

Dr Kath McFarlane

Kath McFarlane Consulting
Adjunct Associate
Professor, UNSW School of
Population Health

Dr Mark Donoghoe

Statistical Consultant,
UNSW Mark Wainwright
Analytical Centre

**Children and young people in Out-Of-Home
Care with criminal justice contact:
Recent Australian studies**

FACSIAR and Youth Justice Lunch and Learn
Webinar

25 November 2021



SUMMARY:
Young people in
OOHC in contact
with the criminal
justice system

Young people in OOHC who offend are an extremely small cohort, but occupy police, court and legal resources disproportionate to their size.

19% of children in OOHC in Australia report some involvement with the criminal justice system, but they are over-represented amongst youth appearing before the Children's Court on criminal charges, on community orders and in detention.

The 'cross-over' between the OOHC and justice systems has been criticised by state and federal parliamentary inquiries, Royal Commissions, Special Inquiries, the Australian Human Rights Commission, state Ombudsman offices, Children's Commissions, Advocates and Guardians.

Gough, E. (2011) *The Drift from Care to Crime: a Legal Aid NSW issues paper*. NSW Legal Aid Commission. Sydney, NSW, Australia

A survey of the top users of legal aid services between 2005-2010, identified that 80% of 'high service users' were under 19, clients of the specialist Children's Legal Service and approximately half (46%) had a history of OOHC.

The clients each required an average of 6 legal services, commonly connected to problems relating to OOHC providers, including residential care staff's over-reliance on police and their failure to develop leaving care plans mandated under the Act.

Evidence of the unnecessary criminalisation of these children evident in the casefiles was confirmed by the experiences of agency solicitors appearing before the Children's Court.

Ringland, C.,
Weatherburn, D. and
Poynton, S. (2015). 'Can
child protection data
improve the prediction
of re-offending in young
persons?'
*Contemporary Issues in
Crime and Justice, NSW
Bureau of Crime
Statistics and Research.*
<http://www.bocsar.nsw.gov.au/>

METHOD

Linked child protection and criminal justice data for 17,638 young people.

FOUND

- Approximately 10% of the cohort were in OOHC.
- Child protection factors associated with re-offending differed according to gender:
- The risk factors for **males** were:
 - an OOHC placement before 10 years of age,
 - a ROSH report in the five years prior to the index contact, and
 - being reported missing in the five years prior to the index contact.
- The risk factors for **females** were:
 - longer duration in OOHC (more than 10 years)
 - a ROSH report in the 12 months prior to the index contact
 - neglect in the preceding five years, and
 - being placed in residential care

McFarlane, K, (2018)
'Care-Criminalisation:
The Involvement of
Children in Out-of-Home
Care in the New South
Wales Criminal Justice
System' (2018) 51(3)
*Australian & New
Zealand Journal of
Criminology* 412

METHOD

Audit of court files for **160** young people who appeared before the NSW Children's Court in 2009-2010.

FOUND

- Almost half the sample (49.5%) had been in OOHC.
- Children in OOHC:
 - were disproportionately more likely to progress quickly through the justice system
 - to be breached for non-compliance with bail conditions
 - to be remanded in custody
 - entered the justice system at an earlier age than children without OOHC experience: the OOHC cohort appeared in court an average of nine months earlier than the non-care group (13.4 : 14.2 years).

Identified three processes distinct to the OOHC environment that exacerbated involvement in the justice system

- **Care-criminalisation** – when children in OOHC are disproportionately impacted upon by aspects of both the care and criminal justice systems in circumstances that would not lead to police involvement in a private family home.
 - Eg Residential care staff's inappropriate reliance on police to manage children's behaviour, police refusal of bail to runaway children who offend in the mistaken belief they will not turn up to court, judicial decisions to place youth in secure detention for their own protection and increased police scrutiny in residential or group care placements.
- **Care-specific trauma** - arises when structural issues in the child welfare system increase the likelihood of involvement in the CJS.
 - Eg Lack of support services, multiple and changing caseworkers, separation from siblings, and unsafe, unstable placements
- **Care-related offending** - many children in OOHC come into contact with the CJS for offences that arose out of and were unique to the care environment.
 - For eg, of the OOHC cohort's current matters before the Court, 35% involved offences that were directly attributable to the child's placement: almost half of these matters involved damage to property, one-third involved assaults against staff, co-residents or kinship carers.

Victoria Legal Aid
(2016) *Care not
Custody: A new
approach to keep kids
in residential care out
of the criminal justice
system*. Victoria Legal
Aid. Melbourne, VIC,
Australia.

