

# Care-criminalisation: the involvement of children in out of home care in the NSW criminal justice system

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**Care-criminalisation:  
the involvement of children in out of home care  
in the NSW criminal justice system**

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**Thesis in fulfilment of the requirements for the degree of  
Doctor of Philosophy**



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## ABBREVIATIONS

AAP	Australian Associated Press
ABC	Australian Broadcasting Commission
ABS	Australian Bureau of Statistics
ACFA	Australian Foster Care Association
ACSAT	Aboriginal Child Sexual Assault Taskforce
ACWA	Association of Children's Welfare Agencies
AIHW	Australian Institute of Health and Welfare
ALRC	Australian Law Reform Commission
APPG	All Party Parliamentary Group
BBC	British Broadcasting Commission
CJS	Criminal Justice System
CLAN	Careleavers Australia Network
CREATE	CREATE Foundation
CPD	Commonwealth Parliamentary Debates
DfES	Department for Education and Skills
DoH	Department of Health
DJJ	Department of Juvenile Justice
HM	Her Majesty's
HoC	House of Commons
HREOC	Human Rights and Equal Opportunity Commission
MCATSAI	Ministerial Council on the Administration of Justice
NACRO	National Association for the Care and Resettlement of Offenders
NSW	New South Wales
NSW AGD	NSW Attorney Generals' Department
NSW BOCSAR	NSW Bureau of Crime Statistics and Research
NSW CCYP	NSW Commission for Children and Young People
NSW CDRT	NSW Child Death Review Team
NSW CG	NSW Children's Guardian
NSW CSC	NSW Community Services Commission
NSW CWD	Child Welfare Department of New South Wales

NSW DCS	NSW Department of Corrective Services
NSW DAGJ	NSW Department of Attorney General and Justice
NSW DCW	NSW Department of Child Welfare
NSW DoCS	NSW Department of Community Services
NSW DHS	NSW Department of Human Services
NSW DJJ	NSW Department of Juvenile Justice
NSW FACS	Family & Community Services
NSW LRC	New South Wales Law Reform Commission
NSW PD LA	NSW Parliamentary Debates, Legislative Assembly
NSW PD LC	NSW Parliamentary Debates, Legislative Council
NSW YACS	NSW Department of Youth and Community Services
OOHC	Out of Home Care
PoC	Parliament of the Commonwealth of Australia
PRT	Prison Reform Trust
PSA	Public Services Association
QLD CG	Queensland Child Guardian
RCIDIC	Royal Commission into Aboriginal Deaths in Custody
SA CG	South Australian Office of the Guardian for Children and Young People
SCRB	State Children's Relief Board
SEU	Social Exclusion Unit
SMH	Sydney Morning Herald
SRAI	State Records Archives Investigator
UK	United Kingdom
UK CfSJ	UK Centre for Social Justice
USA	United States of America
US DJJ	United States Department of Justice
US DoHHS	US Department of Health and Human Services
US GAO	United States General Accounting Office
VAGO	Victorian Auditor General's Office
WA Ombudsman	Western Australian Ombudsman
YJB	Youth Justice Board

## CHAPTER ONE: 'A CENTRAL LINK IN THE CARCERAL ARCHIPELAGO'

In his work *Discipline and Punish* (Foucault 1977) the French theorist Michel Foucault described the child welfare home as a central link in the 'carceral archipelago'. He saw the orphanages, almshouses and childrens' homes as the beginning and an extension of, the prison system. The child welfare homes that housed 'poor innocent girls' (Foucault 1977:298) and 'vicious and insubordinate wards of the public assistance' were recruiters of 'major delinquents' and generators of 'disciplinary careers'. The 'carceral with its many diffuse or compact forms, its institutions of supervision or constraint, of discrete surveillance and insistent coercion, assured the communication of punishment...' he wrote (Foucault 1977:299). Through 'various exclusions and rejections, a whole process is set in motion' (Foucault 1977:300). The delinquent, according to Foucault, 'is an institutional product' [and] 'the prisoner condemned to hard labour was meticulously produced by a childhood spent in a reformatory' (Foucault 1977:301). Foucault's assessment of the impact on the development of criminological theory and particularly of some strands of feminist and critical criminology (White and Haines 2008:16), is undeniable. Yet consideration of his contention that the child welfare home created criminals, far from being contested, has been largely ignored, particularly in the Australian context.<sup>1</sup>

Yet prisoners who have lived the pathway from welfare home to gaol cell have confirmed Foucault's theory. As *Discipline and Punish* was published, an armed robber half a world away observed that:

*For most of us behind these walls, the road to prison has been a steady progression of Boy's Homes and Reformatories... there is one thing that has occurred with monotonous regularity: the guys I knew in Mt. Penang and Albion Street and Yasmar were in those places for truancy, running away from home, stealing and in some cases house-breaking. Today I see those guys I knew 14 and 15 years ago walking the yard.*

---

<sup>1</sup> As will be discussed later in this thesis, one notable exception was Kerry Carrington (1991; 1993a; 1993b).

*Now they are doing time for murder, rape, armed robbery and kidnapping.*

(Matthews 1979:24)

Having conducted his own survey of prisoners at Parramatta Gaol in New South Wales ('NSW'), Mathews subsequently noted that 'nearly 85 percent of the jail population had been incarcerated as kids...a statistic that had never appeared in an official report' (Matthews 2006b:270). At the time, he declared that:

*I am not a lawyer. I do not have a degree in Sociology. I am not a politician or an administrator of the juvenile/justice system... I am a prisoner who witnesses the products of your juvenile/justice systems everyday. I walk the yard. Men living in the cells next to me have been shunted through your juvenile/justice institutions. Men lining up for prison musters have been spewed out of your juvenile/justice systems. Men who are now wearing numbers instead of a name all travelled the well-worn paths of Mittagong, Daruk, Gosford and Tamworth.*

(Matthews 1979:32)

One likely explanation for the failure to acknowledge the role of the welfare system in manufacturing delinquency is that argued by United States Professor of Criminology and Social Work Anthony Platt. In his examination of the role of the juvenile justice system in the United States, Platt argued that his book destroyed 'the myth that the child-saving movement was successful in humanising the criminal justice system, rescuing children from jails and prisons, and developing dignified judicial and penal institutions for juveniles'. He argued that 'if anything, the child-savers helped to create a system that subjected more and more juveniles to arbitrary and degrading punishments' (Platt 1977:xvii-xviii). Platt was also scathing of 'scholarly research', which, he argued 'tends to avoid issues that might be critical of responsible officials and management, and instead caters to facilitating the efficient and smooth operation of established systems' (Platt 1977:181). Thirty years later US academic Mark Courtney noted a similar disinclination on the part of academics and policy-makers to discuss the outcomes of the child welfare system. The ignorance about the out of home care system, he wrote, 'cannot be attributed to the level of economic and social development, de-centralisation of responsibility for



child welfare services and privacy concerns alone'. Rather, 'there is at least sometimes a veiled attempt by child welfare and other social welfare bureaucracies to avoid being held accountable for the outcomes experienced by those they serve' (Courtney in Stein and Munro 2008:287). I argue in this thesis that Courtney's use of the term 'veiled' cannot be said to apply to the NSW child welfare system. Rather, I will demonstrate that the attitude and practices of child welfare bureaucracies towards the criminalisation of children in out of home care (OOHC) is a form of institutional systems abuse.

### The theories

I have read numerous criminology theories to try to understand why the child welfare system creates criminals. Yet while there are countless theories and empirical studies that have sought to explain and to predict delinquency, few of them have acknowledged, let alone provided a satisfactory explanation, for the over-representation of the OOHC cohort in the CJS. The same limitations apply in respect to the child welfare research: although there is a growing body of research on the impact and processes of the care experience generally, this has not been grounded in a theoretical framework. Some commentators have expressed surprise that so little empirical and theoretical work has been undertaken in the area of child welfare generally (Barn and Tan 2012:212). This so-called 'poverty of theory' (Stein 2006) has only recently begun to be addressed: for example, social exclusion and general strain theory (Barn and Tan 2012) have been posited as contexts in which crime committed by youth aging out of OOHC should be considered. Attachment theory, focal theory and resilience have also been suggested as useful general theoretical frameworks (Stein 2006). The fact is that alternating theoretical discourses in Australia have had no discernible impact upon children involved in both the care and justice systems. For example, neither the conservative theoretical perspectives (such as classical and positivist views) that dominated criminal justice policy formulation and action until the 1950s; the more liberal viewpoint (typified by labelling theory) that ushered in a series of justice reforms in the 1960s; the re-emergence of conservatism that saw 'strident calls' for tough law and order measures during the 1980s and 1990s; nor the more recent dual emphasis on offender responsibility and strong government responses mixed with liberal restorative justice responses to crime (White and Haines 2008:15) have addressed what I refer to as 'care-criminalisation' – the relationships and processes by which children in out of home care become involved in the criminal justice system. As will be demonstrated

in this thesis, the criminalisation and over-representation of children in OOHC has continued regardless of the preferred theory of the day.

## **MOTIVATION FOR THE THESIS**

My experience providing legal research assistance to male prisoners on remand at Long Bay Gaol supported Foucault's analysis that the child welfare home created criminals. As a criminology student at Sydney University, I spent a day a week in the prison. Over the space of 12 months, I heard first-hand of the progression from foster care and boys' homes to juvenile gaols and adult prisons that had been identified by Foucault and by prisoners such as Bernie Matthews. For many prisoners this pathway was regarded as normal, almost a rite of passage. It was how many people knew each other, a part of the gaol network of shared experiences. While I was surprised prisoners did not distinguish between the welfare homes in which they had been placed for their own protection and the juvenile gaols to which they had been sent as punishment for crimes they had committed, I discovered later that the authorities had not distinguished between them either. As Carrington (1993a) found, the system was arbitrary. Children appearing before the Children's Court on welfare matters could be sentenced to juvenile detention centres and those appearing on criminal charges could be sent to welfare homes. Not that the institutions were that dissimilar: as will be discussed later in this thesis, a series of Inquiries and investigations have shown that both children's homes and juvenile gaols had been run by the NSW child welfare department. They were often built on former gaol sites or later, became adult gaols themselves. Staff and routines were interchangeable and abused and at-risk children were considered at worst criminal and at best, pre-delinquent.

Another aspect of childhood institutionalisation became apparent when the University asked me to establish a student legal service at a maximum-security women's gaol. Many of the women had had their children removed from their care by the child welfare system. Many of the women had themselves been placed in care and had been subject to regimes that failed to distinguish between offenders and the offended against. Their accounts revealed lives of sex work, of drug use and addiction, of poverty and of unrelenting violence both as victims and as perpetrators. For many, their criminal careers apparently began when charges were laid after they had been abandoned by their parents or after they had committed crimes 'of survival' such as prostitution or theft after they had run away from care homes. When the women spoke about the welfare history they had experienced

it was almost always in the context of their children's removal. They saw the bigger care to crime pattern, but most didn't consider it to be exceptional or remarkable. There were some notable exceptions – such as a female prisoner who bluntly observed that she had been incarcerated at the Norma Parker Prison (formerly the Parramatta Training School for Girls) on three occasions: once as a vulnerable teenager charged with being 'in moral danger'; once as a young offender; and now as an adult prisoner. 'Rowie' was very aware of the pathway from OOHC through the juvenile justice system to adult corrections. She was resentful of continued welfare involvement in her life, sceptical of the charitable and religious agencies that visited the gaols and adamant that she wanted nothing to do with 'the welfare' upon release.

This was my introduction to a phenomenon that was observed ad nauseam during the three years I spent as an Official Visitor in the NSW correctional system. Throughout this thesis I have referred to these childhood pathways from OOHC to the criminal justice system as 'care-criminalisation'. I found this concept particularly remarkable because it excited so little attention from the NSW prison and welfare administrators. I wondered why no one in authority seemed to have noticed that so many prisoners had been placed in the welfare homes as children. Still more remarkable was that many prisoners appeared to have incurred their first criminal charges while living in child welfare institutions. It seemed to be an issue requiring further investigation. Without this insight, information that might contribute to the knowledge of why and how people offend, and what may assist in their rehabilitation, is missing. Importantly, the identification of triggers for subsequent offending or mitigation strategies to prevent reoffending is also lacking. In the United Kingdom in contrast, analysis of OOHC status is both a legislative and regulatory requirement, because the authorities have come to realise the failure to address care-criminalisation has far-reaching implications for effective program development and service delivery, as well as incurring significant costs for the State (HoC 1998; 2009a; 2009b; 2011; 2013; DfES 2002; 2005a; 2006a; 2006b; 2006c; 2007).

Child welfare activist John Murray and I began researching the area, writing submissions, giving evidence to government inquiries and academic conferences and publishing in community magazines and scholarly journals (see for example, McFarlane and Murray 1996; 1999; 2000; McFarlane 2005a; 2005b). The NSW Corrections Health Service (now JusticeHealth) was the first agency to respond to our request to collect information

specifically about OOHC, incorporating questions into the 2<sup>nd</sup> *Inmate Health Survey* (Butler and Milner 2003). This comprehensive study<sup>2</sup> identified that approximately one-third of women and one-fifth of men in NSW prisons had spent time in OOHC before the age of 16. A survey informed by the NSW experience conducted in Queensland (Kilroy 2000) revealed similar percentages. Subsequent research confirmed our observations that the rates of children in OOHC in juvenile detention centres and on community orders far exceeded the rates in juvenile detention that had been reported by the NSW Ombudsman (NSW Ombudsman 1996) and Community Services Commission (NSW CSC 1999a). Yet despite findings that there were different outcomes amongst the Aboriginal gaol population depending on whether a person had been removed from their family or not (Egger and Butler 2000), JusticeHealth did not release its research that identified other differences between the OOHC and non-care cohorts. Nor have the Department of Corrective Services (DCS) or Juvenile Justice (DJJ) developed programs to address the specific issues raised by this distinctive and easily identified population. This contrasts with the approach of the Scottish Prison Service, whose recent surveys of careleavers in prison identified striking discrepancies between the two groups in terms of their offending rates, patterns of drug and alcohol use and mental health characteristics, sparking further investigations (Carnie and Broderick 2011; 2012; McCoard et al., 2013a; 2013b; Carnie et al 2014a; 2014b; 2014c).

I have worked in a variety of roles in the child welfare and criminal justice systems, which has given me first-hand experience of political responses and agency reactions to the idea that there is a connection between OOHC and the CJS. For example, I was a policy advisor to the NSW Shadow Minister for Community Services, worked in the Attorney General's Department, was Executive Officer of the NSW Sentencing Council, a consultant to the Department of Community Services' longitudinal study of the outcomes for children in OOHC.<sup>3</sup> With the thesis nearly complete, I was the Chief of Staff to a State Minister across various successive portfolios, including Juvenile Justice, Corrections, Attorney General and Family and Community Services. This experience confirmed that children in OOHC were being criminalised within a system that had been intended to support and overcome childhood disadvantage. In researching this area I was assisted by

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<sup>2</sup> The sample included approximately 10% of male and 34 % of female inmates in full-time custody.

<sup>3</sup> A longitudinal study was not undertaken although the groundwork was completed by the Department's Parenting & Research Centre. See for example Taplin (2005a) and (2005b).

judicial officers, court workers, psychologists, caseworkers, lawyers and bureaucrats. For example, while working with the NSW Children's Court I met a magistrate, who, alarmed by the constant parade of familiar faces appearing before him in the criminal lists, had begun to compile a register of children whom he suspected were in OOHC. His Honour methodically collected details of the non-government or private agencies into whose care the child had been placed, details of the offences with which the child had been charged and the period between court appearances. He told me that children in OOHC were continually being brought back before the court for minor matters arising from the care environment and observed that he was repeatedly forced to bail defendants back into the care of the agency that had brought charges against them. He observed bitterly that the child would inevitably reappear just a few weeks or even days later, charged with similar offences. When his endeavours to break the cycle by involving the child welfare department proved futile, he began referring children for mental health assessments. If the child was found to be mentally ill at the time of the offence, under s32 and s33 of the *Mental Health (Forensic Provisions) Act 1990* he was able to dismiss the criminal charges. Yet although this action provided some measure of respite for some children who appeared before him, it did not result in systemic change. Other judicial officers provided details of agencies they commonly encountered during circuit visits to regional NSW. They complained that non-government agencies were under-qualified, under-staffed and completely ill-equipped to respond properly to the high-needs children placed in their care. Rather than qualified staff, agencies employed casual workers with little skills or training, or short-term, probation officers who quickly grew punitive when their charges became difficult. Workers also repeatedly called police to arrest children who acted out or displayed challenging behaviour. According to one magistrate, this was 'as ridiculous as putting someone in a psychiatric hospital because they were sick and then calling police when they acted crazy'.

## **KEY RESEARCH QUESTIONS**

I wanted to know if the views of people like Bernie Matthews and what I had observed in the prisons was evident in properly constituted research – whether, as Foucault alleges, the child welfare home is a major contributor to the creation of criminals. Accordingly, the thesis explores the intersection between the child welfare and criminal justice systems to identify:

1. the rates of appearance of children in OOHC before the NSW Children's Court on criminal charges;
2. whether this appearance rate is disproportionate; and if so,
3. what the factors are leading to that over-representation.

## **METHODOLOGY**

In order to assess my observations of the pathway between OOHC and subsequent involvement with the CJS – what I have termed ‘care-criminalisation’ - a sequential mixed methods methodology was adopted. This comprised the collection of qualitative data and analysis followed by quantitative data analysis. The qualitative methods involved a literature review of the leading academic papers in the area; an assessment of over 200 years of Royal Commissions and government reports; an examination of contemporary media commentary (such as newspaper articles, radio and television broadcasts); and analysis of 25 years of NSW Parliamentary Hansard to assess the way in which academics, bureaucrats and successive governments have responded to care-criminalisation. I also examined previously unpublished primary source documents and agency material, including the Minutes and papers of various committees and boards and the personal papers of several members of the NSW Legislative Assembly and the NSW Legislative Council. This was followed by quantitative methods analysis of the NSW Children's Court (Parramatta) records. Police cautions and warnings, the imposition of bail conditions and sentencing practices, including referral to alternative sentencing programs such as the Youth Drug and Alcohol Court (YDAC), were examined also. Data for the study came from a variety of sources, predominantly file reviews conducted at the Court, observational research of Children's Court cases and analysis of the transcripts of individual Children's Court cases. I also assessed institutional responses to the over-representation of children in OOHC in the criminal jurisdiction and drew on my professional experience and background to provide reflective comments on the study findings.

