsuitable accommodation while in a vulnerable state.

A lack of coordination and communication between prison agencies and the local authorities tasked with providing support resulted in the misalignment of entitlements for care leavers in custody. One of our key informants working in custodial services stated:

In some cases, local authorities actually are trying to give [support and entitlements]; they’re visiting and they’re engaging with the young person. But because we didn’t know that, we haven’t been engaging with the local authorities, so, ironically, you’ve got this situation where you’ve got local authorities who are actually engaged in the care, they’re writing a plan for this young person, and we’re busy in prison writing a plan for this young person both for inside and for outside, and the two are running in parallel and not actually meeting. So we’ve done some work on that as well. There’s obviously masses of issues around support and I feel like we’re really, kind of, doing tip-of-the-iceberg stuff with that around what support do care leavers need and what are the issues... (UK7)

As this respondent outlined, while such collaboration is a good first step, a swathe of other support initiatives are required to meet the needs of care leavers. Ensuring that all local authorities and youth correctional services were aware of the entitlements available to care-experienced children was an important goal, but the respondents felt that more needed to be done (UK7).



The establishment of care leaver support groups run by people with care experience was reported to be an important initiative within several UK prisons (UK7). One of our key informants said that these ‘worked really well’ and had grown over time in both men’s and women’s prisons:

I know one of the female prisons has just started one and in fact is looking at having a separate support group for older women than the younger women just because they’d identified different issues. So the idea is that we found it really useful to have [a facilitator with care experience] there for the support group because it was about having somebody who understood the care experience and could engage with them, and it was very much about not just getting together to complain about having been in care, but let’s deal with the issue. So I think that’s really good and I think that’s really positive, and in fact at [one facility], they’ve now got champions out on the wing... We’re now having care leaver reps out on wings in one of the prisons. (UK7)

The respondent went on to say that one of the key impacts of having care leaver representatives on wings in the prison was that they can help mitigate the stigma of having been in care. Our care leaver respondents from the UK referred to this stigma as a significant and challenging issue. The development of support groups and the presence and visibility of care champions, although in their nascent stages of development, were seen as reducing the stigma associated with being in care and providing much-needed support networks for care leavers.

One final initiative discussed by this respondent related to training and development within prison and probation services to equip staff with the skills to recognise care leavers, and the issues that this cohort faces, so that adequate support could be provided:

We have focused on communication and awareness, which sounds like the same as the first one [identifying and recording care status], but actually what we realised was that identifying care leavers is one thing, actually part of that process is that our staff don’t know—most of our managers don’t know why we’re having this conversation, why we’re talking about care leavers. So without that we can’t actually have the conversation with prisoners, because even if we get out to prisoners and say to them or people in the community... ‘Tell us that you’re a care leaver’, you know, and they say, ‘Why?’ and our staff just look at them blankly, and, kind of, shrug their shoulders and say, ‘I don’t know; I’ve just been told to do it’...because there’s a massive communication and raising awareness piece of work that we’ve been trying to do. (UK7)

Not only were frontline prison staff unaware of the relevance and significance of recognising care leaver status but, as this respondent observed, managers were also ill-equipped to understand why this information was collected and how it was relevant to service delivery. Staff training was therefore focused on providing a context to explain why knowing about a person's care leaver status was critical.

The key informants in our UK case study expressed the view that custody numbers had fallen across the UK. The decline among girls was described as particularly significant (UK2). The changes that have occurred within both policing and the care environment have had a flow-on effect by reducing the number of people in custodial facilities.



# Conclusion and policy implications

It is a significant undertaking for government to remove a child from their family or home and assume responsibility for them. We know from research with care leavers that care can be a positive experience when there are relationships that build attachment and placement stability (Taylor 2003). We also know that children in state care are far more likely to find themselves in custody, as a result of maltreatment, multiple care placements, damaging institutional cultures, social disadvantage, psychological harms and differential treatment in the criminal justice system (Stanley 2017).

This report has illustrated the continuums of criminalisation experienced by children in care. While those with care experience are more likely to have been exposed to trauma, our findings show how the care and criminal justice systems generate new challenges at specific intervals. Our study uses a unique mixed-methods approach: qualitative interviews, court observations and file reviews. Our analysis has revealed that the child protection and criminal justice systems are not designed to respond effectively to care-experienced children with complex needs and histories. There is a need to design systems with these children in mind and with their input. Our respondents argued that the complex needs of children with care experience are not properly understood at all stages in the care and criminal justice systems, including arrest, bail and sentencing. Our findings also demonstrate how a lack of resources and structural deficits in the youth justice system result in ineffective responses to care-experienced children.