FOUND:

- One-third of young people in residential care required legal help for a criminal matter.
- They were 3 x more likely to have contact with police, and to face criminal charges, than other children.
- Justice involvement often arose from very minor matters, such as breaking a cup or throwing food
- This constituted unnecessary or unwarranted criminalisation.
- Despite residential care being supposedly restricted in all but exceptional circumstances to children over 12 years of age, 69% of the children were under 14 years of age when they became involved with the justice system.

Victoria Legal Aid. (2018)
Media Release: Action
needed to stop children
in state care entering
youth justice'. 26
September 2018.
Victoria Legal Aid.
Melbourne, VIC,
Australia.

The link between residential care and entry to the criminal justice system was found to be 'stronger than first thought'.

'Two out of every three young people placed in residential care also needing help for criminal charges...within the first 12 months of being there'.



Malvaso, C., Delfabbro, P., (2015) 'Offending Behaviour Among Young People with Complex Needs in the Australian Out-Of-Home Care System'. *Journal of Child and Family Studies* 24:3561-3569.

METHOD

- Utilised data from a national comparative profile study of young people in OOHC with a history of placement instability.
- Analysed casefile analysis and interviews with caseworkers for 301 young people, aged 10 years or older, with 'high support needs' (defined as medical and psychological issues).

FOUND

- Just over half of the cohort (50.2%) had been involved in the criminal justice system.
- Males were more likely to have offended than females
- Residential care was significantly associated with offending for females (and was near to being statistically significant for all youth)
- Young people who offended had greater vulnerability than non-offenders in terms of emotional and behavioural problems, especially substance use, damage property and conduct problems
- Being younger in age and not having conduct problems was associated with reduced probability of offending.

Malvaso, C., Delfabbro,
P., & Day, A. (2017).
'Child maltreatment and
criminal convictions in
youth: The role of
gender, ethnicity and
placement experiences
in an Australian
population'. *Children and
Youth Services Review*,
73, 57-65.

METHOD

- Examined South Australian linked child protection and youth justice data for **17,671** maltreated young people.

FOUND

- Gender, ethnicity and placement in OOHC moderated the association between child maltreatment and subsequent youth convictions.
- As duration of contact with the OOHC system increased, so too did the odds of conviction for both general and violent crimes
- Residential care was associated with increased odds of involvement in the CJS for females compared to males AND increased the odds of both general and violent offending for non-Indigenous youth
- Foster care was associated with reduced odds for convictions, including violent and drug convictions (but not property or breach convictions)

- Indigenous youth were over 13 times more likely to be convicted of breach-related offences compared to non-Indigenous youth.
- A higher number of placements was associated with a greater likelihood of convictions, including convictions for violence
- Placement instability *preceded* involvement in the criminal justice system, “potentially ruling out arguments that suggest that behaviour leads to placement instability.


Davis, M. (2019) *Family is Culture: Independent Review of Aboriginal Children in OOHC*.
Sydney, NSW

METHOD


- A detailed examination of the circumstances of the 1,144 Aboriginal children who entered OOHC in NSW between 1 July 2015 and 30 June 2016.

FOUND

- Placing a child in OOHC increases his or her risk of being involved in the juvenile justice system.
- This risk, known as 'care-criminalisation', arises from the fact that children are often charged with offences against carers or residential home staff due to conduct that would not be criminalised if they occurred in the child's home environment.
- Care criminalisation also results from placement instability, a lack of cultural connection and a lack of secure accommodation for children in custody and seeking bail.
- The failure of the child protection and juvenile justice systems to adequately address the issue of the cross-over of children between OOHC and juvenile justice has intergenerational consequences for the Aboriginal community.
- Aboriginal children are more likely to be affected by this phenomenon due to their gross over-representation in the OOHC system.

- 
- Involvement in the justice system perpetuates a cycle of disadvantage and child removals that must be halted in order to reduce the entry of Aboriginal children into the OOHC system in the longer term.

Recommended

- Greater data collection and research into the cross-over of children in OOHC and the justice system, and
 - the development of further resources to ensure foster carers and residential home staff are trained about appropriate responses to children exhibiting behavioural difficulties in OOHC.
- 

Baidawi, S. and Sheehan, R. (2019). *'Cross-over kids': Effective responses to children and young people in the youth justice and statutory Child Protection systems.*

Report to the Criminology Research Advisory Council. Canberra: Australian Institute of Criminology.

METHOD

- Casefile analysis for **300** young people appearing before the Victorian Children's Court in 2016-17.