This mixed methods design was chosen because of the consideration it allowed of the depth and complexity of the issues. Australia has only ‘limited jurisdictional data’ on the experiences of those who have been in OOHC and has been ‘silent on government data used for research and data drawn from population-based studies’, particularly in relation

to aspects of the OOHC experience such as incarceration (Courtney in Stein and Munro 2008:279). To my knowledge, analysis of the type undertaken for this thesis has not been previously completed in NSW and constitutes a significant and original contribution to the literature.

### **File Audit**

The file audit of children's criminal cases was retrospective and based on hard-copy paper files held by the NSW Children's Court at Parramatta. This provided sufficient information for analysis and enabled conclusions to be drawn regarding bail and sentencing decisions and processes. It also avoided the research having an influence on court proceedings, as might have been the case if a prospective study was chosen. As the paper file is meant to record all relevant information for the purposes of a bail determination or sentencing (including the Magistrate's notes of verbal arguments proffered by defence and prosecution), it was thought unlikely that additional useful information on any individual case would need to be gathered from other written sources (indeed, the failure to record relevant information on the paper file was itself likely be a useful research marker). Reliance was placed on written records of Children's Court proceedings over oral records, as although recordings are made they are not routinely transcribed unless the Magistrate specifically orders it or an appeal is lodged. Transcription costs for non-parties' are prohibitive and were outside the scope of the thesis budget. Recordings are also routinely destroyed after three months – thus excluding many of the files able to be accessed as part of this retrospective study. It was also the author's experience that useful additional material was unlikely to appear on tape while being simultaneously omitted in the paper file – potentially useful material such as lawyers' submissions on bail conditions are not routinely recorded as the tape is suspended at this stage of proceedings.

The file audit comprised 180 Parramatta Children's Court criminal jurisdiction files. This yielded information on 160 individual children. The difference between the figures lies in the fact that a number of children appeared more than once - on separate criminal matters - in the period selected for analysis. The selected files contained sufficient information to enable analysis of the child's demographics; circumstances relating to the alleged offence; and police and judicial decision-making processes for bail and or breach of bail determinations, the imposition of sentences or, in some instances, each of these

stages. Files which involved non-finalised matters; transfers to the adult jurisdiction or to a Children's Court other than Parramatta; applications to conduct forensic procedures and other minor matters were excluded from the study as they did not contain enough information to enable analysis. The files were chosen so that an even distribution of weekdays were examined in each month between July 2009 and December 2010 to ensure that court files heard on all days of the working week were examined. All relevant cases on the day were included in the sample. Files were manually inspected at Parramatta Children's Court between August 2009 and January 2011. Manual inspection was required as a comprehensive electronic criminal database was not operational at the time of collection.

The file documentation was assessed in order to identify whether a child before the Children's Court criminal jurisdiction had ever been in OOHC. This required some official documentation to verify either current or former OOHC status and generally comprised a letter provided to the Children's Court by the Department or a care agency provider. Police facts, lawyer's submissions and identification by the Children's Court magistrate were also deemed to constitute a verifiable identification. The non-care group was composed of children for whom there was no indication of OOHC status on the official record. This latter group included those who resided with nuclear families and who had no documented involvement from the State, as well as those who may have had previous child protection involvement but had not been removed from their families.

The file reviews yielded both quantitative and qualitative information. Descriptive demographic statistics are presented in Chapter Five, with a number of descriptive accounts or brief 'vignettes' or summaries of actual cases drawn from qualitative data included to provide a counterpoint to the quantitative analysis and to illustrate specific aspects of the systems' criminalisation processes. These case studies also provide greater depth and understanding of the complexity of the criminal justice process and decisions undertaken by both police and the courts by documenting the known criminal and social history and demographic attributes of an individual offender. Consistent with ethics approval that specified children's identities be protected, pseudonyms are used throughout.



### Observations and field notes

Court practices were observed at Parramatta Children's Court from July 2009 to December 2009 and included a wide range of matters including bail determinations and sentencing. This provided an understanding of the various administrative and judicial processes involved in the CJS as it impacts on children. During the research period I took field notes of my observations.

### Stakeholder feedback

While undertaking this thesis I was approached by numerous agencies, including the NSW Children's Court and individual magistrates; the Departments of Family and Community Services' (FACS) and Juvenile Justice (DJJ); the NSW Police Force; Legal Aid NSW; the Association of Children's Welfare Agencies ('ACWA'); prisoners' representatives and community organisations. This provided a valuable opportunity to test the assumptions and findings in my work. Due to access and accessibility issues the material was not raised with children currently in OOHC or before the Court, however, the issues and preliminary findings were presented to people who had been in OOHC as children, both those who had been in gaol and those who had never been in trouble with the law, and with both serving and former prisoners, in order to test emerging themes and interpretations.

Presentations based on preliminary analysis of 111 NSW Children's Court files for example, were made to several conferences between 2008 – 2014 (see for example McFarlane in Cunneen and Salter (eds) (2008). In *Current Issues in Criminal Justice* (McFarlane 2010), I argued that children in OOHC in my cohort were 68 times more likely to appear before the NSW Children's Court than other children and described the criminalisation process whereby children were charged for relatively minor property damage offences that occurred within, and were fuelled by, the OOHC environment. I also examined the police and court responses that led to children in OOHC being channelled into juvenile detention centres at disproportionate rates.

Concerned at these findings, Legal Aid NSW ('the Commission') undertook research to test my assertions (discussions with Legal Aid NSW 2010). It conducted a survey of the top users of legal aid services between 2005-2010 and found that 80% of its 'high service users' were under 19 and clients of its specialist Children's Legal Service ('CLS').

Approximately half (46%) had a history of OOHC. Confirming my findings, the Commission reported that the criminalisation of children in OOHC was evident in the casefiles and experiences of CLS solicitors appearing before the Children's Court (Gough 2011; Maher 2012). The Commission's Children's Civil Law Service (working with the Children's Legal Service, Aboriginal Legal Service and the Shopfront Legal Centre) recently initiated a wrap-around legal service to target children with complex needs. Initial analysis revealed that the clients each required an average of six legal services, commonly relating to problems relating to OOHC providers, including residential care staff's over-reliance on police and their failure to develop leaving care plans as required by the *Children and Young Persons (Care and Protection) Act 1998* NSW (discussions with Legal Aid NSW 2013).

In 2010 some colleagues and I at Charles Sturt University undertook a research project for the NSW Government, analysing bail and bail conditions and the relationship of these factors with the recent increase in the juvenile remand population. The study of 408 paper files relating to 374 individuals who appeared before the criminal jurisdiction of the NSW Children's Court (Parramatta), a regional Children's Court and state-wide bail court between July 2009 and December 2010, found that almost 70% of the sample was 'extremely likely' to be in OOHC (McFarlane et al., 2011).<sup>4</sup>

In 2012 the Australian Broadcasting Commission's *Lateline* program included my research in its examination of the circumstances leading to the death of an Aboriginal girl in Queensland residential care, concluding that 'the child protection and foster care system in Australia is serving as an incubator for a lifetime of crime, violence and prison' (ABC 2012 30 May 2012a; 2012b).

### Terminology

This thesis has employed the language that seemed the most appropriate to the author. In NSW, the nomenclature for children removed from their families refers to them being placed in the 'care' of the State. English terminology similarly refers to 'looked after'

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<sup>4</sup> This assessment was based on positive identifications of children who were currently or had recently been in OOHC based on the court papers and those deemed 'extremely likely' to be or have been in OOHC based on identification by a Children's Court Magistrate, Department of Juvenile Justice records, lawyers' submissions and other documentation (but for whom no official agency documentation was on file) (McFarlane et al., 2011).

children. Although it is highly contestable that all children are ‘cared for’ (Australian Senate 2001; 2004; 2005; 2009) the term ‘Out of Home Care’ (‘OOHC’ or ‘in care’) has been used because it is in general use.<sup>5</sup> ‘Careleaver’ has been preferred to that of ‘Forgotten Australian’<sup>6</sup> - its use in this thesis includes ‘Stolen Generations’<sup>7</sup> and the ‘Child Migrants.’<sup>8</sup> In order to explore differences between the two cohorts, the phrase ‘Stolen Generations’ is employed in this thesis only when specific reference is made to Aboriginal people who were removed from their parents or communities and not to the descendants of those who were removed.

The term ‘child’ refers to a young person under 18 years of age, ‘ethnic’ refers to people of non-Anglo descent<sup>9</sup> and ‘people with disabilities’ refers to those with cognitive or intellectual impairment or physical disabilities. The terms ‘Indigenous’ and ‘Aboriginal’ have been used interchangeably to refer to people of Australian Aboriginal descent. ‘Prisons’ and ‘gaols’ have been used interchangeably in lieu of ‘correctional centres’ and following the NSW Ombudsman<sup>10</sup> ‘juvenile detention centre’ has been preferred to ‘juvenile justice centre’. Finally, for ease and consistency when referring to the ‘NSW Department of Family and Community Services’ (FACS) - an agency that has had nine official names since 1970 - I have simply used ‘the Department.’ The titles of the

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<sup>5</sup>The term has been used since the *Children and Young Persons (Care and Protection) Act* 1998 and refers to ‘any residential care and control of a child or young person in any place other than the usual home, by any person other than a parent or relative for any period over 28 days (or 14 days if subject of a Court order)’ (NSW FACS 2014a).

<sup>6</sup> This term was used by the Australian Senate (2004) to describe the estimated 500,000 children brought up in orphanages, children’s homes, institutions and foster care in Australia. The phrase was adopted as a rallying cry for a national apology and compensation schemes by many individuals who had previously referred to themselves as ‘careleavers, homies, state wards, or ex-residents’ (Victorian Government 2014). A Federal Government apology was given to the Forgotten Australians in 2009 (CPD 16 November 2009).  
<sup>7</sup> The term ‘Stolen Generations’ refers to Indigenous children who were forcefully removed from their families between the 1890s and 1970s under Government policy. Children were placed in institutions or in non-Indigenous foster or adoptive families. Many children did not see their families or communities again. A Federal Government apology was given to the Stolen Generations in 2008 (CPD 13 February 2008).

<sup>8</sup> ‘Child Migrants’ are part of the larger ‘Forgotten Australians’ group. The term ‘Child Migrants’ refers specifically to the 7000 children sent to Australia under assisted child migration schemes. Some were sent without their parents’ consent or knowledge and some were falsely told their parents did not want them or had died. Adopted or brought up in children’s homes, institutions, orphanages or foster care, some were neglected or abused in care.

<sup>9</sup> Following former Community Relations Commission Chair Dr Stepan Kerkyasharian, cited in the *Daily Telegraph* 13 August 2013.

<sup>10</sup> The Ombudsman ‘saw a lot of detention, but there was less certainty that all detainees would be treated “justly” throughout their term of custody...[i]f the word was to be understood as ‘the quality of being (morally) just righteous ; the principle of just dealing; just conduct; integrity; rectitude’ as the Dictionary defines it, then ‘NSW’s juvenile justice centres may be falsely labelled’ (Maneschi 1997:2).

Departments of Juvenile Justice (DJJ), Corrective Services (DCS), Aboriginal Affairs (DAA) and JusticeHealth (JH) have been retained.

### Ethics Approval

Ethical approval for the study was obtained from the University of New South Wales Human Research Ethics Committee. Approval to conduct the file audit, undertake observational research and speak with individual judicial and court officers was also obtained from both the former Chief Magistrate of the Children's Court of New South Wales, the late Senior Children's Magistrate Mr Scott Mitchell and from the first President of the NSW Children's Court, His Honour Judge Mark Marien. Additionally, in principle support for the proposal was received from a number of Government agencies, including the Directors General of the (former) Departments of Juvenile Justice and Community Services.

### Thesis Chapters

The State's child protection legislation is predicated on the belief that government intervention in a child's life should be 'the least intrusive action' necessary to ensure the child's 'safety, welfare and well-being' (s32 *Children and Young People (Care & Protection) Act* 1998). Placement in OOHC is only permitted if no other order would be sufficient to meet the child's needs. Once a child is in care, he or she is entitled to an environment free from violence and exploitation (s8 *Children and Young People (Care & Protection) Act* 1998). These basic principles have not protected children in OOHC from institutional abuse and neglect. As described in Chapter One, a succession of inquiries has shown that the quality of care provided to children by religious agencies, the non-government sector and the State has often been of a far lower standard than is tolerated from parents. The significant and intergenerational harm that has been inflicted on hundreds of thousands of families through policies of forced removal and child adoption over the course of two centuries, has recently been acknowledged by federal and state and territory governments. Apologies made to the so-called 'Stolen Generations,' 'Forgotten Australians,' 'Child Migrants', 'and victims of 'Forced Adoptions'<sup>11</sup> have

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<sup>11</sup> The term 'Forced Adoption' refers to the 150,000 women whose children were removed from them and adopted out by 'unethical and in many cases illegal' practices by churches, hospitals and non-government organisations during the 1950s to 1980s. A Federal Government apology was given in 2013 (CPD 21 March 2013).

conceded that child welfare institutions established to protect children not only failed to protect many from abuse but, as the current *Royal Commission into Institutional Responses to Child Sexual Abuse* (McClellan 2014) has heard, perpetuated a culture and practices that allowed abuse to continue. The seemingly inevitable exodus of children from the child welfare homes to adult prisons is one aspect of institutional abuse that has not yet been sufficiently ventilated in Government apologies or various Commissions and Inquiries. Yet the nexus between the wretched conditions of many children's homes, including rape, abuse and brutality, has been linked to children absconding from care, the commission of 'survival offences' on the streets and institutional retaliation in the form of placement of children in notorious detention centres and prisons (see for example *Forde Commission of Inquiry into the Abuse of Children in Queensland Institutions* 1999; Fletcher 2006; Petraitis 2009). This thesis examines the State's failure to protect children in its care from involvement in the criminal justice system (CJS) and explores the concept of 'care-criminalisation', the relationship between the child welfare and justice systems that Foucault identified and the processes by which children in OOHC become involved in the justice system.

Chapter Two will describe the OOHC system in NSW and explore the underlying tension between the interests of the State, its non-government 'partners' and the Children's Court to show that the current forms of OOHC have proven inadequate to prevent children from being criminalised by the very system that is intended to protect them. Chapter Three continues this analysis, focusing on the historical 'systems abuse' (Gil 1982) apparent in NSW from its earliest days as a convict colony. By examining the institutionalisation of supposedly 'delinquent' and unmanageable children and the removal and forced assimilation of Aboriginal children into religious and State-run orphanages and foster homes, I will show that police surveillance of state wards, girls 'exposed to moral danger' and absconders mixed with religious and philanthropic zeal to deliver a 'scare them straight' mentality that permitted the use of military-like discipline and failed to distinguish between vulnerable children and hardened prisoners. Examining the primary source material of Royal Commissions and inquiries into the NSW child welfare system, I will demonstrate that the authorities viewed children as a menace to be controlled and tamed lest their inherent delinquency come to the fore. The centuries-old practice of housing victims of abuse and neglect alongside children who had committed offences, Departmental reliance on unstable, inappropriate placements and inadequately trained

and unsupported workers and the often brutal treatment meted out in child welfare institutions resulted in generations of children regarding the authorities responsible for their ongoing care with deep scepticism and distrust. As demonstrated in my analysis of practices at institutions such as Gosford, Yanco, Tamworth, Parramatta and Hay, this created a self-fulfilling prophecy whereby some children became the most notorious, dangerous and feared criminals in Australia.

Care-criminalisation is an under-researched area in academic literature (Taylor 2006:14; Sinclair et al., 2004). In Chapter Four I examine contemporary academic research and revisit Platt's observation that criticism of responsible officials and management is often ignored in preference to facilitating the efficient and smooth operation of established systems (Platt 1977:181). I argue that in NSW, this has resulted in little in the way of attempts by policy-makers or researchers to address the criminalising practices of the child welfare and criminal justice systems. This is a major limitation of the field.

In Chapter Five I present the findings of my original analysis of 180 NSW Children's Court criminal files, explore the pathways from the welfare to the criminal justice system and discuss the differences between the OOHC cohort and the general population. The chapter will discuss how negative police and workers' attitudes can lead to children being criminalised for minor offences 'that would have been unlikely to result in criminal charges if they had arisen within the child's or young person's own family' (Darker et al., 2008:142; NACRO 2003:16; Taylor 2006; HoC 2013) and will explore the potentially devastating consequences when workers apply for Apprehended Violence Orders (AVOs) against children in their care. Through the use of vignettes drawn from the file analysis, I argue that the 'absence of parental advocacy' (Turpel-Lafond 2009:51) can lead to files being unallocated and to children in OOHC facing criminal charges without caseworker support (McFarlane 2008; 2010). I also demonstrate that ostensibly non-discriminating judicial processes, 'foster care bias' (Conger and Ross 2001) and paternalism disadvantage children in care (NSW LRC 2001) and lead to the imposition of onerous bail and probation conditions that drive children deep into the CJS (Hart 2011:24; Turpel-Lafond 2009:37).

Chapter Six presents an original analysis of the political and bureaucratic responses to care-criminalisation in NSW over the past 25 years. I will demonstrate that far from being

passive recipients of damaged children, welfare agencies have actively engaged in labelling and stigmatising children in OOHC while permitting inadequate data collection and facilitating research shortcomings. This intractability has seen legislative reform, funding initiatives, election commitments pledging to reduce crime in society and a series of public inquiries into aspects of the NSW child welfare system fail to overcome the factors that have permitted care-criminalisation to continue to this day. This chapter draws on an original analysis of Parliamentary papers, Government reports and Commissions of Inquiry to explore why successive governments' professions of commitment to overcoming the criminalisation of children in care has not been implemented by the responsible Departments or the child welfare sector. Using the case study of the interagency *Wards Project* of the mid 1990s (NSW Government 1999a; 1999b; 1999c), I demonstrate that care-criminalisation has been repeatedly downplayed and ignored. I argue that the lack of policy and programs relevant to the criminalisation of children in OOHC in NSW has been brought about by bureaucratic 'patch protection' (NSW PD LC 1994) and the desire to avoid 'issues that might be critical of responsible officials and management' (Platt 1977:181). By examining current practice against Australia's obligations under international law and against the experience of England and Wales, where considerable government priority has recently been afforded to children in care, I argue that the NSW policy and program vacuum is an example of the continuation of the 'institutional neglect and indifference' towards children in OOHC identified by Royal Commissioner Justice Wood almost 20 years ago (Wood 1997:258).

