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Abstract | The current study examines the factors underlying pathways from out-of-home care into the criminal justice system. Using a multi-method approach—specifically, 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 increase criminalisation. While many policy initiatives have been developed to address this criminalisation, in all parts of our study we found little evidence these are having an impact on practice in relation to care-experienced children. Some innovations we observed in our United Kingdom case study offer potential solutions to address this serious and ongoing problem.

Care-experienced children and the criminal justice system

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In Australia, between 2016 and 2017, a total of 168,352 children aged 0–18 received child protection services (30.8 per 1,000 children), and 47,915 children were in out-of-home care (OOHC) on 30 June 2017 (8.7 per 1,000 children). OOHC is the provision of temporary, medium- or long-term care by the state. There are a number of reasons for placement in OOHC, but most relate to situations where the child is thought to be at risk of harm or has suffered actual harm (Australian Institute of Health and Welfare (AIHW) 2018). The largest number of children in OOHC was 17,879 (10.3 per 1,000 children) in New South Wales (NSW), while the Northern Territory had the highest rate of OOHC, at 16.8 per 1,000 children. Most of the children in OOHC (93%) were in remunerated home-based care, with 47 percent residing with relatives or kinship carers, 38 percent in foster care, seven percent in third-party parental care 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).



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One key feature of the Australian OOHC system is the over-representation of Indigenous children. Inconsistent and partial applications of the Aboriginal and Torres Strait Islander Child Placement Principle persist, alongside narrow constructions of the principle as relevant only to preferences for placement, instead of an emphasis on maintaining connections to family, country, culture and community (Tilbury 2013). The reasons underlying this pattern of over-representation are complex and relate 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, and a lack of culturally engaged services (HREOC 1997; Purdie, Dudgeon & Walker 2010; Raman et al. 2017). This pattern of over-representation is not confined to the OOHC system. Indigenous Australians also make up a disproportionate number of people who come into contact with the criminal justice system and are subsequently incarcerated (ABS 2018; Cunneen & Porter 2017; Weatherburn 2014).

It has been suggested that children in OOHC are more likely to come into contact with the criminal justice system (McFarlane 2010, 2017a; Prison Reform Trust 2016). In the current study, we investigate the link between the experience of care and involvement with the criminal justice system. We do so using a multi-method approach that includes observations of Children's Court hearings, reviews of court files, and qualitative interviews with Children's Court magistrates and other criminal justice professionals who interact with care-experienced children.

OOHC and the criminal justice system

In Australia, research has shown that, while the overwhelming majority of those in OOHC do not commit crime, placement in OOHC is associated with increased contact with the criminal justice system (Malvaso & Delfabbro 2015; Ringland, Weatherburn & Poynton 2015). A disproportionate number of juveniles in detention have previously come into contact with the child protection system, and children in OOHC are also more likely to be under Juvenile Justice supervision (AIHW 2017). In a study of 17,638 young people involved with the criminal justice system in New South Wales, Ringland, Weatherburn and Poynton (2015) found approximately 10 percent of their sample (9.1% of males and 12.5% of females) had had previous OOHC placements. We note the lack of data disaggregated by gender and Indigenous status.

Research from the United Kingdom (UK) has observed similar findings. The Laming report found children in care to be significantly over-represented in the criminal justice system and in custody (Prison Reform Trust 2016). The Howard League for Penal Reform (2018) found children in care were more likely to have come to the attention of authorities compared with the general population; this finding was particularly marked for children in residential care. Carnie and Broderick (2015) found approximately a quarter of their prisoner respondents had been in OOHC and 16 percent had been in care at age 16. In the United States, research has shown children with a history of care are approximately twice as likely to come into contact with the criminal justice system between the ages of 14 and 16 compared with children of this age who are not in care, with placement instability being a particularly significant criminogenic factor (Ryan & Testa 2005). Further, the Midwest Evaluation of the Adult Functioning of Former Foster Youth found 28 percent of their sample had been arrested and 20 percent had spent at least one night in custody (Courtney & Dworsky 2006). In summary, although estimates of the degree of over-representation vary according to jurisdiction, methodology and sample, prior research demonstrates care-experienced children comprise a sizable proportion of those coming into contact with the criminal justice system.