FOUND


- 22 percent of the children before the Court's criminal division were current or historical statutory child protection clients and 12 percent had concurrent involvement in both family and criminal matters.
- Of this 'crossover group', 79 percent had current or historical OOHC experience.
- In other words, over 17 percent of the cohort had been or were, in OOHC.
- Higher rates of charges were identified amongst those who :
 - Were older at entry to OOHC
 - Were male
 - Were living in residential OOHC for 18 months or more,
 - Experienced parental death after 10 years of age,
 - Incurred their first police charge before 14 years of age, and
 - Used substances



Common offences

- 91 percent had current or prior property damage matters, 86 percent had offences against the person and 72 percent had offences against justice procedures.

Sentencing dispositions

- 'Crossover' children had higher sentencing outcomes, with at least 42 percent spending time in custody (including remand) and 12 percent on sentence.
- 

Victorian Sentencing Advisory Council

(2019) Crossover Kids: Vulnerable Children in the Youth Justice System: Report 1: Children Who Are Known to Child Protection among Sentenced and Diverted Children in the Victorian Children's Court.

(2020) 'Report 2: Children at the Intersection of Child Protection and Youth Justice across Victoria


(2020) 'Report 3: Sentencing Children Who Have Experienced Trauma

METHOD

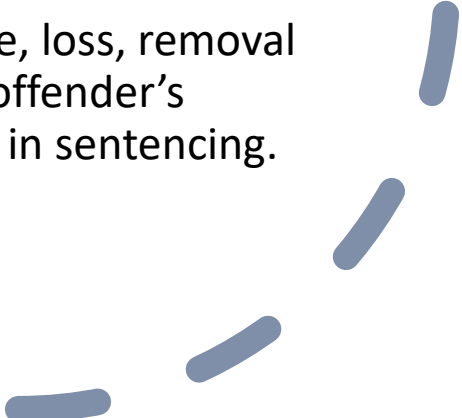
Examined the records of **5,063** children who had offended between the ages of 10-17 and received a sentence or diversion in the Victorian Children's Court in 2016-2017.

FOUND

- One in six children who were sentenced/diverted had been in OOHC.
- Children in OOHC comprised 15% of the children sentenced or diverted by the Victorian Children's Court in 2016-2017.
- Of this OOHC cohort, 68% had spent some time in residential care.
- Almost seven in eight children who experienced OOHC had multiple placements and carers.
- Children who experienced residential care were around twice as likely as other children to be sentenced or diverted for certain offence types, eg offences against the person, and resisting, hindering or assaulting police or emergency workers.

- 
- The overwhelming majority of crossover children were known to the Child Protection Service before their first sentenced or diverted offence.
 - More than half of children in OOHC only offended during or after being placed in care.
 - Identified lost opportunities for concerted and coordinated action across service systems before the child started offending.
 - Concluded that while the experience of trauma and maltreatment is likely to be a causal factor in children's offending behaviour, the experience of care itself may be a contributing factor for many children.

REC:

- That the prevalence of trauma (such as harm, abuse, loss, removal from family and placement into OOHC) in a young offender's background should give rise to potential mitigation in sentencing.
- 

Colvin, E., Gerard, A.,
and McGrath, A. (2020)
*Children in out-of-home
care and the criminal
justice system: A mixed
method study*. Report to
the Criminology
Research Advisory
Council. Canberra:
Australian Institute of
Criminology

METHOD

- Audit of casefiles for **92** young people in the NSW Children's Court criminal jurisdiction.

FOUND

- Almost one quarter (23.9%) had been in OOHC.
- Young people in OOHC were more likely than young people not in care to be:
 - Indigenous
 - to have previous charges
 - to have spent time in custody
 - to have an identified mental health condition
 - to be homeless
 - to have suffered abuse or neglect
 - to have educational problems
 - to have agency reports on file
 - to have been accompanied in court by a carer or guardian.



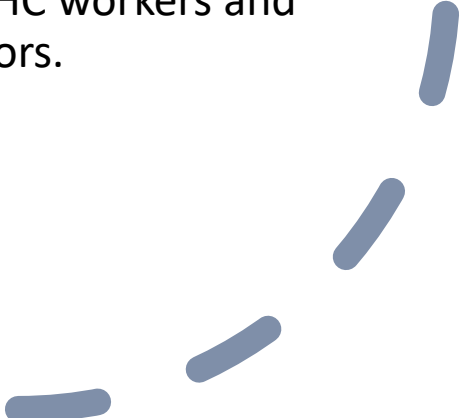
Common offences

- Those in OOHC were more likely (60% compared to 10%) to appear in court in relation to an Apprehended Violence Order, and often the victim was a care worker or co-resident.