Finally, Chapter Seven concludes my argument by embracing Australian sociologist Van Krieken's assertion that 'it is the *injustice* of child welfare institutions, agencies and bureaucracies that is a worthwhile target of criticism' (Van Krieken 1991:145 – original emphasis). In my view, the 'injustice' of the system is demonstrated in the criminalisation of children in OOHC and in the continuing disregard of the over-representation in the CJS of children in its care. Accordingly, I argue that in NSW, 'the state is at least to some degree implicated in the instigation of youth offending' (Bessant and Hil 1998:153).

## **CHAPTER TWO: SETTING THE SCENE – CARE-CRIMINALISATION IN NSW**

In this chapter it is argued that the poor quality of out of home care (OOHC) in New South Wales ('NSW') has contributed to what I have termed 'care-criminalisation', whereby children placed in the care of the State subsequently become involved in the criminal justice system (CJS). The phenomenon has been recognised internationally: with children caught up in the 'overlap problem' (Conger and Ross 2001) commonly referred to as 'cross-over' (Herz et al., 2010), 'dual jurisdiction' (Siegal and Lord 2004), multi-system (Herz et al., 2012) or 'dual order' children (Mendes et al., 2014). Beginning with a description of the OOHC and CJ systems that operate in NSW, the chapter presents a brief history of the role of the NSW Children's Court in authorising the removal and placement of children in the State's formal OOHC system before moving to a critical assessment that explores the tensions between the child welfare department, the Children's Court and the non-government community partners that have characterised child welfare from the early days of the NSW penal colony. Finally, it is argued that both historical factors and the contemporary criminalising processes of the child welfare system have limited the State's effectiveness in reducing crime and in responding to the needs of children in OOHC today.

### **THE NSW OUT OF HOME CARE SYSTEM**

Every year in NSW, children are removed from the custody of their parents by way of an order of the Children's Court and placed in alternate out of home care (OOHC) – to live, however temporarily, with relatives, paid carers in family-like situations or with other children in residential units staffed by paid workers. If it is determined that a child is unable to live with their family for a period of time due to abuse or neglect or 'illness, drug and alcohol abuse, domestic violence or poverty' (NSW FACS 2014a) the State may provide alternative accommodation, temporary care, financial or other welfare support. Additionally, financial assistance and support to carers may be provided where there is a risk of a child entering care in order to ensure a safe living arrangement and support services (NSW FACS 2014c). Assistance may also be available to those young people leaving care until they are up to 25 years of age.



NSW has the highest rate of children in OOHC in the country<sup>12</sup> (AIHW 2011a). The proportion of children in OOHC has fluctuated between less than half a percent (ALRC/HREOC 1997; NSW DoCS 2007) and 1% of the NSW child population. In June 2013, there were 18,300 NSW children in care: approximately one third of whom were Indigenous. The cost of providing OOHC is, on average, \$125.13 a child per day (Baldry et al., 2012).

Once taken into care, a child is placed with foster carers; with relatives; or in a residential placement provided by either the NSW Department of Family and Community Services ('the Department') or one of approximately 50 non-government agencies (NSW CG 2012:6). The Children's Court allocates 'parental responsibility' to the Minister of Community Services; a foster carer or agency providing OOHC services; a parent; or a combination of these (*NSW Children and Young Persons (Care and Protection) Act 1998* (the 'Act')). This gives a carer the duties, powers, responsibilities and authority that, by law, parents have in relation to their children.

There are several models or types of OOHC operating in NSW today. The most common form is foster care, which involves non-related adults assuming a parental role to provide a safe and nurturing family environment for a very brief period through to a long-term placement. Carers must be authorised by the Department or an accredited OOHC organisation overseen by the NSW Children's Guardian. Kinship care, which is foster care provided by a relative, close friend or by a member of a child's community, is the second most utilised - and fastest-growing - form of OOHC in Australia, particularly for Indigenous children. It commonly caters for children at risk of harm or neglect and it is increasingly preferred for the small numbers who are taken into care following the death of their primary carer (Spence 2004). In recognition of the intergenerational and long-lasting harm done to Indigenous people and in an attempt to overcome the practical problems presented by the breakdown of OOHC placements of Indigenous children, Aboriginal Placement Principles were developed during the 1980s. The Principles state that Aboriginal children in care should be placed within the Aboriginal community as the preferred care option – ideally young people will be placed with relatives. If this is not

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<sup>12</sup> Australia-wide, over 35,000 children were in care in 2013 (AIHW 2011a). Between 2005-2010, the Australian OOHC population rose by 51% and now comprises seven in every 1000 children (Mendes et al., 2011).

possible then they should be placed with Aboriginal carers within the child's own community; and with other Indigenous carers if the former options are not available. Placement with non-Aboriginal carers is a matter of last resort (Richardson 2005:3). The Aboriginal Placement Principle is enshrined in State legislation: the Act further states both that account must be taken of the culture, language, and religion of a child or young person in care, and that Indigenous people should participate in decisions made concerning the placement of their children and young people.

Treatment Foster Care (TFC) or Multi-Systemic Foster Therapy (MST) provides more intensive therapeutic support than is available in standard foster care or residential accommodation and is seen as a preferable method of care for behaviourally and emotionally disturbed adolescents. Carers are chosen specifically to deal with troubled children; receive a higher rate of pay than standard foster carers; receive ongoing training and are actively engaged in case planning and determinations and are regarded as partners of a team, not as subordinates. TFC is apparently more highly regarded, better supported, and better remunerated than other models and carers have severely restricted caseloads - generally one child per carer (Barber and Gilbertson 2001).

Just 3% of the NSW OOHC population (Wood 2008) lives in residential care. At less than 2%, Aboriginal children are proportionately less likely to be in residential care than their non-Indigenous peers (Wood 2008). In NSW, children under 12 years of age can only be placed in residential care in exceptional circumstances; if for example, they are part of a sibling group in the placement or have special needs which cannot be met by a family-based placement. Agencies seeking to accommodate young children must receive permission from the NSW Children's Guardian and the placement must be endorsed by the Department of Human Services. In 2007-08 there were 17 children aged 5-11 years in residential care. This comprised 9% of the residential care population (NSW CG 2009).

With the decline of the large-scale residential care and the expansion of the non-government and not-for-profit sectors, smaller group homes for so-called 'high-risk kids' (Ainsworth and Hansen 2008:41) have become more common. These provide a 'family-like community setting' for up to four children aged 12-17 who have been assessed as not being suitable for foster care or who prefer a non-family-based model of care. The homes are staffed by workers employed on a rostered basis or by so-called house parents or

principal carers who do not view themselves as foster carers and who are not seen as such by the agency that employs them (Flynn et al., 2005:3). The model has been found to facilitate closer and more positive contacts with biological families, particularly amongst sibling groups housed together (McDonald et al., 1993:121). The size of residential units is shrinking, with pairs and one-on-one placements becoming more common. For example, the 'independent supported living' model caters for children aged 15 to 17 years who have been assessed with moderate to high support needs and allows children to live alone, supported by staff who do not live on-site but visit regularly.

Therapeutic secure care provides for a small group of children who require intensive care and support due to their life threatening behaviour. According to evidence given before the *McClellan Royal Commission into Institutional Responses to Child Sexual Abuse*, the Department currently provides secure accommodation to up six young women 'whose behaviour has put them at...risk to themselves and to others' (Alexander, in McClellan 2013:578). The Department justified this containment as necessary in order to prevent girls absconding from OOHC and to 'keep them safe from adults' who might harm them (Alexander, in McClellan 2013:579). Approval for placement in a secure care facility must be sought from the NSW Supreme Court, which can require monthly reports. Applications to extend the containment beyond three months must also be heard by the Court.

Non-government agencies also provide 'voluntary care' in response to a request for assistance from a family where there is no order from the Children's Court reassigning parental responsibility. Accordingly, the parent retains the decision-making role in respect of the child. The Department may also become involved in voluntary care arrangements, but only if a child is deemed to be at risk of harm pursuant to the Act.

## **THE NSW CRIMINAL JUSTICE SYSTEM**

Less than 1% of Australian children become involved in the justice system (AIHW 2007:115). In NSW, a child under ten years of age is deemed 'incapable of crime' (s5 *Children (Criminal Proceedings Act) 1987*). The doctrine of *doli incapax* provides that a child between ten and 14 years of age can be charged, but the prosecution must establish beyond reasonable doubt that the child understood their actions were wrong in a criminal sense, rather than being merely naughty.

A series of measures operate to divert children who commit offences from the Court system. Under the *Young Offenders Act* 1997, police must first consider issuing an on-the-spot warning for non-violent, relatively trivial offences such as swearing in public. The child does not need to admit to the offence and while warnings are recorded on the police computer system they do not comprise part of the criminal history. A caution may be issued for more serious offences (such as damage to property and stealing) if the child admits to the offence and agrees to the caution process. This involves the child and a responsible adult meeting with a police officer or community member to explore the elements of the offence – including what happened and why; the impact of the offence on the child, his/her family, the victim and the wider community; and the likely consequences of future offending. A written apology to the victim is a common outcome of the caution process. Under NSW law, a child is eligible to receive up to three police cautions before progressing to more formal sanctions such as a criminal charge and appearance before the Children's Court.

At the time of the audit of Children's Court files undertaken as part of this PhD, the arrest of juveniles was a matter of last resort (pursuant to s99 *Law Enforcement (Powers and Responsibilities) Act* 2002 (the LEPRA) and s8 *Children (Criminal Proceedings) Act* 1987).<sup>13</sup> Police were required to issue a Court Attendance Notice or 'Field CAN' to children suspected of committing an offence rather than proceeding to arrest, unless they believed arrest was necessary in order to prevent the offence continuing or being repeated or another offence being committed; to prevent evidence being destroyed or otherwise affected; to prevent witnesses being harassed or interfered with; or to ensure the child appeared at Court (NSW Police 2012). Police were also specifically required to consider the child's age, antecedents and welfare (NSW Police 2012:19). Arrest was also permitted in order to preserve a child's welfare or safety.

The NSW Children's Court operates as a separate Local Court that deals with both care and protection and children's criminal matters where the defendant was between 10 -18 years of age at the time of the alleged offence and under 21 when charged. The Court does not deal with traffic offences or extreme offences such as certain sex offences and matters

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<sup>13</sup> Recent amendments to the LEPRA now require arrest to be 'reasonably necessary'. While opinion is divided as to the impact of the amendments (Sanders 2014) it appears that they apply to juveniles as well as to adults.

punishable by life or in excess of 25 years, such as robbery armed with a dangerous weapon. In such cases the Court considers the evidence available and if it believes there is a reasonable prospect that a jury would convict the child, refers the case to the District or Supreme Court.

The Children's Court comprises 15 specialist Magistrates based at several locations across the State, with the primary Court located in the Sydney suburb of Parramatta. Magistrates are appointed for up to three years and act in both care and crime matters. They also provide a circuit to deal with complex care and protection matters in regional or remote areas (Fernandez et al., 2014). Local Courts also convene as specialist Children's Courts whenever a matter involving a child is heard. The Children's jurisdiction differs from other Courts in that it is closed to the public and media reporting on matters is restricted so that a child cannot be identified. The Court must also apply the principles of juvenile justice to proceedings, particularly in sentencing: the primary aim is the rehabilitation of the offender rather than general deterrence or retribution. As a consequence, most of the orders able to be imposed by the Court do not involve a custodial element. Intended to prevent a child from future offending by addressing the reasons for the offence, court orders commonly comprise a community-based or restorative factor such as participation in education, training, counseling, treatment program or employment program and include: good behaviour bonds; youth conduct orders; probation orders; or community services orders. A matter may be dismissed with or without a caution, or a caution or fine may be imposed. The most severe sanction is a control order that places the child in custody. The Court may also divert a child from the usual court processes and refer them to an intervention or rehabilitation program, such as a Youth Justice Conference, which is designed to address the underlying issues in a child's life that may have contributed to the commission of the offence.

The Department of Juvenile Justice (DJJ) supervises children who have been charged or convicted of a criminal offence. It also provides youth justice conferences for children referred by either the police or the Court. At the time of the data collection undertaken for this thesis, there were seven detention centres in NSW (accommodating both remand and sentenced offenders) and over 30 community offices providing community-based interventions for young offenders.

## REFORMS, RELATIONSHIPS AND RESISTANCE

The history of child welfare in NSW is one of constant reforms and reorganisation carried out against a backdrop of long-standing tensions between government, watchdog agencies and the non-government sector. Between 1990 and 2010 for example – the period in which the children in the sample examined in this thesis entered both the care and criminal justice systems - there were more than 30 critical reports into the child welfare Department's operations. In just ten years there were eight attempts at reform and restructure, presided over by four Ministers and Directors General (Chesterfield-Evans, *SMH* 15 July 2000). According to the Police Royal Commissioner James Wood, there appeared to be no rationale for the Department's '...serious management deficiency...namely, the endless development of plans, and changes in structure, which appear sensible on paper but in the end achieve nothing' (Wood 1997:839).

Despite a well-documented theoretical ideal of an effective OOHC system (NSW DoCS 2004), the Department's inability to deliver a functional system for children has been strongly criticised. As the Association for Australian Social Workers ('the AASW') has stated, far from being a positive intervention for children, the NSW child welfare system has historically delivered consistently poor outcomes.

The AASW argued that the system had long been characterised by:

*inadequate living options exacerbated by lack of flexibility and creativity; the absence of active standards and accreditation systems; poor support and supervision for carers and caseworkers; inadequate funding for specialised assistance to clients such as education, therapy, recreation; poorly managed administrative and policy change; poor co-ordination between Federal and State Governments; failure to advocate for children in care with other service systems, particularly education; and lack of involvement of children and young people in decisions about their lives, service planning and review.*

(Tregeagle 2000:19).

The need for systemic reform has been identified by watchdog agencies established to oversight the Department and its non-government partners. The NSW Parliament,

Department of Premier and Cabinet, Treasury, Independent Commission Against Corruption (ICAC), Privacy Commission, Public Guardian, NSW Community Services Commission (NSW CSC), NSW Children's Guardian, Administrative Decisions Tribunal, the Child Death Review Team ('the CDRT'), the NSW Commission for Children and Young People ('the CCYP'), the Auditor-General, Children's Court and the Coroner, among others, have all expressed concerns. For example, the NSW Ombudsman Bruce Barbour delivered a scathing condemnation of a child protection system that operated as 'more a matter of good luck than good management'. The Ombudsman also criticised the 'buckpassing' between the Family Court and the Department that had resulted in children falling through the cracks of agency investigations (*ABC Radio* 30 April 2002) while a leaked report from the *Joint Working Group on Child Protection* (Kibble 2002) revealed a 231% increase in the numbers of 'Priority One' child at risk reports closed without Departmental investigation because of an alleged lack of resources. An internal Departmental Inquiry was established to investigate allegations broadcast on the national *Four Corners* program regarding file tampering (*ABC Four Corners* 15 July 2002) and another was undertaken to investigate complaints by Family Court Chief Justice Alastair Nicholson that lawyers were by-passing the Department because of staff inaction (*AAP* 7 November 2002). The CDRT, which had been conducting annual reports into the deaths of children since 1995, also complained of Government inaction on its recommendations (CDRT 2002; 2003).

Allegations of inadequate computer and record keeping systems, a persistent failure to communicate with other Government agencies or to act on warnings children were in danger, crippling staff shortages and a 'manifestly inadequate' Departmental management style and systems (NSW CSC in NSW Parliament 2002) also plagued the Department during this period, while ongoing management difficulties and poor casework practices led the Parliament to conclude that the State's OOHC system - the 'overlooked arm of the New South Wales child protection system' - was failing children (NSW Parliament 2002:94). Facing the threat that child welfare would dominate the 2003 State Election, both Director General Niland and Minister Lo' Po resigned. Premier Carr determined that he would 'throw still more money at DOCS to stem an epidemic of abuse' (Dodkin, 2003:240) and injected \$1.2 billion and an additional 875 frontline workers into the government's 'Achilles Heel', the troubled Department of Community Services (*ABC PM Radio National*, 18 December 2002).

The establishment of a *Special Commission of Inquiry into child protection services* (Wood 2008) just a few years later provided evidence that matters had not improved. Wood determined that the sheer number of child protection notifications meant that the Department would never be able to cope and led to the introduction of a ‘dual track’ threshold for reporting in an effort to direct relatively minor reports to the community sector and other government agencies, to allow the Department to concentrate on more serious child protection matters (Wood 2008). The increasing demand for OOHC services and impacts on capacity and service delivery also led to acceptance of Wood’s recommendation that OOHC be outsourced to the non-government sector, leaving the State responsibility only for those children with complex needs (NSW Government 2011).

The historical failings of the State’s child welfare system was acknowledged in the Federal Government’s trilogy of apologies made during this period for abusive Church/State policies that deleteriously and deliberately impacted on hundreds of thousands of vulnerable children and their families. The first of these was the 2008 *Apology to Australia’s Indigenous Peoples* (CPD 13 February 2008) which drew on the Australian Human Rights Commission’s expose of government and sector-sanctioned abuses that had culminated in the forced removal of Indigenous children and the disintegration of communities (HREOC 1997). Described by some as tantamount to genocide (Tatz 1999; Cunneen and Libesman 2000), the forced removal of their children did immeasurable harm to generations of people. This was recognised in the national Apology:

*We apologise especially for the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country. For the pain, suffering and hurt of these Stolen Generations, their descendants and for their families left behind, we say sorry. To the mothers and the fathers, the brothers and the sisters, for the breaking up of families and communities, we say sorry. And for the indignity and degradation thus inflicted on a proud people and a proud culture, we say sorry.*

(Prime Minister Rudd, CPD, 13 February 2008)



Recognition of the systemic abuses of process, transportation and subsequent mistreatment of approximately 7,000 former child migrants who were taken from Britain and Malta and placed into Church/State homes in Australia (Australian Senate 2001) was followed by the revelation of the abuse and neglect experienced by upwards of 500,000 children in foster-care and institutions (Australian Senate 2004). This led to a second Government apology to the 'Forgotten Australians' that recognised the widespread emotional, physical and sexual abuse suffered by children at the hands of their caregivers. Under widespread practices that spanned over a century, children in OOHC 'were neglected and isolated, brothers and sisters separated, contact with family restricted or denied and opportunity disregarded' (CPD 16 November 2009). Governments, churches and the not for profit sector all bore responsibility for the harm the children had suffered.