Explanations for the link between care and crime

Staines (2016) has identified two competing explanations for the link between care and crime: the risk factor approach and the adverse environment approach. In the first of these, the correlation between care experience and crime is a result of pre-existing risk factors. The most commonly cited of these factors is a history of trauma, and indeed there is considerable evidence linking trauma and contact with the criminal justice system (Anda et al. 2006; Dixon, Howie & Starling 2005). In the second explanation, the care environment itself is seen as criminogenic. In our previous research, participants perceived a number of factors to be implicated in the criminalisation of children in care, including behavioural management techniques that resulted in children being charged for offences rather than their behaviour being dealt with at home, and the limited support provided for residential care staff (Gerard et al. 2019). In the second approach, the importance of the traumatic histories of care-experienced children is acknowledged but it is argued there are factors associated with the care environment itself that contribute to criminalisation over and above pre-existing risk factors.

Stanley (2017) explored the criminalising trajectory from care to custody by conducting a comprehensive review of 105 case files and interviews with participants. She concluded care-experienced children are more likely to come into contact with the criminal justice system for five reasons. The first is the history of abuse and neglect experienced by many of these young people. The other reasons were: placement instability, which in turn disrupts education, social relationships and health; the criminalisation of children's behaviour while in care; the limited support given to adult care leavers; and the differential treatment of these children by the criminal justice system in matters of bail and sentencing (Stanley 2017).

Research aims and questions

This study investigated the continuum between care and crime with a multi-method approach. Using court observations, file reviews and qualitative interviews, we sought to answer the question: what factors underlie the criminalisation of care-experienced children? In particular, we were interested in understanding how criminal justice authorities treat these children in relation to matters such as bail and sentencing and whether we could identify how and why care-experienced children come into contact with the criminal justice system. In what follows, we use the term 'care-experienced children' to incorporate children currently in OOHC and those with previous experience of OOHC.

Method

Ethical approval for this study was obtained from the Charles Sturt University Human Research Ethics Committee, protocol H17141.

Court observations

We obtained approval from the Chief Judge of the Children’s Court of New South Wales to observe hearings. We also obtained approval from the presiding magistrate each day we attended court. Our observations were conducted in three Sydney outer metropolitan courts. At least two researchers attended each day of the hearings and took notes. Previous court observation studies guided our approach, and we aimed to obtain information about court procedures and how these impacted on care-experienced children (Booth 2012; Tait 2001). We thought that, by being present in court, we could explore some of the more subtle aspects of decision-making processes that are not evident in court data or written sentencing decisions. Among other things, we focused on the physical appearance and location of the child, the support available in court for the child, and the interplay between judicial officer, prosecution, defence and the child.

In total, we observed 150 hours of court hearings, relating to 134 separate matters. Researcher notes were later compiled into a single document. Based on this document, we developed a series of vignettes, which we will report throughout the *Results* section, where appropriate, to corroborate other findings. Some quantitative information was also derived and entered into a database for further analysis.

File reviews

After obtaining the appropriate approvals, we accessed a number of court files in the registry offices. Subsequently, the information was coded and entered into a database. In total, we reviewed 107 files, relating to 92 individuals. The information we obtained relating to charges and sentences was based on the most recent court appearance on file. We coded for criminal history, whether the young person had been in custody (either at the current appearance or previously), mental health conditions, homelessness, abuse or neglect, educational problems, court support (both family and other, such as case worker) and whether the current appearance related to an apprehended violence order (AVO). Our coding was based on reading the entire file; where we had unambiguous evidence for the variables we were interested in, we coded this as present.

Qualitative interviews

We conducted a series of semi-structured interviews with key stakeholders that built on the work we had undertaken in our pilot study (Gerard et al. 2019). We interviewed 10 magistrates sitting in the Children’s Court and three lawyers. We also conducted three focus groups with Juvenile Justice case workers ($n=9$ and 2) and lawyers ($n=3$). As in our pilot study, we commenced by asking about the participants’ general experience in the criminal justice system before shifting the focus to a discussion of care-experienced children. We were particularly interested in how magistrates took this factor into account when setting bail conditions and sentencing, but we also asked about their more general perceptions of the OOHC system and the children who come into contact with it. The interview data were transcribed, and all team members read and coded the resulting data thematically using a scheme developed collaboratively. A case study was also conducted in the UK, where 11 key informants were interviewed. The aim was to interview as many individuals from different backgrounds as possible to gain a cohesive overview of current research and policy in relation to OOHC. More detailed information relating to our qualitative method and analyses is found in Gerard et al. (2019).