Detention due to lack of appropriate accommodation

- There was a ‘vexed relationship’ between OOHC status and lack of appropriate accommodation, resulting in bail refusals and greater likelihood of court ordered time in detention on remand. Attributed to “welfare disadvantages rather than criminal offending”.

Cultural competence

- Limited awareness of Indigenous issues among OOHC workers and need for increased cultural competence for all sectors.
- 

Zhou, A. (2020). *Offending Among Young People in Contact with the Out-of-Home Care System. Pathways of Care Longitudinal Study: Outcomes of Children and Young People in Out-of-Home Care.* Research Report Number 18. Sydney. NSW Department of Communities and Justice.

METHOD

- Used linked DCJ child protection administrative data and Bureau of Crime Statistics & Research Reoffending Database (ROD) to examine the likelihood and timing of first offence among **859** young people, aged 10-17 years, who entered OOHC for the first-time with no history of criminal justice contact.

FOUND

- Over a quarter (27.9%) had a formal contact with the criminal justice system within the following three years and 7 months.
- Longer time in OOHC was significantly related to a decreased risk of offending.
- Those more likely to come into contact with the criminal justice system, and who did so in a relatively shorter period of time after entry into OOHC were:
 - older at placement (i.e., 12-14 years of age)
 - male
 - Indigenous
 - exposed to neglect or who had a history of risk behaviour (e.g., drug and alcohol misuse) prior to entry to OOHC
 - had predominantly lived in residential care or 'supported accommodation.

Office of the Guardian for
Children and Young People/
Training Centre Visitor

(2019) *A PERFECT STORM*
Dual status children and
young people in South
Australia's child protection
and youth justice systems
Report 1

FOUND

- Almost **one quarter** of children and young people detained in the Adelaide Youth Training Centre were in OOHC.
- Found that 'it's not that these individual children and young people are inherently 'criminal' but that systems make their criminalisation more likely'.
- Found that 'systems abuse' 'is prevalent in the lives of dual involved children and young people.'
- Egs included:
 - exposure to peers with difficult behaviours,
 - inadequate staff training,
 - institutional reliance on unsuitable or inexperienced and casual workers,
 - poor placement decisions and
 - poor interagency suitable policies, practices or procedures within systems or institutions.

Concluded the state's child protection system is struggling to undertake its core function of keeping children and young people safe

- Inadequate planning, policy, procedure, and communication across government and non-government systems mean that children and young people in OOHC who need therapeutic support are instead being drawn into the justice system.
- Children in OOHC who end up in the youth justice system are sometimes kept in detention days after they are granted release because child protection authorities have no homes for them to go to.
- Children in OOHC had elected to remain in detention once they reached the end of their sentence because they felt “fearful and unsafe” at residential or commercial care facilities.
- Serious physical and sexual abuse was being perpetrated between young people in residential and commercial care
- “Many aspects” of the state’s child protection system are “in crisis”.
- Initiated a project to give a voice to the growing number of children under guardianship who end up in the youth justice system – otherwise known as “dual involved” children.

Office of the Guardian
for Children and Young
People/ Training Centre
Visitor

*(2021) Six Months
Snapshot of South
Australian Dual Involved
Project: Children and
young people in South
Australia's child
protection and youth
justice systems.*

METHOD

Examined the circumstances of 51 dual status children detained on 124 separate occasions between 1 Feb to 31 July 2021.

Interviewed 16 young people and 30 govt and ngo service providers.

FOUND

- Children in OOHC account for only 1% of the SA child population but comprise almost a third of young people in detention.
- The proportion of dual status children in detention is increasing - their numbers have remained stable although overall detainee numbers have fallen.
- Approx 10 South Australian children under guardianship orders were, on any given day, also serving a sentence or on remand at the Adelaide Youth Training Centre.
- Identified that since data collection started in 2017, the number of dual involved children in South Australia has grown by more than 20 per cent.
- Over-representation in the dual-status cohort of:
 - Females
 - Indigenous children
 - Very young children (under 14 years) and
 - Those with a diagnosed disability.

Concluded that

- Residential care, especially large-scale congregate care, 'appears to cause 'criminal' or offending) behaviour'.
- Systems bias could be contributing to the overrepresentation of Aboriginal children in the youth justice system, and would certainly lead to their overrepresentation in detention.
- Children in residential care are at far greater risk of criminalisation
- lack of suitable options and poor placement decisions increase this risk
- residential care often exposes children and young people to peers with difficult behaviours
- systemic problems mean that detainees can be held on remand longer than they should
- interagency relationships are strained and lack clarity about relative responsibilities; and
- transitions from the youth detention back into the child protection system can be poorly planned and result unnecessarily extended periods of detention.