While the method may be novel, our findings echo previous research on the criminalisation of children in care. For example, there is a long history of criticism of the use of remand custody for welfare reasons (see McFarlane 2010; Stubbs 2010; Wong, Bailey & Kenny 2009; Marien 2012) and this was reflected across our various datasets. Additionally, recommendations to enhance staff training have been a regular feature of past inquiries and research (see Darker, Ward & Caulfield 2008) and were similarly highlighted by our respondents. These consistencies demonstrate the systemic nature of the criminalisation of those with care experience and galvanise arguments for a cultural shift in how we respond to this cohort.

Another salient feature of our research is that, in many cases, policy responses designed to reduce the criminalisation of those with care experience, particularly Aboriginal and Torres Strait Islander children, seemingly had little impact. For example, the following frameworks already exist in New South Wales: an emphasis on diversion in the *Young Offenders Act 1997* (NSW); the NSW Therapeutic Care Framework; the NSW Police Force Youth Strategy on promoting interagency cooperation on children and young people; the NSW Government's 2016 Joint Protocol to Reduce the Contact of Young People in Residential Care with the Criminal Justice System, prepared by the NSW Ombudsman; and the NSW Police Force *Aboriginal Strategic Direction 2018–2023*. Yet we observed little visibility of these frameworks in the practice we observed and, in many cases, our respondents highlighted a lack of compliance. In particular, our court observations undertaken in 2018 showed no mention of the protocol, nor was it raised by our magistrate respondents. To our knowledge, no monitoring or review has been made publicly available. As Shaw (2012: 366) foregrounded in her research, unless there is a change in attitude, 'real progress' on the implementation of protocols can be difficult. There needs to be greater transparency in the review and monitoring of the protocol to assess what progress has been made against objectives.

## Resilience

Our study is an acknowledgement of the strength and resilience of children in care and adult care leavers, who face continuums of criminalisation through their involvement with the care system. The stories of survival and self-placement we observed highlight the challenges faced by this cohort within a care and criminal justice system that, at times, produces incarceration, institutional abuse and instability. While an emphasis on pre-care experience is important, structural-level interventions that shift the culture of criminalisation are urgently required.

## Shifting culture

Our results indicate a need for transformative change in the OOHC and criminal justice systems. The unnecessary criminalisation of care-experienced children emerged strongly across our different methods (qualitative interviews, file reviews and court observations) and jurisdictions (New South Wales and the United Kingdom). How to address this remains an open question but, in our view, it should involve a shift in culture that sees the state's parental responsibility taken seriously enough for all involved in the care system to ask, 'What if this were my child?' This ought to extend to supporting children at every stage of the legal process. Our research highlighted particular gaps in this regard.

Many of our respondents raised insufficient staff training and qualifications as contributing to criminalisation but we would rather focus on the structural constraints that result in underqualified and underpaid individuals being placed in the challenging position of caring for traumatised and vulnerable children. To address this, we believe several initiatives should be fundamental. First, higher qualifications, together with a therapeutic model (such as trauma-informed care) and additional educative tools, have improved the quality of residential care in Italy and Spain, using a social pedagogy approach (del Valle & Bravo 2013). If residential care facilities are to remain, greater emphasis on relational and therapeutic approaches that are child oriented, and contain an educative component, ought to be central. Second, staff training and practice need to recognise and prioritise the voices of those with care experience. Currently, these voices are largely unheard.

## Aboriginal and Torres Strait Islander children and OOHC

Our respondents understood Aboriginal and Torres Strait Islander children in care to have specific needs that are currently unmet. The number of Indigenous children in OOHC has grown rapidly and is predicted to triple by 2037 (SNAICC 2018). Indigenous people have specific rights, as embodied in the Aboriginal and Torres Strait Islander Child Placement Principle (see AIHW 2018). The safety and wellbeing of Indigenous children in OOHC depend on maintaining and developing connections to family, community, culture and country (SNAICC 2018). The cultural safety of Aboriginal and Torres Strait Islander children in care was perceived as a critical concern (JJ Focus Group, L4, L5). Magistrate, lawyer and Juvenile Justice stakeholders all referred to the impact of transgenerational trauma and offending (JJ5, M1, M2, M4, L4, L5).