Results

Court observations

Table 1 shows descriptive statistics from the court observations. Approximately 60 percent of the matters we observed were at one major outer metropolitan court in Sydney; 13 percent were at a second court and 28 percent were at a third. There was evidence of Indigenous status in 16.4 percent ($n=22$) of the cases. Of these, nine (41%) were female and 12 (59%) were male. Nearly a quarter of the children (23.9%) coming before court were in custody at the time, with a number of these appearing by video link. More than half of the matters related to bail determinations or extensions, 17.2 percent were sentence matters and 30 percent were for AVOs. Just under 30 percent of the children were accompanied by family members, and 12 percent were accompanied by a carer or some other non-family support person. There were significant gender differences in this regard, with males more likely to be supported by family members (38.6% compared to 19.5%, $p=0.033$) and females more likely to have some other form of support (22% compared to 8.4%, $p=0.035$). Analysing this in more detail, we found that family support was often perceived as advantageous to the child. It was raised by defence lawyers as a mitigating factor on several occasions and was referred to by magistrates in a number of sentencing matters. For instance, in one sentencing matter the magistrate commented:

...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.

In another, the magistrate told the defendant, 'You have good prospects, a caring mother, father in court' and subsequently imposed a good behaviour bond with no conviction. In a final example, the magistrate said, 'I am confident we won't see you back here for any offences, you are with family, you have support.' Indeed, family support is a well-recognised protective factor for delinquent behaviour (Malvaso & Delfabbro 2015), so for care-experienced children, who are unlikely to have such support, this is an additional disadvantaging factor that can lead to criminalisation.

Given the low number of cases where care experience was mentioned in court ($n=6$, 4.5%), we were unable to make any comparisons based on this variable; however, we speculated non-family support might be a proxy for OOHC status and note in this regard that females were more likely to receive this kind of support. The low number of cases where OOHC status was mentioned in court was a finding of some interest to us, given both the prevalence rates reported elsewhere in the literature (eg Ringland, Weatherburn & Poynton 2015) and the prevalence rate of 23.9 percent we observed in our file reviews. We discuss this finding further in our concluding section.

Mental health also emerged as an important theme. In six (4.5%) of the cases we observed, a finding was handed down under section 32 of the *Mental Health (Forensic Provisions) Act 1990*, which allows magistrates to dismiss the charges if a mental health disorder is identified as contributing to the offence. In three cases, all relating to care-experienced children, we observed the defendant being so obviously unwell they were removed from court; in one case the defendant was sent to hospital. In some cases, the defence indicated that they would make an application under section 32; however, due to the child being held in custody pursuant to section 28 of the *Bail Act 2013*, they were unable to obtain a suitable medical assessment and therefore could not make the submission. This situation was referred to as a 'catch-32' by one interview respondent (L9).

| Table 1: Descriptive statistics from court observations | | | |
|---|------------------|-------------------|--------|
| | All ^a | Male ^b | Female |
| Court | | | |
| Court 1 | 58.9 | 69.9 | 30.1 |
| Court 2 | 12.9 | 50 | 50 |
| Court 3 | 28.2 | 68.6 | 31.4 |
| Gender | 61.9 | | |
| Indigenous status | 16.4 | 14.5 | 22 |
| Court support (family) ^c | 29.9 | 38.6 | 19.5 |
| Court support (carer) ^d | 11.9 | 8.4 | 22 |
| OOHC | 4.5 | 3.6 | 7.3 |
| Custody at appearance | 23.9 | 19.3 | 29.3 |
| Sentencing matter | 17.2 | 19.3 | 17.1 |
| Bail determination/extension | 52.2 | 51.8 | 56.1 |
| AVO | 29.9 | 30.1 | 24.4 |
| S28 application | 8.2 | 7.2 | 9.8 |
| S32 hearing | 4.5 | 3.6 | 7.3 |
| Fail to appear | 9.7 | 7.2 | 12.2 |