In 2013 a third historic apology was given to the 150,000 women affected by 'unethical and in many cases illegal' practices that had seen babies removed for adoption - often without their mothers' consent - by churches, hospitals and non-government organisations during the 1950s to 1980s (CPD 21 March 2013). Seen by many as some of the proudest moments in Australian history – but viewed by others as merely a cynical, symbolic exercise from a media-savvy Government – the apologies have not been matched by the establishment of national compensation schemes. States and Territories have adopted an idiosyncratic and highly individual approach to fill the void.<sup>14</sup> Legal actions seeking redress have also been initiated against the State, but very few have been successful.<sup>15</sup>

Despite such criticism, the Department has often claimed that the plethora of external independent monitoring bodies established to oversight the troubled agency meant it was 'the most scrutinised, inquired into and reviewed human service agency in the State of NSW' (NSW PD LC 23 June 2000:7602 (Tebbutt) and 'one of the most publicly

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<sup>14</sup> In 2006 Tasmania provided a \$5 million compensation package under the *Stolen Generation of Aboriginal Children Act* that provided a one-off payment to over 100 Aboriginal people. In Queensland and NSW reparations schemes were established in acknowledgement of the theft and mismanagement of the trust funds into which the wages of hundreds of thousands of Aboriginal people were placed during the 20th century.

<sup>15</sup> In 1998 Aboriginal man Bruce Trevorrow successfully sued South Australia for pain and suffering incurred following his removal from his family. In 2007 he became the first member of the Stolen Generations to be awarded compensation by a court. In March 2010 the government lost its appeal.

accountable government agencies in NSW' (Rygate<sup>16</sup> in NSW Parliament 2008:70). This argument was not new. As long ago as 1939 for example, the NSW Parliament was told that 'no department of the public service has been subject to so many inquiries as this Department has gone through in the last few years' (NSW PD 1939 Vol 158:3985, cited in Brennan 1982:59).

### The Role of the NSW Children's Court

The NSW Children's Court has overseen the provision of OOHC services since the early 1900s. The Court was established with a special interest and responsibility to both children in need and those involved in offending and according to the doctrine of *parens patriae*, was required to ensure that care was 'thrown round' children whose parents could not provide for them (Vignaendra & Hazlitt 2005:6). In this respect it was heavily influenced by Sir Charles MacKellar, the former chief of the State Children's Relief Board (SCRB).<sup>17</sup> MacKellar believed that 'a more modern and enlightened means for the treatment of minor offenders and the rescue of neglected waifs and strays' was needed. MacKellar envisioned a Court dedicated to 'the reclamation of the child...the aim is to reform and not to punish, recognising that the child's misdoing is the result of ignorance and misfortune for which it is in no way responsible.' The Court's role was to lend 'a protecting hand and [shield] the child while there is yet still time' [for] not only is prevention better than cure; it goes further, and makes the child better than the law has found it' (SCRB 1904:17).

Initially the Court operated a single jurisdiction and, as MacKellar had wished, did not differentiate between children needing care and those who had committed an offence. An essential part of the Court's armoury in dealing with both neglected and criminal children was a declaration that the child was in need of care and placement of that child in the care of the State (Blackmore 1998; Crawford 2005; 2009). The Court's ideology was heavily influenced by the 'child-saver' movement, whose rhetoric gave voice to the authorities'

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<sup>16</sup> Deputy Director General, Strategy, Communications and Governance, NSW Department of Community Services.

<sup>17</sup> The State Children's Relief Board (SCRB) was established by the *State Children's Relief Act (1881)* and operated from 1881 to 1923. It was a government body responsible for the removal of children from large institutions homes and their subsequent care through the boarding out, or foster care, system. It also ran several small cottage homes or small-scale institutions intended to provide special care to children with high-needs, such as physical disabilities. The SCRB was closed down in 1923 following a scathing condemnation by Royal Commissioner Allard (1920). (FIND & CONNECT, [findandconnect.gov.au](http://findandconnect.gov.au))

fears that poor or orphaned youth would become the criminals of tomorrow (Ramsland 1986; Mason 1992; Kociumbas 1997; Vignaendra and Hazlitt 2005). As the ‘parent, protector and ultimate punisher’ (Vignaendra & Hazlitt 2005:6), the Court was presided over by judicial officers who were not always immune from holding views and acting in a manner that disadvantaged children (Dillon 1985; Chisholm in Burns et al., 1985). The combination justified intrusive and morally-based state intervention into children’s lives in order to save them from a lifestyle of vice and corruption and created a problem whereby ‘juveniles convicted of comparatively minor offences appear[ed] to be dealt with far more harshly than an adult’ (Muir 1975:41). Children in need of care and protection were treated in ‘almost indistinguishable ways from offenders’ and the powers of the court in both proceedings ‘almost coincided to the point of absurdity’ (Blackmore 1989:105). As a consequence, children charged with welfare-related matters were detained in institutions, often for years, ostensibly for their own protection.

Being responded to with criminal-like sanctions that included detention, even if it was justified as being in the child’s best interests, could have significant consequences. As the NSW Department of Corrective Services’ inmate surveys reveal, girls were often incarcerated for predominantly welfare-based matters, such as truancy, absconding from OOHC, vagrancy and ‘being exposed to moral danger’ (Dewdney & Swarris 1971). In 1972 for example, just over 61% of women in custody in NSW had criminal histories that included court orders for such welfare-based matters (Miner 1987:14). Research undertaken by academic Kerry Carrington revealed that many of the girls incarcerated in NSW over the twenty years to the 1980s had been directed into the criminal justice system for ‘non-criminal behaviour for which adults cannot be punished’ (Carrington 1993a:1). This was particularly evident amongst girls who had been in OOHC, of whom almost 20% had been incarcerated in a juvenile detention centre compared to just one in 2000 (0.05%) of their non-care peers. One third had been detained simply because they had run away from care homes and residential institutions (Carrington 1993a).<sup>18</sup>

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<sup>18</sup> Carrington argued that for girls, the child welfare and criminal justice institutions were engaged in ‘a highly selective delinquency manufacturing process... primarily designed to save ‘good’ children from ‘bad’ children’ (Carrington 1993:1). She observed that families under the supervision of the NSW child welfare department ‘were drawn disproportionately from the most marginalised, impoverished and welfare dependant sections of the population’ (Carrington 1991:111) and painted a picture of disenfranchised and powerless families pitted against a ‘strategic alliance’ (Carrington 1991:113) of powerful judicial and non-judicial agencies that blurred the boundaries between punishing criminal behaviour and shaping social mores and morals.

In the 1970s there was a nationwide bid to separate the Children's Court care and criminal jurisdictions. Most commentators have regarded the move as a well-intentioned attempt to quarantine criminal justice matters from welfare considerations and overcome the problems outlined above (Vignaendra and Hazlitt 2005). The age of criminal responsibility was increased from eight to ten years of age and in the child protection sphere, the Court was empowered to investigate cases of child abuse and to order the release of neglected children from welfare institutions (Fernandez et al., 2014). In practice however, children were commonly regarded as offenders rather than as children in need of special assistance. Children continued to be incarcerated in juvenile detention institutions without having necessarily committed a delinquent act (Dewdney & Swarris 1971; O'Connor & Tilbury 1986; Miner 1987). In 1984 for example, 'status offenders'<sup>19</sup> comprised 22% of detainees in juvenile justice centres across Australia (O'Connor & Tilbury 1986:27).

Further measures to separate the child protection and criminal jurisdictions of the Children's Court were introduced as part of a measure of initiatives in 1987. The *Children's Court Act* 1987 established the Children's Court as a distinct Magistrate's Court and led to the recruitment of judicial officers based on their personal characteristics and specialised training (Blackmore 1998). The *Children (Criminal Proceedings) Act* 1987 changed the Court's focus to that of a 'justice model', with the aim of concentrating on the offence rather than on the individual child. The package sought to streamline and make consistent the Court's more individualistic and disparate approach to offenders (Crawford 2005; Fernandez et al., 2014). The third part of the legislative triumvirate, the *Children's (Care and Protection) Act* 1987, refocused the child protection system and further separated the two jurisdictions. Again, the reforms had mixed success. The 1980s decline in care and protection matters was more than offset by a significant rise in the number of criminal matters brought before the Court. Commentators argued that the 'trifecta' of public order offences - obscene language, resist arrest and assault police - had increasingly replaced the care and protection applications of the past (Alder 1997).

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<sup>19</sup> A status offence referred to types of behaviour 'which would not constitute an offence if committed by an adult, but which may constitute grounds for placing a child in the control of the State' (Shaver and Paxman 1992:6). Common examples relied upon in NSW were that a child had 'no visible means of support', was 'uncontrollable' by his or her parents or had been 'exposed to moral danger': the latter was described as a 'notorious phrase...which has been widely used to force a strict code of sexual morality on girls' (Chisholm, R. in Burns et al (Eds) 1985).

Nor did children in OOHC necessarily benefit from these reforms. For example, girls in care were approximately 40 times more likely to be remanded to custody than girls who had never been in care, not because they had committed serious criminal offences but because they were unable to meet bail conditions imposed on welfare problems related to poverty, homelessness, exposure to abuse and lack of agency support (NSW Parliament 1992).

A series of reforms throughout the 1990s led to legislative and ideological changes that further shaped the functions and purpose of the Children's Court, fuelled by the ratification of the United Nations *Convention on the Rights of the Child* in 1990.<sup>20</sup> For example, the *Green Paper* (NSW DJJ 1993) and *White Paper* (NSW DJJ 1994) on juvenile justice refocused attention on young offenders in a way that had not previously been seen: enshrining the concept of crime prevention, diversionary and post-release programs and community participation in justice issues, into legislation. The desire to divert minor offenders from the justice system and reduce recidivism, while reserving the Court's authority and gravitas for more serious or persistent young offenders (Crawford 2005) saw the introduction of the *Young Offenders Act* 1997 and a four-tiered system of police warnings, cautions, youth justice conferences and the formal Children's Court process. It also led to the establishment of the Youth Drug and Alcohol Court (YDAC): a move which reinstated the Court's original mandate of addressing the underlying welfare and health issues of young offenders in a bid to reduce recidivism.<sup>21</sup> In 2008 the *Wood Special Commission into child protection services in NSW* (Wood 2008) recommended a series of changes to the Children's Court, including the appointment of a District Court Judge as President and increasing the number of specialist Children's Magistrates.

Attempts to separate the Children's Court care and crime jurisdictions had limited success for children in need of care and protection. A series of reports confirmed that children in OOHC remained far more likely to be detained for welfare-related matters than children with no care experience (NSW Parliament 1992; NSW CSC 1996b; 1999a; NSW Parliament 2000b; NSW Parliament 2001c). In many cases children were detained for

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<sup>20</sup> For a discussion on international human rights instruments in the Australian context, see Chapter Six.

<sup>21</sup> The NSW Youth Drug Alcohol Court was closed by the Coalition Government in 2012.

offences unlikely to have led to the arrest of someone who lived at home with their own family (McFarlane 2010; McFarlane et al., 2011).

### *The Court and the Department*

While the Court is ‘widely accepted [as] an effective means for transforming the treatment of children by their parents and carers, and for influencing the behaviour of criminal defendants and potential young offenders in the community’ (Fernandez et al., 2014:6), its operation is premised on beliefs about the State’s role and responsibility in protecting children’s ‘best interests’. As discussed below, this cannot be separated from wider social, political and economic developments (Fernandez et al., 2014). As Sir Laurence Street, former Chief Justice of NSW has noted, the judiciary has ‘traditionally played a necessary role in overseeing the care of children, [being] called upon over the years to fill out with unwritten, judge-made law the areas not provided for by statute law’ (Street 1980). Senior Children’s Magistrate Rod Blackmore liked to think that this ‘was a warning to all concerned in the ‘welfare industry’ that the Court would be over-sighting their actions’ (Blackmore 2005:26). The Court’s tendency to make public comment on the ‘substantial overlap or nexus between the care and criminal jurisdictions’ outlined above (Fernandez et al., in Sheehan and Borowski 2013:10) has invariably brought it into conflict with the care agencies and particularly the Department, which ‘regarded the children’s courts as simply a tool of its own, expressing petulance when its recommendations were not followed’ (Blackmore 2005:26).

A series of the Court’s most senior personnel have complained at the failure to address the welfare system’s inherently criminalising processes. Looking back on almost 20 years as head of the jurisdiction, Magistrate Blackmore placed the blame for care-criminalisation firmly on the child welfare Department’s shoulders. Blackmore claimed that the Department had ‘promoted a culture of detention which persisted until the late 1970s, often simply ‘for the child’s own good’, rather than any real offence and lamented ‘the effect on the lives of the 40,000 children who were detained in the department’s institutions for indeterminate periods, often nine months or longer’ (Blackmore 2005:26). In 2000 the NSW Parliament heard that Children’s Court Magistrate Steve Scarlett had complained that children in OOHC were being remanded in custody ‘due to the failure of Department of Community Services case officers to attend court on their behalf’ (NSW Parliament 2000:469). In 2002 Senior Children’s Magistrate Roger Dive rejected

Departmental attacks over his Court's 'naivety' (Jacobsen, *SMH* 16 April 2002) and failure to follow agency recommendations on children's wellbeing. Marking a new low in the relationship between the two agencies, the acrimony was fuelled by Magistrate Holborow's demands for a royal commission following the Department's mishandling of child abuse reports. Dive chided Director-General Carmel Niland for not raising her concerns with him before she spoke to the media and declared he was 'not sure why the courts are suddenly an issue' (Jacobsen, *SMH* 16 April 2002).

An inter-departmental committee was established behind the scenes to try and resolve the tension between the bodies. It had limited success. A series of judicial officers continued to place onto the court record their concerns about care-criminalisation. In one case, a Magistrate warned that charges were being laid against children who had had 'either minimal or no prior criminal records for violence' before being taken into OOHC but who were now facing matters that without exception, involved violence toward welfare agency employees, because of the system's reliance on casual, poorly trained and inadequately supervised staff, placements made at considerable distance from family and friends and lack of support services. 'Involvement with the criminal justice system is increasing with these children' he said and it is 'only a matter of time before their frustration and anger results in a very serious injury to a worker or to a child' (personal correspondence 09.03.04). Magistrates also took to the airwaves to express concern that the Court was compelled to remand children in OOHC to custody for welfare-based reasons, rather than inherent criminality, 'because of a lack of assistance from community services' (*ABC The Law Report*, 4 October 2005).

Matters came to a head when a paper by Senior Children's Magistrate Scott Mitchell on care-criminalisation was made public. Mitchell had called for the Department to respond when a 'children's magistrate "gets wind" of significant care and protection concerns which are not being addressed and which, if ignored, will almost certainly involve the young person in further offending' (Mitchell 2005:2). Despite his protestations that he did not mean to criticise the Department who 'are bound by their resources', Mitchell's condemnation of the inadequacies of the system earned him a sharp rebuke. Director-General Dr Shepherd complained that the Court's comments had been made 'without prior notice to the Department' and in breach of an agreement that such matters were to be resolved by way of committee deliberations. In a four page letter to Judge Price, Chief

Magistrate of the Local Court of NSW and the official head of the children's jurisdiction, Dr Shepherd derided the Court's 'apparently entrenched approach of publicly criticising the Department, failing to acknowledge on-going discussions, failing to accept processes that the Court had voluntarily entered into and failing to permit a right of reply'. These most recent comments, Dr Shepherd continued, 'criticise a government policy that has been implemented by governments of both political persuasions [and] show that, despite rulings by higher courts, there is a failure to accept that there are two jurisdictions being exercised by the Children's Court and that those jurisdictions are separate' (Shepherd, 24 February 2006).

Matters were not assisted by the poisonous relationship that had operated in the Children's Court care jurisdiction. As the NSW Ombudsman (2006a) reported, a dysfunctional and adversarial environment had soured relations for years. The Department believed that the Court did not respect the expertise of its workers, while the judiciary was frustrated by caseworkers' amateurish practices and unreliable evidence in Court proceedings (NSW Ombudsman 2006a). The Daily Telegraph's decision to print leaked emails in which Magistrate Mitchell described Dr Shepherd as 'too timid' [to] lay down the law to the welfare agencies paid to find care places' (Fife–Yeomans, *Daily Telegraph* 23 January 2008) sparked further concern.

### *The Court and the non-government sector*

The non-Government sector also resented the Court's interference in matters that agencies thought were none of its business. This was graphically illustrated in the early 1990s, when the Coalition Government's commissioned review of OOHC services by the head of the Catholic agency Centacare, Father John Usher, recommended the non-government sector be given greater responsibility and an enhanced role in service provision (Usher 1992). The Court viewed Usher's recommendations with considerable disquiet, regarding the Government's proposed withdrawal from the provision of community services as an abrogation of its accountability (Blackmore, correspondence to Attorney General Hannaford 16 April 1992). It argued that Usher's recommendation to outsource OOHC services was premised on the truism that the non-government sector truly cared *for* children, because it provided care *to* children. It warned however, that 'the fact that a person is employed in such a position by a non-government organisation is not a guarantee of those factors' and urged great caution be exercised lest further damage be



caused 'to a very damaged portion of the child population...a fearful prospect' (Blackmore, correspondence to Attorney General Hannaford 16 April 1992).

The Court also argued that the superiority of the non-government sector had not been established and that agencies often made unilateral arrangements for children's wellbeing without the responsibility of oversight or accountability (Blackmore, correspondence to Attorney General Hannaford 16 April 1992). Repeating the warning a few months later, he pointed out that 'agencies are essentially saying "we provide a professional service, place the child with us and trust us that everything will be all right"' but noted that the Court could not just accept their word. The Court's legislative duty was clear: it had 'to ensure that a definite plan for the child's future exists and is approved' (Blackmore, correspondence to Courts Administration, 12 October 1992). While conceding many organisations were highly professional, Blackmore stated that 'the degree of trust in the agencies has not yet reached the level where the court is prepared to abrogate the responsibility it perceives necessary under the legislation' (Blackmore, correspondence to Courts Administration, 12 October 1992).