The Aboriginal and Torres Strait Islander Child and Young Person Placement Principles, which are contained within Part 2 of the *Children and Young Persons (Care and Protection) Act 1988* (NSW), were not visible in our interviews, court observations or file reviews. Moreover, we found evidence of inconsistencies in Indigenous cultural competence among criminal justice professionals. In its recent assessment of New South Wales, *Family Matters* reported that the state had 'regressed', with community representatives expressing concerns about the 'lack of government transparency and low involvement of Aboriginal people and organisations in policy and legislative design' (SNAICC 2018). New South Wales is criticised for having no strategy to reduce the over-representation of Aboriginal and Torres Strait Islander children in OOHC (SNAICC 2018: 15). The NSW Government is urged to work with the *Family Matters* principles and building blocks (AbSec 2018) and Aboriginal communities to achieve better outcomes (SNAICC 2018). On this point, a shortcoming of our UK case study is that it is unable to illustrate the impact of colonisation on practices and processes to reduce the involvement of those with care experience in the criminal justice system. In future we would be better placed to learn from Canada and New Zealand how to reduce the legacies of colonisation and about their impact on children and adults.

## Data collection and data sovereignty

Our research adds to previous studies that have identified deficiencies in data on the involvement of children in OOHC in the criminal justice system (Wong, Bailey & Kenny 2009). We add to these calls in three ways. First, those collecting data need to understand the broader context within which identifying care status is important. Second, and on a related point, identification of care experience needs to be accompanied by resourcing where required. Third, data collection needs to follow the principles of 'data sovereignty' such that data are used to advance the self-determination of Aboriginal and Torres Strait Islander people (SNAICC 2018: 6). Balancing concerns about the stigma attached to care experience is challenging; however, the focus must remain on removing the stigma and ensuring the visibility of care status in official statistics.

## Addressing vulnerabilities from the bench

Through our interviews with magistrates and our court observations, we saw practice vary considerably in terms of the use of legislative provisions to recognise mental health concerns, cognitive impairments and how these impact on offending. Magistrates were critical of the paucity of resources available to actively treat the health issues of those with care experience in the criminal justice system. Of particular concern was the paradox created for children who are ineligible for section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) because they are in custody under section 28 of the *Bail Act 2013* (NSW). Magistrates indicated a lack of clarity around the operation and effectiveness of section 32, and this needs to be reviewed. Further, magistrates wanted more information on a child's care status and background to enable better informed decision-making. Measures that enable magistrates to spend more time on substantive matters, as opposed to adjournments and so on, would assist them to better manage their case loads. This is particularly important in light of the functions the Children's Court is required to discharge, as set out in section 6 of the *Children (Criminal Proceedings) Act 1987* (NSW). For example, section 6(a) requires that children have 'a right to be heard, and a right to participate, in the processes that lead to decisions that affect them'.

Magistrates interviewed in this study indicated their frustration at the lack of alternatives to custody for children who are unable to access secure and safe accommodation. According to established international conventions, such as the Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules') and the *Young Offenders Act 1997* (NSW), custody should be a last resort for children coming into contact with the criminal justice system. Previous research clearly shows that custody serves no deterrent purpose and is in fact more likely to be criminogenic (Villettaz, Gilliéron & Killias 2014) and, further, that children who are in custody at the time of sentencing are more likely to receive control orders (McGrath 2016). We have shown that care-experienced children are more likely than non-care-experienced children to have previously been in custody. We have also identified case studies illustrating how offending in care can lead to homelessness and time spent in remand custody.

## Decriminalisation in the UK: Pockets of success

The case study provides a useful snapshot of how pockets of culture and practice in the UK have shifted and produced significant reductions in the involvement of children with care experience in the criminal justice system. The initiatives adopted have an emphasis on children's voices, multi-agency cooperation, restorative justice, integrated approaches and a whole-systems approach. The case study also shows how these benefits have extended to all children in the criminal justice system; however, more analysis is required to evaluate how widely the benefits are shared. This would involve analysis of whether children with identifiable factors—care status, race and gender—benefit equally from these reforms. We know from past experience in Australia, for example, that Aboriginal and Torres Strait Islander children have not benefited from diversionary approaches (Cunneen 2015). Also, restorative justice approaches should not be seen as a panacea to the unnecessary criminalisation of children in care, so caution should be exercised in this regard (see Shaw 2016). Further, various scholars have pointed out that, despite the existence of police protocols, police involvement for poor behaviour still occurs in some children's homes across the UK (see Staines 2016).