a: $n=134$, 7.5% ($n=10$) gender unknown

b: $n=124$, 10 cases where gender is unknown removed from analyses

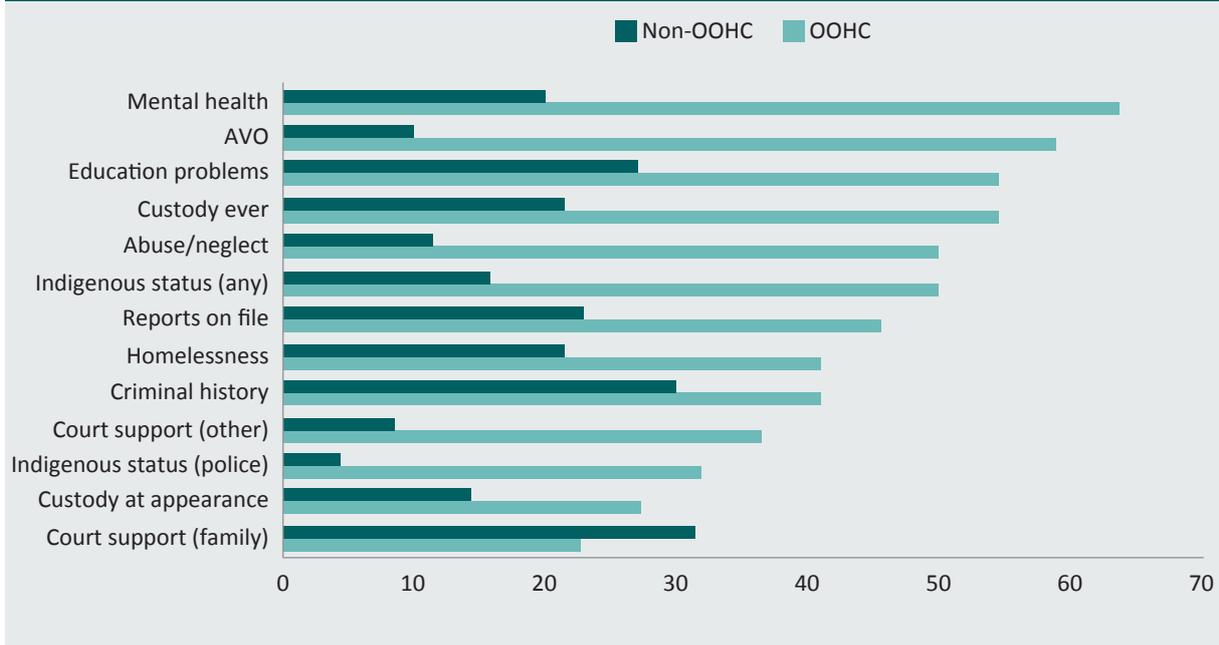
c: Males had significantly more family support than females, $p=0.033$

d: Females had significantly more 'other' support than males, $p=0.035$

File reviews

We reviewed a total of 107 files, relating to 92 individuals (65, 70% males). The average age was 15.9 ($SD=1.51$). We coded Aboriginal status according to whether it had been identified by police in the first instance or whether there was any evidence for this in the file, such as the young person being represented by the Aboriginal Legal Service. Police identified 10 (10.9%) of the young people as Aboriginal. For a further 12 (13%), we found other evidence of Aboriginal status, meaning that, overall, 22 (24%) of the files related to Aboriginal young people. We also found evidence in 22 files of care experience. Based on these figures, we were able to compare care-experienced children with non-care-experienced children; Figure 1 reveals a number of important differences between the two groups. There was no difference in age or gender distribution between the groups; however, care-experienced children were more likely: to be Aboriginal ($p=0.001$), to have previous charges (as opposed to cautions, $p=0.057$), to have experienced custody ($p=0.003$), to have reports on file ($p=0.040$), to have evidence of a mental health condition ($p<0.001$), to be homeless ($p=0.070$), to have suffered abuse or neglect ($p<0.001$) and to have educational problems ($p=0.018$). In addition, as might be expected, they were more likely to be accompanied in court by a carer ($p=0.002$). Finally, just under 60 percent of the care sample appeared in court in relation to an AVO, compared with 10 percent of the non-care children ($p=0.001$). We will return to this finding in more detail, as we believe that imposition of an AVO in residential care facilities is an important determinant of criminalisation.

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



Note: OOHC=out-of-home care

Qualitative interviews

The first broad theme we identified in our interviews was understanding care-experienced children. The magistrates we interviewed acknowledged the challenges facing care-experienced children (Magistrate Focus Group, M6). Like our pilot study respondents (Gerard et al. 2019), the magistrates recognised that police are commonly called as a strategy to manage the problematic behaviour of children in care:

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...without resorting to the criminal justice system. (Magistrate Focus Group)

Other magistrates perceived the care environment itself as a source of offending behaviour:

We have a lot of contact. Far too much...mainly it’s offences against other residents. So young people against young people which escalates because of their vulnerable status themselves and offences against carers. (M1, M2)