The sector's peak body, the Association of Children's Welfare Agencies (ACWA), in turn complained that the Court frequently over-extended its authority over children because it 'has seen itself as providing an opportunity for dispensing social work and "good advice" (ACWA 1996). According to ACWA, 'because this jurisdiction is not seen to be a rewarding one for establishing reputations (or good law), very few cases are appealed...which then allows poor practice to become standard practice.' Magistrates 'have nothing to contribute' in placement of children, the agency asserted, for 'without training or experience they are least likely to form a professional assessment of the capacity of the carers'. The Court's involvement therefore '...borders on a prurient and amateur intervention, which must impact on good practice by fostering agencies' (ACWA 1996).

### *The non-government sector and the Department*

Relationships between the various agencies providing child welfare services have also been far from cordial. Indeed, commentators have argued that the Department and the non-government sector 'barely tolerated the need for each other for virtually...100 years' (Blackmore 1998:8). This animosity, in fact, goes back more than 200 years.

The tumultuous relationship was evident in the colony's very early days, when '...early and prolonged incarcerative schooling' (Kociumbas 1997:43) combined with a belief in the immorality of female sexuality led to the establishment of an asylum for girls – a move which pre-dated orphanages or institutions for boys or Aboriginal children. The girls' home was presided over by the notorious disciplinarian, the Magistrate and 'flogging parson'<sup>22</sup> Samuel Marsden (Kociumbas 1997:45). Marsden had previously argued against the creation of a State-run boarding out scheme<sup>23</sup> for vulnerable children, believing that the convict taint of so many of the colony's residents made the boarding-out of their children to the middle-class a dangerous idea. He argued it was wasteful to soak up scarce resources in the form of extra rations for boarded-out children and maintained (successfully) that it would be far better to erect a public building in which neglected and deserving children could be accommodated en masse and at considerably less expense to the State (Marsden 1800 cited in Ramsland 2011). It also ensured that the religious teachings of the providers was inexorably linked to the provision of OOH, for industrial homes, orphanages and other institutions were regarded as a sure mechanism to 'safeguard the faith of children who would otherwise be at great risk' (Burns 1991:47).

This lucrative toehold in the lives of supposedly delinquent and vagabond children was further consolidated with the establishment of the *Church and Schools Corporation Act* 1826, which gave one seventh of the land in every county and parish in NSW to the Church of England and led to the arrival of additional missionary orders such as the Sisters of Charity (1838) and Christian Brothers (1841) (Kociumbas 1997). The clergy's all-encompassing control over the rising generations (Ramsland 1986) lasted until a series of damaging scandals and inquiries into non-government run institutions led to the *Royal Commission into Public Charities* (1873) and to the government's reassertion of control over the child welfare system through the State Children's Relief Board (SCRB). The large Roman Catholic and Protestant Orphan Schools closed down, leaving only a small contingent of children in the government-run Randwick Asylum and some other smaller

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<sup>22</sup> The epithet originated in 1800 when Marsden inflicted 300 lashes on an Irish convict suspected of knowing about hidden weapons. According to the Anglican Archbishop of Sydney, Sir Marcus Loane, Marsden's 'strong ingrained belief that a rigorous discipline was the only way to preserve morality', coupled with the harshness of the age, 'the brutality of his upbringing as a blacksmith's son, his own rugged strength...and his recognition of the abnormality of character of a convict community' combined to earn him a reputation as 'harsh and brutal in the extreme' (Loane 1976:14).

<sup>23</sup> The 'boarding-out system' was essentially the forerunner of the modern foster care system.

institutions (Ramsland 2011). In 1917 Sir Charles MacKellar, former President of the SCRB and Member of the Legislative Council, argued against the non-government sector's call to establish 'State Boarding Schools' (which 'in earlier times [were] called Barracks, Asylums, Orphan Schools, Industrial Schools and Reformatories'). He warned that 'you do not alter the character of a school or anything else by simply changing its name' (MacKellar 1917:4) and argued that claims of faith alone were no guarantee that children would receive adequate care. MacKellar noted that 'one of the principal reasons which have been advanced for the Orphanage Institution is the circumstance that many of the clergymen think that they could more easily retain their hold upon the children if they were confined to barracks' but while 'I quite admit that it would be a simpler matter for the visiting clergyman', he queried whether it would 'be equally in the interest of the children' (MacKellar 1917:4), for children in agency care had been ill-treated by clergyman in the past (MacKellar 1917:8).<sup>24</sup>

Tensions between the various agencies continued into the 20<sup>th</sup> century, fanned by the view of some bodies involved in the provision of OOHHC services that they served a higher calling than any duty owed to the State. The Christian Brothers' advice to schoolchildren in the pre-WW2 era was explicit:

*Religion, its ministers, ceremonies, and practices should always be spoken of with great respect and veneration. The fault of an ecclesiastic, whether real or imaginary, should never be made the subject of conversation. The noble sentiments of the Emperor Theodosius ought to be ever present in our minds '— If I ever saw an ecclesiastic commit a fault, I would instantly conceal it beneath my royal mantle' ...conversations which tend directly or indirectly, to wound Christian modesty should never be tolerated. A virtuous person is pained at the bare thought of listening to such discourse.*

(The Christian Brothers 1937:81).

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<sup>24</sup> Nonetheless MacKellar believed religious agencies had a role in the care of neglected children – and particularly in the reformation of 'immoral and unruly girls' – so long as they 'were maintained by funds voluntarily subscribed by the public' (MacKellar 1917:11). As SCRB President he took pains to bring various denominations into the child welfare camp, recruiting over 600 volunteer Inspectors, Lady Visitors and Honorary Probation Officers from religious philanthropic bodies including the Salvation Army, Society of St Vincent de Paul, Church of England, Wesleyans, Presbyterians and Congregationalists – to oversee the treatment of children in care (MacKellar 1917:10).

Brother Gerald Burns, Head of St Vincent's Society, also made it clear that societal changes 'were resisted or welcomed' depending on whether the 'outcome was consistent with underlying beliefs of the church, the Society and the Marist Order' (Burns 1991:vii). For example, the failure of the Order's Westmead Boys Home 'to conform to the policy of the State for welfare' was not seen as a problem for the Church, for it 'believed that if the Home had the sanction of the Cardinal it was approved by someone who was *a higher authority than the State*' (Burns 1991:55 - my emphasis). Significantly, Brother Burns was not just the head of a religious or non-government agency. He was the influential Chair of the Association of Children's Welfare Agencies (ACWA) and a member of the Ministerial Advisory Alternate Care Committee, bodies which held great power over the conditions and lives of children in care.

Some 65 years after MacKellar (1917), the NSW Parliament *Inquiry into residential and alternate care* complained that some welfare agencies did not 'acknowledge the right of the state to intervene in the operations of their services' (NSW Parliament 1982:80). Royal Commissioner James Wood noted that religious agencies initially refused to cooperate with the *Inquiry into the New South Wales Police Service (Paedophile Inquiry)* (Wood 1997) and rejected his authority to inquire into their child protection practices. Commissioner Wood subsequently identified a 'substantial incidence of sexual abuse involving clergy, members of religious orders, ministers, acolytes and others involved on a paid or unpaid basis in and around Churches or institutions associated with or conducted by Churches *[including] residential homes*' (Wood 1997:991 – my emphasis). The NSW Ombudsman too reported that his mandate to investigate allegations of misconduct toward children by staff of non-government organisations had been met with a hostile response by many 'private and religious institutions [who] had never before come within the jurisdiction of the Ombudsman' (2009a:5). More recently, the *Special Commission of Inquiry into matters relating to the Police investigation of certain child sexual abuse allegations in the Catholic Diocese of Maitland-Newcastle* (Cunneen 2014) was critical of the views of the same Monsignor John Usher, Chancellor of the Archdiocese of Sydney and former member of the NSW Child Protection Council, who had been responsible for reshaping the provision of OOHC in NSW. Usher testified that the Church had been on a steep learning curve in relation to the abuse of children by clergy during the 1990s and that priests who denied allegations of abuse and against whom the church thought there was insufficient evidence to proceed further were not expelled from the church, but 'for

risk minimisation purposes' were moved to a 'special ministry' such as a nursing home or aged care facility (Usher, in Fife-Yeomans *Daily Telegraph* 10 September 2013). Similar concerns about non-government agencies, including religious institutions, involved in the provision of OOHC services in NSW are currently being investigated by the ongoing *McClellan Royal Commission into Institutional Responses to Child Sexual Assault* (McClellan 2014).

Agency resistance to State oversight goes some way to explaining why relations between the Department and the non-government providers of OOHC services for children in care were 'severely strained' for a number of years (West 1999:1). By 1999 the relationship had deteriorated to such an extent that the former Community Services Commissioner, Roger West, was recruited to provide formal mediation between the Department and its community partners. The agencies expressed concern over funding and their future and demanded certainty regarding policy directions in care, contract negotiations and processes, service standards and quality, organisational relationships and scope for co-operation on research, training and recruitment. They also insisted the government agree to them retaining 'a major and possibly increasing role in substitute care service delivery'. The Department, which had once been described as believing it 'was the repository of the best knowledge and practice in the area' and only reluctantly tolerated other welfare organisations (Blackmore, correspondence to Attorney General Hannaford 16 April 1992) responded by urging services to 'develop professional and organisational resilience, so that they can withstand criticism that is unwelcome but inevitable' (West 1999:2). Despite an agreement that "gratuitous badmouthing" was 'unprofessional, unhelpful and damages relationships' (West 1999:2), just four years later Director General Dr Neil Shepherd referred to the Government's reliance on non-government agencies as 'a major concern'. Although official departmental rhetoric tended to praise its 'community partners', he complained that services provided by the non-government sector varied 'substantially in availability, quality and efficiency' and warned that 'the non-government sector is more accurately described as an antagonist than a partner in delivering services' to departmental clients (Horin *SMH* 1 September 2003).

## CONCLUSION

The various Apologies, Commissions and inquiries outlined above have had a profound impact on people who have gone through the child welfare system. Yet for the children who are the subject of my research – those who appeared before the NSW Children’s Court criminal jurisdiction between 2008 and 2010 – it was all largely irrelevant. Of far greater consequence for them were the day-to-day operations of the child welfare and justice systems. In my assessment, the agencies had failed to learn from the mistakes of the past. Instead, they embodied many of the same limitations, attitudinal barriers and poor practices that facilitated the poor outcomes for many children placed in OOHC. While the agency practices will be discussed in more detail later in this thesis, my analysis of the NSW child welfare system in the two decades from 1990 to 2010 - the periods during which the children in my cohort entered the OOHC system – reveals that the quality of child welfare services in NSW remained poor. For example, the State’s child welfare Department itself still has not achieved full accreditation in the provision of care to children, despite this being identified as a key priority over 15 years ago.<sup>25</sup>

The sectors’ inability to provide quality care to the children for whom it has responsibility has long been known to contribute to the criminalisation of children in OOHC. Tensions between the Children’s Court, the Department of Community Services and the non-government sector have at times made all parties appear unprofessional and unrelentingly obstinate. This thesis will argue that the situation for children in OOHC who appear before the NSW Children’s Court criminal jurisdiction has not been assisted by these historically poor relationships. Constant bickering over respective responsibilities has consumed considerable judicial, bureaucratic and political resources, while children remain largely unsupported in criminal proceedings. As will be explored further in the following chapters, the failure of agencies to work together to address issues around children’s offending has left them vulnerable to continued social dislocation and justice exclusion, at risk of engaging in high volume, protracted offending and on the inexorable path to adult incarceration.

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<sup>25</sup> Pursuant to cl22AA of the *Children and Young Persons (Savings and Transitional) Regulation 2000*, the Children’s Guardian issued a *Community Services Accreditation Order 2015* (NSW) in July 2015. This Order extended the Department’s interim accreditation to 31 July 2016.

## CHAPTER THREE: SYSTEMS ABUSE IN NSW

In the previous chapter, analysis of the historical interplay between the New South Wales ('NSW') out of home care (OOHC) and criminal justice systems (CJS) demonstrated that while OOHC may operate as a protective or stabilising factor for some children, for others the system has operated as Foucault (1977) described: as a facilitator for involvement in crime. In this chapter it is argued that care-criminalisation is at least partially attributable to the 'systems abuse' (Gil 1982) that has characterised the NSW child welfare system from the earliest days of the penal colony. 'Systems abuse' is defined as the 'actions of individuals [and] the lack of suitable policies, practices or procedures within systems or institutions' that cause 'preventable harm...to children in the context of policies or programs which are designed to provide care or protection' but actually undermine 'children's welfare, development or security' (Cashmore et al 1994:11).

Through original analysis of primary source documents such as Royal Commissions, Inquiries and internal departmental policy, this chapter will explore the all-pervading influence of the penal colony on the administration of child welfare. Systems abuse is seen in the successive social control policies, fuelled by the fear of peer contagion and community delinquency, that shaped the child welfare system. For example, government policies of forced removal and assimilation initially focused on orphan 'vagabonds' and transported British children but rapidly spread to shape the way in which the authorities viewed Indigenous families. Systems abuse is also evident in the Department's reliance on military and Church personnel to run welfare institutions, the indiscriminate placement of orphaned children and young offenders in gaols and mental institutions and the infliction of severe punishments that had their origins in convict-discipline.<sup>26</sup> The forbidding architecture of the NSW Children's Court and the use of stigmatising language in care proceedings that failed to distinguish between child offenders and vulnerable children, also created a perception that children in OOHC were criminal. The result of these abusive practices was a constant stream of children who passed through the child welfare homes to juvenile detention centres, and, completing the carceral archipelago, to adult gaols.

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<sup>26</sup> A 'regime of grim brutality' (Grabosky, 1989) operated in the colony. Over 42,000 floggings (of an average of more than 40 lashes per beating) and 240 executions by hanging were officially recorded between 1830-1837 (The Historical Records of Australia vol 1. No 19:654, cited in Grabosky 1989:)

### Peer contagion

Offending by children in OOHC has often been attributed to the influence of delinquent peers, especially by welfare staff working in residential care (Shaw 2012:362). Residential homes in particular, have long been regarded as ‘school[s] of blackguardism’ (Barbizet, cited in MacKellar 1917:5) and as ‘universities of crime’ (Cain 1993:36). Delinquent peers can lead non-offending children into crime, or escalate the offending of children with whom they associate by bringing ‘a large group of troubled young people together, creating an environment where peer pressure might exacerbate youth offending’ (POC 2011:3.134). International practice has confirmed that non-offending children continue to be placed in inappropriate accommodation alongside their delinquent peers (Ryan et al., 2008; Berridge et al., 2012), with those requiring welfare assistance often housed with persistent or prolific offenders (Evans 2007; Paul 2008), as well as children who have penetrated deeply into the CJS for more serious offences (Darker et al., 2008) and those for whom the combination of ‘less consistent care’ (Taylor 2006 in Schofield et al., 2012:28) and peer pressure has exacerbated their offending (Sinclair and Gibb 1998; Ryan et al., 2008).

As this chapter will demonstrate however, an historical assessment of the NSW child welfare system indicates that attributing blame for the OOHC cohort’s involvement in the CJS to peer contagion is an inadequate approach. Of at least equal import is the impact of the systems abuse that permitted the association of delinquent children with those who have not committed offences. Research has established the potentially catastrophic consequences of detaining vulnerable and non-offending youth together (Farmer and Pollock 1999; 2003). Children with disabilities for example, are particularly vulnerable if housed alongside young offenders, particularly those with histories of sexually offending behaviour, and bear an increased risk of additional disadvantage, placement breakdowns and the development of abusive behaviour (NSW CG 2010k). Accordingly, in this section care-criminalisation is examined by reference to primary source documents to demonstrate that the criminalisation of children in OOHC in NSW owes much to the historical practice of accommodating children who had not committed a criminal offence alongside juvenile offenders.



### *Transportation and the NSW colony*

The indiscriminate treatment of delinquent and non-criminal children has a long history. The English Privy Council believed that exile was ‘a greater terror than death itself’ (Shaw 1966): a punishment that highlights the concern with which the authorities viewed the hundreds of orphaned children transported to America in the early 1600s. At least 200 children were sent to work the plantations of Virginia between 1618 and 1619 alone: more than double the number of convicted felons transported in the following two decades. As the British peer Sir Samuel Romilly later acknowledged when arguing for the establishment of a Select Committee into the prison system to Australia, transportation did not necessarily mean that a child had done something wrong. Rather, it was ‘sometimes inflicted on boys at a very early age, merely as a means of separating them effectually from the bad companions they may have formed at home’ (Romilly, cited in MacKellar 1915:8).

Australia inherited English unease regarding the criminality of its children along with its convicts. Perhaps this is understandable given the sheer number of convicts sent to the new colony: between 1788 and the 1840s approximately 80,000 people were transported to NSW. Convicts outnumbered free settlers and soldiers from the very beginning. In 1836 for example, convicts comprised half of the colony’s 100,000 non-Indigenous inhabitants. Thousands of those transported were children, many of whom were exiled for fairly minor and indeed at times quite dubious, reasons. By 1870, with the colony numbering just 500,000, approximately 2,500 children were effectively in OOHC (Vignaendra et al., 2005:14).

The dominance of the criminal class had a profound effect on the NSW psyche. As noted prison reformers, Rosamond and Florence Hill remarked, the question of ‘how to deal with a criminal population so far exceeding any normal proportion has been a terrible problem for this young country, and its solution has been retarded by the legacy of mistaken views of prison discipline which obtained too frequently in the administration of our colonial convict system’ (Hill and Hill 1875:273). Almost as the first ship berthed, fear of the corrupting influence of convict parentage warred with concern over the number of poor and apparently neglected children on the streets of Sydney. The result was a confusing blend of paternalistic government measures designed to provide for neglected children, educate children as a domestic workforce for the colony’s settlers and head off

a seemingly inevitable increase in the criminal classes. This led to some contradictory policies. For example, orphan schools established by Governor King in 1800 received thousands of acres in land grants, as well as the first taxes, fines and auctions of impounded imports, to support the children and render them partially self-sufficient. Yet the authorities' fear of the 'irregular and immoral habits of the parents [which] are likely to leave their children in a state peculiarly exposed from similar vices' meant that within a few short years Governor Bligh had been instructed to use education as a means of inculcating children from the corrupting influences of their criminally-inclined parents. The curious dominance of the convicts in Australian society led to the 'peculiar necessity that the Government should interfere on behalf of the rising generation and by the assertion of authority as well as encouragement, endeavour to educate them in religious as well as industrial habits' (in Brown 1980). Accordingly, Bligh was 'authorised to make such advances...deem(ed) requisite to afford the means of education to the Children of the Colony'. So seriously was this direction taken that within a decade almost 50% of the colonies' children were receiving some form of instruction, compared to just seven percent of English children (Brown 1980:23).