The range of measures introduced in the UK has sought to demonstrably move away from a sanction-based, punitive mode of responding to children and families in difficulty towards a restorative, relational approach that keeps children away from courts and police stations. Further, the UK appears to be prioritising child wellbeing, an area of deficiency we identified in Australia, and we should look to its success with this. These shifts have sought to reject the tendency to 'turn children into offenders' and all the ensuing stigmatisation and labelling that come with that. Instead, they have focused on helping frontline criminal justice professionals realise that 'the traditional criminal justice system is part of the problem' (UK10).



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# Appendix: Interview respondent pseudonyms

Interview respondent pseudonyms	Shorthand pseudonym
<b>Police respondents</b>	
Police Respondent 1	P1
Police Respondent 2	P2
Police Respondent 3	P3
Police Respondent 4	P4
Police Respondent 5	P5
Police Respondent 6	P6
Police Focus Group	Police Focus Group (4 participants)
<b>OOHC respondents</b>	
OOHC Respondent 1	OOHC1
OOHC Respondent 2	OOHC2
OOHC Respondent 3	OOHC3
OOHC Respondent 4	OOHC4
OOHC Respondent 5	OOHC5
OOHC Respondent 6	OOHC6
OOHC Respondent 7	OOHC7
OOHC Respondent 8	OOHC8
OOHC Respondent 9	OOHC9
OOHC Respondent 10	OOHC10
OOHC Respondent 11	OOHC11
OOHC Respondent 12	OOHC12
OOHC Respondent 13	OOHC13
OOHC Respondent 14	OOHC14
OOHC Respondent 15	OOHC15
OOHC Respondent 16	OOHC16
OOHC Respondent 17	OOHC17

Interview respondent pseudonyms	Shorthand pseudonym
<b>Lawyer respondents</b>	
Lawyer Respondent 1	L1
Lawyer Respondent 2	L2
Lawyer Respondent 3	L3
Lawyer Respondent 4	L4
Lawyer Respondent 5	L5
Lawyer Respondent 6	L6
Lawyer Respondent 7	L7
Lawyer Respondent 8	L8
Lawyer Respondent 9	L9
Lawyer Respondent 10, 11, 12	L10, L11, L12 (interviewed together)
Lawyer Respondent 13	L13
Legal Respondent 14	L14
<b>Juvenile Justice (JJ) respondents</b>	
JJ Respondent 1	JJ1
JJ Respondent 2	JJ2
JJ Respondent 3	JJ3
JJ Respondent 4	JJ4
JJ Respondent 5	JJ5
JJ Respondent 6	JJ6
JJ Respondent 7	JJ7
JJ Respondent 8	JJ8
JJ Respondent 9, 10	JJ9, JJ10 (interviewed together)
JJ Focus Group	JJ Focus Group (9 participants)
<b>UK respondents</b>	
UK Respondent 1	UK1
UK Respondent 2	UK2
UK Respondent 3	UK3
UK Respondent 4	UK4
UK Respondent 5	UK5
UK Respondent 6	UK6
UK Respondent 7	UK7
UK Respondent 8, 9	UK8, UK9 (interviewed together)
UK Respondent 10, 11	UK10, UK11 (interviewed together)



Interview respondent pseudonyms	Shorthand pseudonym
<b>Magistrates</b>	
Magistrate Respondent 1, 2	M1, M2 (interviewed together)
Magistrate Respondent 3	M3
Magistrate Respondent 4	M4
Magistrate Respondent 5	M5
Magistrate Respondent 6	M6
Magistrate Focus Group	Magistrate Focus Group
<b>Family and Community Services</b>	
FACS Respondent 1	FACS1
FACS Respondent 2	FACS2
FACS Respondents 3, 4, 5	FACS3, FACS4, FACS5 (interviewed together)

CRG reports  
**CRG 22/16–17**

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