These observations are consistent with the evidence we identified in our court and file reviews: that offending arises out of care experience. We also found care-experienced children were more likely to be in court in relation to AVO matters, and often the victim was a care worker or co-resident. This was referred to specifically by another magistrate respondent: ‘Depending on the crime, if it’s a situation where the child has assaulted or contravened [AVOs], usually accommodation is a major issue’ (M4). Again, consistent with our pilot study findings, the magistrates recognised the deficiencies in agency and staff responses to care children. As one commented:

I have massive concerns as to how well they’re looking after children but those concerns arise out of evidence and experience in the care jurisdiction rather than the criminal jurisdiction.
(Magistrate Focus Group)

Others, however, found agencies and their staff to be supportive of the young people in their care, noting agency workers often volunteered to take children back into care after the court hearing had been concluded (M1, M6). The devolution of OOH services from government to the non-government sector has not resulted in better quality services for children in OOH (NSW Legislative Council 2017).

A second theme to emerge from our interviews was the welfare of care-experienced children and how factors such as mental health and lack of education contribute to criminalisation. Consistent with previous research findings (Ryan & Testa 2005), the magistrate respondents recognised the damaging impact of placement instability: ‘If the child is anything over about five or six, the disruption, especially if it involves schooling, is exponential’ (M4). Impaired educational opportunities were seen as an important factor in criminalisation:

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...so many of them get kicked out of school and expelled. (Magistrate Focus Group)

Mental health and other welfare issues also contributed to their criminalisation:

Because there is no alternative, because they become criminal matters then and I think these are really mental health issues or social issues, or they’re matters not for magistrates to be involved in, in my view. The first call should be to health providers. (M5)

The final theme we identified was in relation to bail and sentencing for care-experienced children. The difficulties of setting appropriate bail conditions for children from care occupied the thoughts of many of our magistrate respondents. As one commented:

Well, if somebody’s only offence is related to being in care, you don’t want to set them up to fail if you don’t release them, so ultimately I get to the stage of minimalist conditions because otherwise you rarely see them. Like, no more crimes. Or just make sure you stay at home...and don’t abscond. (M6)

A lack of suitable accommodation was said to compound these problems:

So often—fortunately not too often, but often enough, you find yourself in a situation where literally the child has nowhere to go and there’s no places now available like the old bail houses that there used to be. (M1)

Given these difficulties, respondents perceived bail breaches by young people in care to be dealt with sympathetically:

We have a high tolerance with breaches similarly to breaching bail as to breaching court orders. We will quite often bring either a male or female back before the court to remind them, rather than taking action which would, for instance, mean arresting them and sentencing them in custody. (M4)

In our court observations, the vexed relationship between OOHC status and accommodation was also a clear theme. One case we observed, involving an 11-year-old male defendant, illustrated this vividly. He had been removed from the care of his mother during the previous year, and the first offence for which he appeared in court was a public transport offence (feet on seat) that occurred while he was apparently in the process of returning home. He was subsequently charged with assault and property damage for an incident in which he threw a chair at his carer. On the third occasion we observed him, he had been in custody for more than two weeks and was appearing via video link. No suitable accommodation had been found for him, so he remained in custody. In the second case, a 13-year-old Aboriginal girl became distressed during the court hearing and was subsequently removed. There was evidence of mental health conditions and a history of trauma. Again, difficulties in finding an appropriate care facility resulted in time spent in custody. At the conclusion of the hearing, the young girl was bailed to live in a care home in a regional area, as her severe agoraphobia, which had developed as a result of her childhood trauma, would likely confine her to the facility.

In our pilot study we also identified a limited awareness among OOHC service providers of the needs of Indigenous children in care, and the need for increased levels of cultural competence in all sectors coming into contact with the care system. The magistrate respondents in the present study demonstrated an awareness of these needs, noting how legislation:

...very properly places requirements on the court in respect of ensuring that any child in care has culturally appropriate connections...I do think that that is something that the legislation and the court does very well. (M6)

Our Aboriginal Juvenile Justice participants also reported concerns about the cultural safety of the residential care environment. 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...there's not enough resources or Aboriginal workers to work with these kids. Aboriginal kids are different, don't you worry about that. (JJ9)

Indigenous children in residential care and under Juvenile Justice supervision were seen as being in need of cultural support:

Just recently me and my colleague, another Aboriginal fellow, we went over...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)

Discussion and conclusion

In the current study we investigated the links between care experience and contact with the criminal justice system through observations of Children's Court hearings, reviews of court files, and interviews with Children's Court magistrates. Our findings demonstrated that the criminalisation of children with care experience results from a complex interaction between trauma, mental health conditions, the care environment, and difficulties in locating suitable accommodation. Addressing the criminalisation of these children can be achieved only if this complexity is recognised. Policy and therapeutic interventions must be developed with an understanding of this context. It is clear care-experienced children face a number of disadvantages compared with their non-care peers, including poorer educational outcomes, lack of family support, unstable living arrangements, and the often chaotic and violent care environment. Although the results of our study are in many ways consistent with previous research (eg McFarlane 2017b), there are a few findings we would like to focus on in more detail.