Very little distinction was drawn between orphaned children and those who had committed a criminal offence. For example, faced with the revelation that over 1000 destitute children were living on the streets of Sydney, the benefactors of the Sussex Street Ragged School announced that five more schools were needed to absorb 'all the juvenile vagabonds' (*Select Committee on the Conditions of the Working Class in the Metropolis* 1860, cited in Murray 1973:105).

### *Indiscriminate accommodation*

In addition to using transportation to manage delinquent and orphaned children, the authorities also failed to distinguish between the two in terms of accommodation. Children were indiscriminately housed together, even though concerns over orphans being placed in prisons had been a source of unease in England since the late 1500s when counties were required 'to build houses for paupers [but] encouraged by example to use them as gaols' (Byrne 1989:71). The Bridewell typified this dual character: it accommodated political and religious dissenters and Spanish prisoners of war alongside orphans and the poor. In England it was only in 1837 that young people awaiting transportation to Australia were separated from adult offenders in the Parkhurst Prison

for Children and destitute and neglected children spent time in adult gaols before being transferred to a juvenile reformatory until at least 1899 (MacKellar 1915). Foucault made similar observations in respect of the indiscriminate placing of ‘abandoned and vagrant children’ (Foucault 1977:297) with offenders in almshouses and orphanages and at the Mettray school during the 1840s (Foucault 1977:294).

NSW was slow to change its practices. The State was abysmally ignorant of international prison reform and child welfare movements. For example, the colonies’ practice of housing delinquent and non-offending children in the same institutions horrified the visiting British prison reformers, the Hill Sisters, who reported that alongside the young women ‘whose loose conduct has led to their committal’ in the Biloela reformatory were housed ‘little children whose sole qualification for admission consisted in their destitution’ (Hill and Hill 1875:285). The institutionalisation of vulnerable children in care alongside convicted juvenile offenders continued in NSW with the emergence of military-style ships such as the *Vernon* and the *Sobraon*. These floating public industrial schools and reformatories operated between 1867 and 1911 and housed over 5000 destitute and vagrant children. The hulks were aggressively presented as an effective crime prevention solution, but contemporaneous accounts suggest they were instrumental in transforming orphan children to adult criminals. According to a warder at Darlinghurst gaol, ‘boys who had been in the *Vernon* frequently passed through the ranks of the criminal class’. In an example of the interchange of staff between the care system, juvenile justice and the prison system, the warder noted that ‘old officials recognised’ the boys, although ‘they always denied their identity...’ (Murray 1973:104). As another commentator noted at the time, ‘one may notice mere youth who, but a few years previously, was an inmate of our reformatories or industrial schools, standing in the ranks at Pentridge’. It may therefore be conjectured, the writer continued, ‘that when the present generation had paid the debt of nature hundreds of these will be found – with grey heads – occupying our prison cells’ (White, cited in Murray 1973:102).

By the mid-19th century a strong community view had emerged that separation of vulnerable children from incorrigible delinquents was necessary to avoid the contamination of innocent children (Quinn 2004). This was encouraged by the actions of Sir Henry Parkes - the ‘Father of Federation’ and the 7th Premier of NSW - who put children in OOHC back on the political agenda with the introduction of foster care, the

introduction of State Children's Relief Board (SCRB) and the demise of the large-scale 'barrack-style' institutions that had characterised child welfare system until this point. Despite the new model of care however, the distinction between offender and offended against was rarely clear-cut in the minds and actions of child welfare authorities. The *Neglected Children and Juvenile Offenders Act* 1905 for example, adopted a decidedly benevolent approach to young criminals, but the utilisation of cottage homes and the boarding out system saw offenders placed in the same facilities as children in care (MacKellar 1907; 1915; 1917). Rather than persuade people to the view that young offenders would benefit from a gentler approach, the practice, as well as the reliance on staff from the State Children's Relief Board to serve as probation officers for delinquent children, further confused the issue. It is easy to see how - if the preferred punishment for delinquent children was the child welfare home and boarding out system - the idea that orphaned children were also intrinsically criminal was able to persist.

The State's ambiguous approach made for a haphazard child welfare system. Many argued that there was no distinction between juvenile offenders and those needing care and accordingly, there was little incentive to require the authorities to separate the two groups. For example, although the Premier instructed the administration to separate children under State control (placing delinquent children under the care of the State Children's Relief Board (SCRB) and non-offending children under the responsibility of the Department of Public Instruction) (Quinn 2004), this did not necessarily translate into practice. Indeed, just five years later the 1914 Special Ministerial Conference of senior government officials again equated vulnerability with delinquency. Established by the Minister for Education, the Committee comprised the Under-Secretary, Director and Clerk of Public Instruction, two Children's Court magistrates, the SCRB's Boarding-out Officer and Inspector and several Superintendents of corrective institutions. Tasked with producing a classification system in respect of State child welfare institutions, the committee immediately set about describing 14 different types of *juvenile offenders* (my emphasis). Into the very first category of 'offender' fell 'neglected children of varying ages' who did not require committal to an institution. This was followed by 'children more seriously neglected...not being capable of being remedied by reason of an accompanying vicious environment' and so on (McCulloch 1934b:115). In all, neglected or uncontrollable children, truants and 'neglected or uncontrollable or delinquent girls' (both those in regard to whom there was 'evidence of sexual immorality' and those for

whom no such evidence existed) accounted for over half of the categories of offender. The authorities could not have been clearer: children in need of care and protection – especially girls - were regarded as criminals.

### *Sir Charles MacKellar*

The failure to distinguish between delinquent and non-offending children deeply angered some commentators. In 1915 Sir Charles MacKellar, the former President of the State Children's Relief Board and Member of the Legislative Council, penned a fictitious rebuke from a member of the Bench to an orphan and therefore automatically delinquent, child:

*Prisoner at the Bar! What do you mean by having disreputable parents, don't you know that renders you liable to be sent to gaol? We know that it's not your fault; you are only a child [but] since you've chosen to have disreputable parents, you must suffer the penalty. You shall be publicly disgraced by going to gaol. You're not a criminal yet, but you're going to the place that criminals are sent to when we know they are criminals. When you have served your time you shall finish your childhood in a reformatory. Perhaps this will teach you to be more careful of your choice of parents in future.*

(MacKellar 1915:12).

MacKellar's sarcasm was hardly subtle, but his critique exposed official attitudes that regarded destitute or orphaned children as criminals and condemned them to be charged, sentenced and incarcerated as a consequence - all without the inconvenience of the child having committed an actual offence.

### *The 1920 Allard Royal Commission*

In 1917 Sir Charles MacKellar declared that 'innocent State children' were continuing to be 'corrupted' by being placed in institutions alongside convicted felons (MacKellar 1917:5). In an open letter to the NSW Minister for Education, he complained that the institutions combined 'large numbers of children...in promiscuous association, and the admission of one or two degenerates – and especially sexual degenerates – too often

contaminates the whole lot' (MacKellar 1917:5). A *Royal Commission into the Public Service of New South Wales (covering the administration of the Acts relating to State Children)* (Allard 1920) was initiated to investigate MacKellar's assertions. The *Allard Royal Commission* was charged with determining, once and for all, whether 'the ranks of the criminal and prostitute classes are largely recruited in consequence of faulty methods of treatment of adolescent delinquents [and whether] vicious adolescents are put into the same institutions as young boys and girls who are convicted of small offences, such as stealing fruit and with detrimental effect to the latter class of confinee' (Premier Holman, in Allard 1920).

Allard confirmed that the child welfare system was in a parlous state. He found that the State Children's Relief Board (SCRB), the body responsible for the removal of children and their subsequent care, had failed to segregate 'innocent' children from those convicted or awaiting trial in the homes and institutions it administered. This was so unjustifiable a practice that he recommended the SCRB be disbanded. 'I find it difficult to express in strong enough terms my view of the utter unsuitableness of the groupings of inmates thereof' Allard stated (Allard 1920:19) and he decried the indiscriminate placement of older and young children, girls and boys and 'cripples and mental defectives' that was carried out in 'a hopeless, amateur manner' (Allard 1920:21). Unknowingly foreshadowing the findings of much later inquiries, he singled out Ormond House for special mention, marvelling that 'it is inconceivable how the mixing of children in this fashion was ever permitted, and how it can have been allowed to continue for so long' (Allard 1920:26).<sup>27</sup> The Government was slow to act on his concerns, but in 1922, two years after the Commission reported, the Minister directed that SCRB President, 63 year-old A. W. Green, be sent on early leave prior to his retirement (Quinn 2004).

The *Allard Royal Commission* was unique in its attitude toward children, particularly in its view that allegations of criminality brought against children in care should be regarded with great concern. Allard recommended there be a full inquiry into any matter where it was alleged that a child had stolen items from a guardian, for 'records should not be

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<sup>27</sup> Allard also recommended that the Public Service Board be sacked, however his recommendation came too late. In 1918, as his first report into the public service became public, the Board agreed to resign: it was rumoured that a generous monetary settlement had been offered to effect such a desirable result (Quinn 2004:133).

besmirched without some form of investigation and a record as to whether the charges have been held to be proved or otherwise' (Allard 1920:24). He also stated that claims that a child was 'feeble-minded' ought not to be thrown about in the absence of systematic medical examination, citing an incident in which an important witness had alleged many of the boys had been labelled not because of some affliction, but because 'the authorities apparently consider that if a boy has been guilty of some immorality, he must be regarded as such', with the result that some boys were inaccurately recorded as 'deficient in reason' and inappropriately placed in institutions (Allard 1920:26). He also recognised that absconding from State institutions could be brought about by 'perfectly natural reasons, such as a desire to return to a parent or to a former guardian' (Allard 1920:24) and should not be regarded as an indication of delinquency.

### *The 1975 Muir Report*

Despite Allard's recommendation however, legislative prohibitions against mixing offending and non-offending children together were generally ignored. In 1975 Justice Muir, who had been appointed by the Minister for Youth and Community Services to examine the operation of the *Child Welfare Act 1939* (NSW), found that children were still being indiscriminately housed together, despite the negative influence that delinquent children were having on their more impressionable, vulnerable peers (Muir 1975:105). Again, this demonstrated departmental intransigence and the view that children in OOHC were less victims of abuse and neglect than young criminals in the making. While His Honour declared that departmental officers had begun to take a 'more enlightened approach...in regarding the child and young person as a child in trouble rather than a young criminal' (Muir 1975:19), he nonetheless felt compelled to reiterate that neglected or uncontrolled children and habitual truants should not be regarded as having committed any offence (Muir 1975). 'Particularly in these categories will be found, I believe, children and young persons who are 'victim' and they should be so regarded' His Honour cautioned (Muir 1975:ix). As Judge Muir noted, many of the institutions were full of truants and runaways and the victims of incest, abuse, neglect and homelessness rather than criminals (Muir 1975:106).

There was no excuse for the bureaucratic refusal to separate children at risk of harm from those detained for criminal matters. As a 1982 resource manual for staff at the Cobbham Centre reveals (NSW DCW 1982), the Parliament's intentions and thus, the Department's

obligations regarding accommodation for children in OOHC, were very simple. For example, pursuant to s101 of the *Community Welfare Act* (1982), 'The Director SHALL, as so far as is practicable, place children in need of care in a facility OTHER than a facility for persons who have committed offences or on remand awaiting proceedings in respect of offences'. The Department's policy will be that this MUST happen, and only in the most extreme circumstances will 'as far as is practicable' apply' (NSW DCW 1982:5 – original emphasis). Just two years after the Cobbham instruction manual was produced however, the Government announced that a multi-purpose centre at Wagga Wagga would cater for 'at-risk' troubled and offending children and children and their families. Intended as 'a forerunner to similar developments in major country towns throughout the State' the Centre would accommodate not just offenders, but '*adolescent wards for whom fostering is no longer an option*' and for whom 'separation from the others should be possible although not necessarily the normal situation for them' (Houston 1983:84 – my emphasis).<sup>28</sup> Indeed, it was only when District Officers were physically prevented from placing children with no convictions in the same physical location as those on criminal charges that custodial populations fell. This was demonstrated with the closure of Kambalah, a female-only juvenile detention unit notorious for accommodating welfare cases alongside children with criminal matters. Shortly after its closure, the female custodial population plummeted (Moore 1990:3).

### **'Essentially gaol-like and cheerless' institutions**

As the preceding section has shown (and as former Senior Children's Court Magistrate Rod Blackmore complained), the Department of child welfare never came 'to grips with the principle of not detaining children in care cases together with juvenile offenders', notwithstanding unambiguous legislative directions and over '70 years of criticism of the practice' (Blackmore 1985b:2). The systems' failure to distinguish between orphan and offending youth was exacerbated by the practice of detaining children in 'essentially gaol-like and cheerless' institutions designed for hardened criminals. The criminalising effect of being detained in gaol-like institutions undoubtedly had a profound psychological impact on many children who had never committed an offence. In the early days of the colony, many of these facilities were located alongside - or actually in - gaols, mental

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<sup>28</sup> Wagga became operational in 1984. Despite its \$3.4 million dollar price-tag and high staff-inmate ratios (30:20) the Centre failed, its high levels of absconding having created deep resentment and public anger (Quinn 2004:360).



hospitals and army barracks. For example, in the 19<sup>th</sup> century the Roman Catholic Orphan School was cheek by jowl with the Parramatta lunatic asylum and men's gaol; the Industrial School for Girls was accommodated in disused army barracks (later the site of the Watt Street Psychiatric Centre); and girls from the former Newcastle Industrial School occupied former convict barracks at Cockatoo Island.

The last was a particularly dismal place. The Biloela reformatory was 'hewn from the solid rock - all worn away by the tread of countless criminals [with] gated iron doors - with massive locks and heavy bolts; instead of windows - grated apertures in high blank walls - allowing no outlook upon the scene beyond' (Windeyer 1874<sup>29</sup> cited in Hill and Hill 1875:285). It was also located within sight and hearing of nearby dockyard workers - a completely inappropriate venue given the authorities' oft-expressed concern for the girls' moral character. Within just a few years Biloela was closed after allegations of mistreatment, a series of riots and the *Windeyer Royal Commission's* surprise visit of 1873, during which the Commissioners literally stumbled upon girls who had been locked up in pitch black cells and fed only bread and water for days at a time. 'Their wild glare and half-crazed appearance as the light of the open door fell upon them struck us with horror' it was reported (Windeyer 1874, cited in Blackmore 1998:7). Such grim surroundings 'constantly impress upon the mind of children the prison-like character of their life' (Windeyer 1874, cited in Hill and Hill 1875:285). Intentionally or otherwise, the architecture of these forbidding places also confirmed the belief amongst workers, the children themselves and the wider community, the essential delinquency of children in care.

Children continued to be housed in inappropriate gaol-like accommodation into the 20th century. For example, both the Hay School for Girls and the Tamworth Boys Home were located on former gaol sites. The boys occupied cells with inadequate plumbing and sewerage and 'daily marched past the gallows which had some use in the earlier days of the gaol's history' (Blackmore 1998:10). Brush Farm at Carlingford, which from 1911 housed boys from the *Sobraon* training ship, was a former reformatory and later the

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<sup>29</sup> The *Windeyer Royal Commission into Public Charities* (1874) (also known as The Commission Appointed to Inquire into and Report Upon the Workings and management of the Public Charities of the Colony. Thomas Richards. Government Printer. Sydney Australia) recommended the closure of large-scale institutions and the introduction of the 'boarding-out system', which was essentially the forerunner of the modern foster care system.

Corrective Services Academy and the Ormond Centre alternated between a juvenile detention centre and a home for vulnerable children in care. In 1983 noted prison reformer and head of the Prison Services Commission, Dr Tony Vinson, recast the Parramatta Industrial School for Girls as a prison for adult women, renaming it after his mentor and renowned social worker Norma Parker, who had conducted an inquiry into allegations of abuse at the School during the 1950s (Vinson 1982). Although the irony was lost on Dr Vinson and the other members of the Commission, the prisoners who had been incarcerated at Parramatta as girls were aware that their connection with the child welfare department had come full circle. In the course of a lifetime a person could now progress from being in OOHC to being institutionalised in a juvenile detention centre to being incarcerated in an adult gaol – all spent in the confines of the one institution, the Norma Parker prison.

The devolution of the State's residential institutions and move to community-based care that took place throughout the 1980s and 1990s saw many orphanages reborn as Children's Courts – an apt choice given that many of the residents subsequently appeared before the criminal jurisdiction. For example, the former Cobbham Children's Court had sat on the site of a home for children with intellectual disabilities, while Bidura House at Glebe, which had housed girls in OOHC for many years, was sub-divided in the early 1980s to accommodate a new Children's Court that is still in use today (Blackmore 1998:15). In the ultimate irony, the former Metropolitan Children's Court in Albion Street Surry Hills - the place where many children were taken into care or placed into juvenile detention centres for being 'uncontrollable' or 'exposed to moral danger' throughout the 20<sup>th</sup> century - now houses a range of social service and children's welfare agencies. Although some of the organisations at Albion Street purport to represent the interests of people formerly in OOHC, some potential 'clients' have refused to attend the premises, finding the old court complex too traumatic to visit (personal discussion with the author and people in institutional care as children).

Similar sentiments continue to be expressed by clients of the modern child welfare system. Complaining that most child welfare department offices 'look like fortresses and are very unwelcoming' the Shopfront Legal Centre argued that for their clients in OOHC, the architecture had a forbidding and traumatising impact that was seen 'to reflect the culture of the organisation as a whole' (Shopfront 2002:3) and simultaneously terrified

and stigmatised children requiring State assistance. Indeed, the relationship between child welfare homes, gaols and some communities has been so prolonged that some former residents have lodged land claims over the institutions, with the NSW Aboriginal Land Council lodging a claim over Berrima (Alexander, Southern Highland News 2012) and assuming control over the former Parramatta Gaol in 2014.

Shared Court premises for care and criminal proceedings continue to give the impression that children in out of home care are criminal. Across the State today, both care and crime matters are still heard in the same building and often in the same courtroom. In the main children's court - the purportedly purpose-built facility at Parramatta that opened in 2005 - the artifice is pushed to the point of absurdity. One enters the court from a single common entrance, passing through metal detectors, security checks and uniformed police and scans the single electronic noticeboard for details of the days' proceedings – both care and crime matters are listed together. An elevator shaft divides the foyer in two: clients for the criminal jurisdiction are directed to the left and those awaiting care matters go to the right. The two lifts are likewise separated - the elevator on the left takes one to the criminal courts and the lift on the right goes to the care courts. While it initially appears that some effort has been taken to ensure that the divisions are kept separate, the superficiality of this distinction is evident the moment one leaves the elevator – for both doors open side by side to a shared foyer on the first floor, where clients of both the criminal and care jurisdictions – children and parents, grandparents and foster carers, teenagers facing criminal charges, police and lawyers – are virtually indistinguishable.

Only a few years ago the farcical nature of the Parramatta Court layout was set to rise to a whole new level, when cost-conscious bureaucrats from the Attorney Generals' Department attempted to construct an enclosed criminal dock in one of the under-utilised care courts to improve efficiency and increase production. The Chief Judge was told this would enable the courtroom to serve a dual role and take on crime matters once the daily care cases had been finalised. It would not inconvenience those children who were the subject of care proceedings, His Honour was advised, for they could simply be placed in the dock as their matters were heard. While the suggestion was quickly abandoned in the face of judicial outrage at the proposed criminalisation of non-offending children involved in child protection matters, it is a modern demonstration of the centuries-old

view that children in OOHC can be treated as if they have committed a criminal offence (personal observations made as Executive Officer of the NSW Children's Court, 2009).

### Labelling and stigma – the significance of language

For almost 100 years, the formal language used by the NSW Children's Court as part of care proceedings reinforced the perception that children in OOHC were delinquent. Although the former Senior Children's Magistrate expressed an intense dislike of the term 'charged' being used to describe proceedings brought in care matters (Blackmore 1989:105) the practices of the NSW Children's Court left little doubt that coming into care was a criminalising process. In fact, it was not until the *Child Welfare Act* 1939 was amended in 1969 that terminology with a less obvious reference to the child's supposedly delinquent past was introduced. Instead of a child being 'charged' with being uncontrollable, abandoned or exposed to moral danger, matters now proceeded with a 'complaint' being preferred. A similar practice had operated in Victoria, where 'child protection fused with child detention [as] neglected children were charged at the Children's Court in the same way as those who had broken the law' (Golding 2004:236). Golding, a school principal, university lecturer and former inmate of Victoria's Ballarat Orphanage, noted that many former children in OOHC, 'never recovered from their institutionalisation...some have been in and out of prison and psychiatric hospitals' (Golding 2004:238).

The Court's practices were slow to change. Blackmore complained that even 11 years after the *Child Welfare Act* 1939 had been amended, both practitioners and child advocates persisted in using the old terminology, perpetuating the stigmatisation and shame for the children involved (Blackmore 1980:26). The Department of Youth and Family Services' was a prime offender – as the Department confidently asserted, the 'Child Welfare Act gives Children's Courts powers to deal with three basic types of *offenders* (my emphasis), including 'those who are neglected or uncontrollable' (YACS 1981:1). Such sentiment was typical of the attitude that children in need of care were, for all intents and purposes, still considered criminals.

The fiction that children in care and delinquents were one and the same was also maintained by reliance on old Court forms and documentation. To this author's certain knowledge, court documents were not immediately re-drawn to reflect the legislative

changes. Rather, old forms continued to be used – their archaic language of ‘charged’ and ‘found guilty of being abandoned’ simply scored over in pen and the new terminology inserted. Children’s care files too, up until at least the mid-1970s, were punctuated with references to the child being ‘charged’ and ‘found guilty’ (personal observation). Moreover, although care proceedings may well have been civil rather than criminal sanctions and in later years were intended to be ‘seen to be *about* and not *against* the child’ (Blackmore 1989:106 - his emphasis) for the child involved, the practical effect was the same. As the Senior Magistrate conceded, children taken into care because they were neglected or uncontrollable were dealt with by the Children’s Courts in ‘almost indistinguishable ways from offenders’ and the powers of the court in both proceedings ‘almost coincided to the point of absurdity’ (Blackmore 1989:105). Well in the 20<sup>th</sup> century, young people in need of care and protection could be incarcerated in juvenile detention institutions without having necessarily committed a delinquent act (Dewdney & Swarris 1971; O’Connor & Tilbury 1986; Miner 1987; Carrington 1993a). Indeed, as a series of government reports confirmed, children in OOHC were far more likely to be detained for essentially welfare matters than young people with no care experience (NSW LC 1992; CSC 1999; NSW Parliament 2000).

### The impact of institutional brutality

The child welfare department’s reliance on police (themselves often drawn from the ranks of the convict classes) and former military or custodial personnel to enforce child welfare policy also impacted on children in OOHC. Police worked hand in glove with ‘the welfare’ to monitor and control society’s behaviour from the earliest days of the colony. State reliance on the police to enforce social engineering policies also shaped perceptions and attitudes toward children in care. Perceptions that children in care were ‘troublesome’ rather than ‘troubled’ influenced the police response and saw so-called immoral, anti-social or even childish behaviour met with a heavy-handed authoritarian response. As long ago as 1885, for example, the head of the NSW State Children’s Relief Board complained that police were harassing boarded out and destitute children guilty only of ‘orchard robbing’ or ‘bathing in public’, just as they had persecuted convicts in days past (Renwick, cited in Murray 1973:103). Police were key players in the State surveillance of children in care (MacKellar 1917:10), the returning of runaways from children’s homes (Barbalet 1983; Australian Senate 2001) and the rounding up of truants and girls ‘exposed

to moral danger' for confinement in laying-in homes and institutions (Australian Senate 2004; 2009; 2012).

Children in OOHC were often treated harshly in institutions that also housed convict or delinquent children. The impact of such institutional brutality was commented upon early in the penal colony's history, when a warden of Darlinghurst Gaol commented on the tendency for the *Sobraon* and *Vernon* boys to end up in adult gaols. Referring to the brutality of institutional life, the warden said 'when it is considered how the lads are disposed of, it is not surprising, [for] how many people have been prosecuted for brutally ill-treating State children?' (Murray 1973:104). Isolated from outside scrutiny, the excesses of military discipline imposed on vulnerable children behind closed doors were easily hidden. Public scrutiny of the gaol system especially was actively discouraged: the Comptroller-General of Prisons (who had formerly run the *Vernon*) for example, preferred his prisons to be free from external oversight and 'very inaccessible'. As one international commentator observed, Captain Neitenstein 'does not approve of visitors who are actuated by motives of idle curiosity being shown over his gaols' (Fraser, *Otago Witness* 1908:13). Neitenstein's belief in strict discipline as a tool of reform essentially protected those who wielded unlimited power over children from scrutiny. With his prisons exhibiting their own 'crisp air of militarism' (Fraser *Otago Witness* 1908:13) and his publicly stated view that 'imprisonment under seventh class treatment would suffice as a sharp deterrent' for first offenders of just 12 or 13 years of age (in Murray 1973:103) the Comptroller-General was not a man to whom complaints could easily be made.

Many of the non-government agencies at the time also adopted pseudo-military characteristics. Organisations such as The Salvation Army and Barnardos Homes adopted military terminology and uniforms and imposed a military-like discipline through roll-calls and musters on children in their care. As Sir Charles MacKellar noted, vulnerable children were often placed in a precarious position by all-powerful, military personnel. The former President of the State Children's Relief Board (SCRB) complained that the effect of 'iron discipline' on 'bright intelligent boy[s]' could be shattering and that increasingly severe punishments would ultimately render a boy 'incorrigible' (MacKellar 1915:13). He complained that children 'having no parents to appeal to' were at the mercy of the institutional brutality that such homes tended to foster (MacKellar 1917:6). Inmates had little power in a place where the Superintendent 'makes his own rules and provides

for carrying them out – either by punishment or other means – and there is practically no check upon him in the exercise of his prerogative’ (MacKellar 1917:5). More effective crime prevention methods, MacKellar observed, would flow from ‘more humane methods of treating the young’ and he pointed to the recently ‘improved statistics of the gaol population’ as proof (MacKellar 1917:12).

### *A series of Inquiries*

MacKellar’s fears of the institutional brutality operating in child welfare homes was borne out by a number of Inquiries conducted throughout the early to mid 20<sup>th</sup> century. The Gosford Farm Home for Boys was staffed by former *Sobraon* officers and utilised a system of discipline based on military service that had been heavily criticised for over forty years before the Home was established (Quinn 2004:112). In 1923 - only a decade after the Home had opened – the *Fincham Inquiry* found there had been excessive use of corporal punishment (Fincham 1923). However, the Inquiry did not lead to any significant changes. Just eight months after the Inquiry was provided to the Minister, the Parliament unquestioningly accepted assurances that any problems at Gosford were in the past and that ‘nothing but good order and discipline exist today’ (Quinn 2004:148). The Under-Secretary of the Department, Walter Bethel, actually rejected Fincham’s recommendations, arguing that as parents had not made any complaints, there could be no real problem (Quinn 2004:154). To add insult to injury, the officer who had been found to have used excessive punishment on children was promoted to a senior instructor. After a discrete interval, so was the Gosford Superintendent (Quinn 2004:156).

Corporal punishment and abuse also characterised the Yanco Riverina Home for Boys under former military Inspector Arthur Parsonage (who had also served at Gosford). Just five years after Yanco opened, ‘the most significant and traumatic [inquiry] in the history of juvenile corrections in New South Wales’ (Quinn 2004:165) was launched following the deaths of two young boys. The *McCulloch Inquiry* (1934) found the institution was run by a man with ‘no previous experience of, or training in, institutional management [and]...no knowledge of the history of reformatory and industrial schools in England or elsewhere’ (McCulloch 1934a:7), who nonetheless, had come ‘to be regarded, departmentally and publically, as an advanced student of reformatory treatment, and as a diligent and efficient operator’ (McCulloch 1934a:8). It also uncovered a system whereby senior boys were permitted to administer ‘suitable punishment’ for suspected

infringements and to conduct court-martials into runaways – the punishment for which included participation in a succession of organised fights. These activities were not recorded in a punishment ledger but were verbally announced ‘at muster on the quarterdeck’ (McCulloch 1934a:9). Yanco also operated a system of so-called ‘special treatments’ from which no boy was exempt. As part of these disciplinary exercises, boys who had already worked 8 hours in the fields were required to run, in their bare feet, anywhere from 11 to 23 miles with ‘no spell or break’ (McCulloch 1934a:14). One 14 year-old boy with a congenital heart defect collapsed and died after enduring such ‘special treatment’ for three days in a row.

No criminal charges were laid in the wake of the Inquiry, for McCulloch found the court-martials, organized bouts between boys and the forced exercise were ‘not activated by rage and did not act to gratify any passion’ – rather the Superintendent had ‘acted contentiously and from motives of duty’ (McCulloch 1934a:8). Indeed, the Inquiry was met with a distinct lack of concern by the Government’s watchdog agency, the Public Service Board, which appeared unconcerned that Parsonage had, since 1926, held dual roles as superintendent and the Inspector of Institutions, which had made him responsible for investigating the same institutions that he had been running. As Quinn (2004:155) has argued however, this obvious conflict of interest meant that ‘clearly the holder of the position was not meant to make any serious criticism of any institution.’ However, in a very unusual move, the Government overturned the Board’s recommendation that Parsonage be transferred, without loss of salary, to Head Office. Cabinet invoked the rarely used Royal Prerogative and dismissed Parsonage from the Public Service – a ‘substantial penalty’ which meant forfeiting all rights to recreation leave, long service leave and superannuation (Quinn 2004:183).

Just a few days later, the Premier ordered an in-camera report specially focusing on the NSW Child Welfare Department as part of the extensive *McCulloch Royal Commission into the Public Service* (McCulloch 1934b). The Commission was charged with identifying whether ‘the history of NSW institutions provided (as in the United Kingdom) danger signals, which should have served to place the Secretary of the Department upon his guard’ to either personally inspect or provide effective inspections ‘to ensure that those activities entrusted to his direction and control were always subject to critical scrutiny’ (McCulloch 1934b:10). The Inquiry produced mixed results: while the



Department's physical facilities were deemed 'superior to those existing in other Australian States and in many countries of the world' (McCulloch 1934b:2), its administrators were criticised for having failed to learn from the score of inquiries that had been conducted over the previous 60 years. 'In view of so many inquiries, the organisation and administration of the Child Welfare Department should be nearly perfect' McCulloch commented. Instead, 'many recommendations, forced on me by existing facts, have been anticipated and submitted for consideration on more than one occasion, over a number of years, and have not yet been adopted' (McCulloch 1934b:20). The Assistant Secretary of the Department, 62-year old Mr. Thompson, a former employee of the *Sobraon* and Brush Farm and Superintendent of Parramatta Girls Industrial School since 1906, came in for particular condemnation. McCulloch found that the 'respected educationist and university graduate who had lectured at the Teachers Training College' (Quinn 2004:113) had not even read previous Inquiry reports (McCulloch 1934b:10). As with Parsonage, the Government acted swiftly: just two days after the *McCulloch Inquiry* was tabled in Parliament, Assistant Secretary Thompson, having refused to resign, was compulsorily retired (Quinn 2004:193).

Despite these high-profile Inquiries, institutional brutality remained. At Tamworth Boys Home for example, boys aged 15-18 years who had absconded from other welfare facilities were treated as hardened offenders. In 1975 the *Muir Inquiry* strongly condemned the institution. Judge Muir was 'quite unable [Tamworth] to regard as anything but a prison, with the exception, the conditions within are far less desirable than those in a prison' (Muir 1975:110). His Honour found the physical accommodation to be 'totally inadequate', the programs to be based on punishment rather than treatment and the rule that the boys 'may talk together only for two periods each of ten minutes during the day... totally unreasonable' (Muir 1975:111). Former residents have alleged that boys were routinely bashed, starved, tortured and abused by staff, likening it to 'Alcatraz' or a 'prisoner of war camp during WW11' (*ABC 7.30 Report* 13 December 2011). This brutality shaped futures of crime and violence for many of its residents. As alleged Sydney crime boss George Freeman recounted, he was met with a king-hit from a guard on his arrival to the institution and recalled resorting to swallowing soap in the hope of a transfer (Freeman 1988). Notorious rapist and murderer Billy Munday was in no doubt that his time at Tamworth helped turn him into a violent and sadistic criminal. 'I can almost lay blame there for what I've done. I came out of there a hardened but scared boy

on the verge of manhood. I left there full of hatred' he wrote in his autobiography (Munday 1980). Infamous underworld crime figure Neddy Smith, who was implicated in eight murders but only convicted for two, also laid responsibility for his offending at the door of Tamworth:

*Tamworth boys' home was a real concentration camp [where] they treated the young boys like animals, with daily bashings and starvation...I've been to the notorious Grafton Jail twice [where] I was systematically bashed daily, flogged into unconsciousness several times but, believe me, that was nothing compared with the treatment I got at Tamworth.'*

(Smith, cited in ABC 7.30 Report, 13 December 2011).

The institutional brutality of child welfare homes and juvenile detention facilities was blamed by other prisoners for their offending. Peter Schneidas, who once wore the label of the 'most dangerous prisoner in NSW' (Rice, *Sydney Morning Herald* 31 March 1983) began a lifetime of brutal institutionalisation at the age of nine. Newly arrived from Lithuania, he was sentenced to 18 months for truancy and sent to Anglewood child welfare home. Schneidas described the racism and brutalisation that saw him physically attacked by other boys for being 'a wog [and] a Russian pig' (Schneidas, in Rice *Sydney Morning Herald* 31 March 1983). He later wrote of his time as a 16 year-old minor offender in the Kenworth Boys Home with hatred and contempt:

*It was teaching me how to hate. It was teaching me to abandon love, compassion, understanding. It was teaching me to be cruel, compulsive, bitter... It was my humanity that was being stripped from me. It was my individuality that was slipping away from me. It was my privacy that I was losing. It was my pride that I'd already lost.*

(Schneidas 1985:71)

Schneidas' chillingly matter of fact account reveals how easily the fear and pain of his institutional experiences in child welfare homes fuelled an implacable rage towards not just the people who abused him or those who witnessed the abuse but did not intervene, but against the indifference of wider society:

*And I cast blame; how I cast blame! I blamed...the family doctors, the screws, the police, the magistrates, you and your next-door neighbor. You could have stopped it. Instead you were too busy, wrapped up in your own little world chasing the buck or being do-gooders. What about us? What about me in here? Your silence made me hate you.*  
(Schneidas 1985:71)

Like many of Australia's most notorious criminals, the abused boy was being shaped into a killer. As he concluded, 'The man I am now was on his way' (Schneidas 1985:105).

Other prisoners have moved beyond highlighting the link between care and crime to holding the State legally responsible for their subsequent criminal activity, alleging that this was a direct result of child welfare and juvenile justice culture and practices. In 1999 Christopher Johnson lodged a statement of claim in the NSW Supreme Court that argued that his removal from his Aboriginal family at the age of four and the physical abuse he had suffered in white families and institutions, had left him predisposed to violence (*Daily Telegraph* 23 March 1999). Through this process, Johnson, who had served time for manslaughter, was issuing a critical challenge to the authorities. He placed the burden of his subsequent offending squarely on the shoulders of the child welfare authorities.

As Keith Kelly, a former Tamworth boy who served over 19 years in institutions and prisons for relatively minor crimes such as safe-cracking and breaking and entering told a journalist, graduates of the Tamworth Boys Home include at least fifteen men 'currently serving life sentences for some of the worst crimes in Australian history' (Van Aanholt, *The Leader* 7 June 2009). At least 15 of these were convicted for murder or manslaughter (*ABC 7.30 Report* 13 December 2011). Tamworth closed in 1989 after a spate of residents' suicides (Quinn 2004) but reopened shortly thereafter as the Tamworth Correctional Centre: ironically, housing many of the men who had spent at least part of their childhood in the notorious Boy's Home.