In our court observations, we saw how offences arising out of the care environment led to time spent in custody and how difficult it was in some cases for appropriate accommodation to be found. Here, custody was a result of welfare disadvantages rather than criminal offending. Many of the matters we observed related to AVO orders where the victim was either a co-resident or a care worker. This was corroborated by our file reviews, which identified that care-experienced children were more likely to be appearing in court in relation to an AVO matter. Some of this disparity may be explained by the individual characteristics of these children but, at the same time, it was clear that a number of the AVOs arose directly from incidents that occurred in the care environment. We do not wish to downplay the risks to care workers; indeed, there was evidence in some cases of workers being the victims of considerable acts of violence. Nevertheless, all the evidence obtained in this study suggests the response to problematic behaviour in care is a contributing factor to criminalisation, with children's behaviour being managed by way of police and/or an AVO. Our study was conducted both 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, which aimed to reduce unnecessary police contact with those in residential care; however, we observed little evidence of its implementation in our research. We also note the protocol discusses police responsibilities in relation to AVOs in residential care and aspects to take into account when imposing these. Given the importance of AVOs in escalating criminalisation, further attention should be paid to these provisions.

In our previous research, many in the sector spoke to us about the importance of trauma-informed care (Gerard et al. 2019), a central tenet of which is a focus on the individual rather than their behaviour (Harris & Falot 2001). Although many of our respondents recognised the traumatic histories of care-experienced children, it appears the management of their problematic behaviour was prioritised over a holistic understanding of their individual circumstances. Following the introduction of the NSW Therapeutic Care Framework in 2017, trauma-informed care in the OOH system has been accepted as best practice to avoid the criminalisation of care children. Further attention should be given to the ongoing implementation and evaluation of this framework. Our UK case study also provides a number of mechanisms that could be adopted to help achieve this in Australia.

Access to accommodation emerged as a key theme of this study and another driver of criminalisation. The magistrates spoke of the difficulties in having to remand children where no viable accommodation options were available, and we observed a number of cases where care children charged with relatively minor offences remained in custody while appropriate accommodation was sought. In this regard, the file review data showed care-experienced children were more likely to have custodial experience and to have been homeless (although the latter relationship only approached significance). We recognise the challenges facing authorities in relation to identifying safe and secure accommodation for children with complex needs who may have in the past been involved in violent incidents with care workers and co-residents; nevertheless, remand custody and homelessness can only lead to further criminalisation. Addressing this problem should be a priority for policymakers and justice authorities who seek to reduce the over-representation of care-experienced children in the criminal justice system.

Although many of our respondents recognised the significance of care experience in shaping the behaviour that leads children to appear in court, we suspected that, in a number of the matters we observed, the fact that the child had previously been in contact with the care system was not raised. Care status was raised in fewer than five percent of the matters we observed in court, in contrast to the information found in the files, in which we found evidence of care status in just under a quarter of the cases. A number of our magistrate respondents reported they wished to be informed of this during hearings, but it appeared this information was often not provided. This might be a result of the lack of time available to lawyers to talk to their clients and/or the fast pace which matters are dealt with in some courts. Regardless, we believe this is a critical piece of information that should be raised in court.

Our study was not without shortcomings. The major limitation was the lack of care-experienced voices. We addressed this to a certain extent by extending our research method to include court observations; however, we acknowledge the voices of care children would strengthen our research. We also observed hearings in only a limited number of courts, and our sample of files was relatively small. Because of these limitations, some caution should be exercised in generalising from our findings, although the results reported here are consistent with other work in this area (McFarlane 2017b). Given the limited sample size and measures used, our statistical analyses were restricted to descriptive comparisons, and we could not answer questions such as whether care-experienced children were more likely to have been in custody in the past because of their care experience or because they were more serious offenders. Nevertheless, we identified a number of factors implicated in the continuum between care and crime that should be of interest to criminal justice authorities seeking to arrest this trend.

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