It was not only the boys who were subject to extremes of institutional abuse and cruelty at the hands of former military or custodial staff. The shocking history of the Parramatta Girls School demonstrates that some staff inflicted persistent unrelenting horror of an almost unimaginable nature on girls in their care. Built on the site of the former Female

Factory for convicts, a mental asylum and a Roman Catholic orphanage, Parramatta was initially designed to cater for 'insubordinate and generally unruly' girls whose apprenticeships or foster care placements had broken down (MacKellar 1910, cited in Quinn 2004:115). Later it imprisoned adolescent girls 'exposed to moral danger' – a term which only referred to girls thought 'at risk' of engaging in improper moral behaviour, or involved in consensual sex, and victims of serious crime such as rape or incest.

Parramatta was characterised by appalling conditions that included compulsory medical examinations to detect venereal disease or pregnancy; censorship and restricted visitors; locked doors and dormitories and inadequate meals (Quinn 2004). The *Allard Royal Commission* (Allard 1920) likened the child welfare institution to a gaol. Following a serious riot on Christmas Day 1941, the Child Welfare Advisory Council complained that the institution was being run by 'enthusiastic amateurs'. Despite this, there was no apparent improvement (Quinn 2004:217). Rather than offering protection to vulnerable girls, Parramatta was characterised by prolonged periods of isolation, detention and segregation (Van Krieken 1991; Australian Senate 2004; McClellan 2014). Punishments such as cold baths and forced hair cropping were prevalent (Quinn 2004). Extreme violence was common: residents alleged they had been subject to 'psychological abuse, rape, neglect and other forms of violent torture at the hands of state employees' (Robb 2010). Others described the complete lack of empathy from staff who showed 'no emotion, no mercy, no compassion' at all. 'I realised that in Parramatta you had no rights' one former resident recalled. 'There was no humanity, no pity, no love. You were a number. You were a bad girl. You were a Parramatta girl' (Giles 2010).

In 1961 Parramatta exploded into riots shortly after the Deputy Superintendent was formally suspended for misconduct. The girls staged a series of serious and extremely public protests that, night after night, saw them climb onto the hospital block roof only to be forced down by fire hoses. Nineteen girls escaped and thousands of pounds of property damage was incurred (Quinn 2004). Former inmates claimed the riots were their reaction to an escalation of brutality at Parramatta, specifically, 'the Superintendent making Barbara Price pregnant and trying to induce a miscarriage by bashing and kicking [her] in the stomach' (cited in Matthews 2007b:206). The girl in question later committed suicide (*ABC Stateline* 30 May 2003). As the 14 year old ringleader Marlene Riley later stated: 'I started thinking, "There's so much wrong with this institution - we're not getting

fed properly, we're not getting proper medical attention, they treat us like we're nothing and they tell us how rotten we are all the time, why don't we riot?' (Riley, cited in *ABC Stateline* 30 May 2003).

The government's reaction was immediate: it announced the establishment of an institution at Hay for up to 16 girls 'who have demonstrated by their violent, subversive or incorrigible behaviour that they are a malign influence on other girls and disrupt any training program developed for the average inmate'.<sup>30</sup> Based on the Tamworth model, Hay was in theory a therapeutic treatment centre where girls were to receive 'close individual attention and training...to inculcate in them acceptable standards of social behaviour and obedience to the rules' (Curlewis 1962:202). In reality however, Hay served as a punishment centre for girls who 'misbehaved' at Parramatta. It was a place of savage brutality. Girls were drugged, placed in isolation and transferred to Hay in the middle of the night (*ABC This Day Tonight* July 1974). Strict military-like discipline applied: inmates had to march to and from activities and visitors were not permitted. The rigid regime dictated even the way girls slept in bed (not having their heads under the blanket and facing the cell door at all times) and they were frequently punished by long periods in isolation on restricted rations (Quinn 2004:274). As at Tamworth, the old 'silent system' that had operated in colonial Australian gaols operated at Hay. The punishment had been officially prohibited since the 1880s but continued in isolated adult prisons until exposed by the *Royal Commission into NSW Prisons* (Nagle 1979). Under this system, girls were not permitted to speak with one another. As former detainee Wilma Robb recalled: '... I experienced a sadistic, martial discipline (the Silent Treatment outlawed in the late 1800s) designed to break the human spirit. These days we would describe it as a form of 'programming'...they tried to turn us into unthinking robots by brainwashing and deprivation' (Robb 2010). In the words of another former inmate, Hay 'was very Cruel, inhuman and sadistic. You can still smell, feel and hear the pain in that place still today' (cited in Chynoweth 2010). Former Hay inmates later disclosed that they were routinely and severely beaten by staff for the slightest infraction. Some inmates had also experienced self-mutilation and rape (*ABC Stateline* 9 March 2007). It was only in 1973, when it was revealed that girls at Parramatta and Hay were routinely subjected to

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<sup>30</sup> A similar message was sent by the NSW Labor Government in December 2004, when the *Juvenile Offenders Legislation Amendment Act* 2004 placed the Kariong Juvenile Detention Centre under the control of the adult Corrective Services.

internal examinations to detect whether they were virgins or if they had venereal disease (ABC *This Day Tonight* 1973), that public protests forced the authorities to close down the institutions.

### *The reaction of Government*

The appallingly consistent entrenched protection of child welfare department bureaucrats is evident in the Government response to the institutional brutality exposed at Parramatta and Hay. Despite the brutality exposed by the riots, both the Superintendent and Deputy at Parramatta were allowed to resign before the commencement of the Public Service Board Inquiry into the riots. The same leniency was later extended to the Manager of the Hay School for Girls following allegations of sexual assault in that institution (Quinn 2004:324).

Neither departmental reports nor those from the government's advisory body on youth policy at the time mention any of the scandals unfolding at Tamworth, Parramatta or Hay. To the contrary: official reports give the very strong impression of a fully functioning, well-ordered child welfare system. For example, a report of Government's chief advisory body on youth affairs, the Youth Policy Advisory Committee, specifically stated that 'institutional training is not punitive' (Curlewis 1962:198)<sup>31</sup> and lauded the focus on 'the development of proper cultural standards and acceptable social behaviour' amongst children. According to the report, Parramatta girls were 'encouraged to interest themselves in music, art, fine needlework [and] folk-dancing' and 'had considerable success in district competitions in basketball, softball, vigoro' (and betraying here just a hint of the military supervision the girls received) 'in marching' (Curlewis 1962:202). According to official Government documents, segregation at Hay had a marked effect on the general tone at Parramatta and gave the girls themselves 'a heightened self-respect consequent upon their new found self-control' (Curlewis 1962:202). Meanwhile in Tamworth, the most hardened adult criminals of the future were purportedly being

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<sup>31</sup> The NSW Youth Policy Advisory Committee was chaired by Judge Curlewis and comprised representatives from: the University of Sydney's Department of Social Work; the Council of Churches; the Catholic Youth Organisation; the Labour Council of NSW; the Local Government Shires Association; Employers Interests; the Voluntary Youth Organisation; the Sporting Organisation; and the Departments of Local Government, Public Health, Physical Education and the Department of Child Welfare and Social Welfare.

inculcated in the 'habits of conformity to accepted standards of social behaviour and the rules of the institution' (Curlewis 1962:201).

Yet the evidence of the impact of these harsh institutional practices was evident. In 1971, for example, the Department of Corrective Services' found that approximately 20% of the sentenced women at Silverwater Women's Prison had been in Parramatta Girls Home (Dewdney and Swarris 1971).

### Re-deployment of institutional staff

Despite its troubled history, the child welfare department has also continually re-deployed problematic staff into the new models of care that emerge, phoenix-like, from the ashes of successive government inquiries. In 1982 for example, a Departmental manual commented on the swathe of correctional institutions that had closed in the previous ten years but failed to mention the inquiries and abuses that had led to their abandonment – among them Parramatta and Hay. It was noted that 'no great difficulties were experienced in the quick re-deployment' of institutional staff. In fact, staff continuity was assured, for '[o]n the understanding that no one will lose a job, with sound personnel practice, a close working relationship with the unions concerned and the help of the Public Service Board where required' (NSW DCW 1982:62), workers were simply transferred into the child welfare bureaucracy. The following year the *Report to the Minister of Youth and Community Services* (Pryke 1983) announced that the closure of the Daruk institution for juvenile offenders had resulted in 'surplus staff' being re-trained 'to set up [the] first community residents care units' (Pryke 1983:16). Given such staffing practices, it is little wonder that the residential care units also were subsequently shown to have similarly abusive practices.

### The Aborigines Welfare Board

Such departmental redeployment practices had significant implications for children in OOHC. This is clearly seen in the ongoing influence of the attitudes and practices of staff of the Aborigines Welfare Board on the NSW Child Welfare Department. The Aborigines Welfare Board had been established in 1939, when it had replaced the Aborigines Protection Board that had operated since 1909. Both bodies had overseen the removal of Aboriginal children from their families and their forcible integration into white, mainstream society. On the Welfare Board's dissolution in 1969 the Department assumed

responsibility for over three hundred Aboriginal children. It also inherited the Board's former staff. This was not regarded as problematic at the time. Indeed, Director W.C. Langshaw enthusiastically embraced the move. 'The acquisition of this body of experienced officers is a matter of great importance' he declared 'and I look forward to the special contribution they will undoubtedly make to the work of the Department' (NSW CWD 1969:9). It is probable that the Board's District Officers, most of whom would have been directly involved in child removal practices, had an influence on the culture and practices of the Department to which they had been transferred. It is also possible that the absorption of Board staff into the Department only constituted official recognition of the already close working relationship and regular networking that had existed between agencies involved in the separation of Aboriginal children from their families (Link-Up (NSW) 1996).

In any event and regardless of the shift in official responsibility to the Child Welfare Department, the lingering consequences of the policies of assimilation saw Aboriginal children continue to be removed from their families at vastly disproportionate rates (Gungil Jindibah Centre 1993). The language and sentiments typical of the Board were also evident decades later in the reports of Child Welfare Department psychologists responsible for assessing Aboriginal children entering NSW detention centres. These 'disturbing' accounts of the early 1980s included the same terms commonly used by the Board and 'could as easily have been written by Inspector Donaldson<sup>32</sup> in the 1920s or Ella Hiscocks<sup>33</sup> in the 1950s' (Link-Up (NSW) 1996:88).

### Inadequate staff training

Analysis of internal Departmental policy documents and of the Royal Commissions and inquiries conducted in NSW over the past century or so, reveal that inappropriate and

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<sup>32</sup> Robert Donaldson was the Chief Inspector of Aborigines and advocated for the removal of Aboriginal children and their complete isolation from their families and communities. As such he was feared and hated by many Aboriginal people. In 1929 the Aborigines Protection Board accepted his resignation on grounds of physical disability, placing on the record 'its sincere appreciation of his energy, honesty of purpose, and loyal service, at the same time deciding to recommend that he be granted three months' leave of absence on full pay' - a recommendation accepted by the Minister of the time (NSW Parliament 1930).

<sup>33</sup> Mrs. Ella Hiscocks served as matron of the Cootamundra Girls Home for Orphan and Neglected Children from 1945 to 1967. She was awarded a Member of the British Empire (MBE) in recognition of her 'work among Aboriginal children' (*Cootamundra Herald* 1967 cited in Cole 2005:149). As was subsequently revealed by the *Bringing Them Home Inquiry* (HREOC 1989), Cootamundra is now recognized for the forced separation of Aboriginal children and their families.



inadequately trained staff can have a devastating impact on children. This form of systems abuse can result in staff acting in ways which are ‘uncoordinated, inappropriate and lack preventative focus’ (NSW CSC 1996b:2). Guided by ‘reactive’ policies ‘and influenced by insufficient resources, training and support’ (NSW CSC 1996b:2), staff are unable to de-escalate situations, so that challenging behaviour by a child in care ‘may give rise to a crisis-driven response which can lead to police involvement’ (NSW CSC 1999a:1).

The need for ongoing training for frontline staff is a familiar theme: concerns have been expressed as far back as the mid-19<sup>th</sup> century. For example, ‘poor staff training and a lack of leadership’ was cited as a reason for the closure of the Industrial School for Girls at Newcastle and the residents transfer to Biloela at Cockatoo Island in the 1870s (Crawford 2005) and was complained of in the NSW Parliament’s 2<sup>nd</sup> Reading Speeches for the *Child Welfare Act* 1939. The Child Welfare Legislation Review Committee (NSW Parliament 1974) also emphasised the importance of trained workers when responding to children who have experienced emotional, social and educational disadvantage and recommended increased access to training for all staff. Citing a string of government inquiries and Royal Commissions, the Commonwealth noted the ‘consistent finding’ that ‘welfare services were fragmented, reactive, lacking in well thought-out policies and rarely subject to evaluation’ (Australian Senate 1979:11) with the lack of adequately trained and resourced staff a common theme across each report. A 1983 report noted that ‘major staff recruitment, training and continuing education issues [need] to be resolved by the [NSW] Department before any guarantees of good child care can be given’ (Vardon 1983:6). At times, departmental intractability evidently spilled over to external oversight bodies charged with safeguarding children’s rights. In 1991 for example, the NSW Ombudsman complained that investigations into an alleged assault on a detainee at Reiby detention centre had been ‘disrupted’ by wilful misconduct on the part of child welfare personnel, ‘who did not provide statements when required, did not attend when requested, and did not make witnesses aware of appointments that had been made’ (NSW PD LC 19 November 1991:4887 (Dyer)).

These findings were echoed by the Human Rights and Equal Opportunity Commission and the Australian Law Reform Commission, whose joint investigation into children and the legal process found that the ‘appalling state’ of care and protection systems throughout the country had contributed to the over-representation of children in OOHC in the CJS

(HREOC/ALRC 1997:5). The child welfare's department's own investigations found that poor staff training persisted in services which purported to provide specialised, intensive care to high needs children. Staff - including management – exhibited a lack of awareness and care regarding departmental policies and procedures, resulting in high needs children receiving casework that was entirely inappropriate and inadequate for 'disturbed state wards' (NSW CSC 1999b:8). The NSW Community Services Commission's series of reports of the mid to late 1990s reiterated the urgent need for on-going training and support for staff in the care system, particularly for those working with children exhibiting challenging behaviour (NSW CSC 1996b; 1999a; 1999b; 1999c; 2000a; 2000b; 2000c; 2000d; 2000e; 2000f). The lack of training and support for residential staff in particular created an environment of fear and hostility, leading to an 'us-against-them' mentality strikingly at odds with the model of therapeutic care meant to operating in care settings (NSW CSC 1996b:14). The Commission recommended an 'urgent' audit of existing training packages and programs (NSW CSC 1999a:58), noting that notwithstanding the Department's awareness of the troubled backgrounds of children, 'both management and direct care workers were ill-prepared and ill-trained to work with behaviourally and emotionally disturbed' children at the Ormond Centre. Staff lacked 'the training or skills to deal with residents' often highly complex behaviours' and a number of workers evidenced 'limited insight into the needs of children and 'in care' (NSW CSC 1999b:9). Despite these criticisms, agency inadequacies continued unabated, with the Commonwealth's 2005 inquiry into contemporary child care systems highlighting all too familiar concerns of staff incompetency, organisational inertia and poor child outcomes (Australian Senate 2005).

The lack of trained out-of-home care staff remains a problem today. Residential home workers in particular, are known to be 'a significantly under-trained occupational group' (NSW CG 2010:8). The problem is not restricted to NSW: in Queensland, the Director of Peakcare, the body representing OOH service providers, told the ABC's *Lateline* program into the criminalisation of children in care that, 'we have no mandatory qualification for a minimum entry level qualification...we're talking about some of the most vulnerable children and young people in the state and we have non-qualified people often responsible for their direct care' (ABC *Lateline*, 30 May 2012a). Just three months later the Victorian Public Advocate Colleen Pearce condemned the level of qualifications required to work with people with disabilities in non-government care in her state, telling

*Lateline* that ‘the level of training is very low’. The shortage of staff, she advised, meant that agencies are ‘willing to take anybody who puts their hand up and many of these are unable to meet the inherent requirements of the job’ (*ABC Lateline*, 30 May 2012b). The lack of qualified and properly trained staff is also an international problem: in Scotland for example, despite government emphasis on registration and training, 68% of workers in residential care still are not adequately qualified and only a quarter of workers are registered or have registration pending (Leask, *The Herald*, 22 April 2008).

The continual inability of the child welfare department and its various watchdog agencies to ensure that adequately trained staff are employed has been identified as a primary risk factor for children’s involvement in the CJS. For example, group home staff in England and in NSW have been found to be often ‘poorly qualified and ill-equipped to deal with conflict’ and their reliance on police has been shown to lead to an increased likelihood that residents would be charged and even convicted (Darker et al., 2008:142; see too NSW CSC 1999b). Conversely, children were ‘less likely to be convicted or cautioned’ where homes had clear guidelines and staff training, particularly around managing children’s behaviour (Beecham and Sinclair 2007:112 in NSW CG 2014:7). Training and support has also been identified as a central issue of concern for foster carers and as deserving of urgent attention by both service providers and government (Usher 1992; NSW CSC 1999a:59; 2000b; 2000c; 2000d; Tregeagle 2000; NSW Parliament 2002; NSW Ombudsman 2002; AFCA 2004; Australian Senate 2005; Wood 2008). According to the NSW Children’s Guardian, the importance of staff training ‘cannot be underestimated’ (NSW CG 2010k:5). The combination of poor training, assessment and low remuneration of foster carers was shown to ‘contribute to the abuse of children in care’ (Cashmore et al., 1994:61). It has also been associated with an increased risk of placement instability and breakdown, particularly for children with disabilities, which in turn increases the likelihood of a child coming into contact with the CJS (NSW CSC 1999a).

A lack of adequate training and support for carers – regardless of whether they are professional group-home staff or foster or kinship carers – can lead to children being regarded as ‘difficult’ and delinquent. For example - and mirroring the findings of previous investigations - the *Special Commission into Child Protection Services in NSW* (Wood 2008) found that ‘operational difficulties’ in transferring children’s files between the child protection branch and the OOHC section of the Department of Community

Services had resulted in poor matches between children and prospective carers. A tendency to ‘focus on the crisis’ of the initial child protection notification, rather than on the quality of the subsequent out of home placement, had also led to inappropriate referrals, resulting in children being placed with untrained carers (Wood 2008; see too NSW CSC 2000f). This was also the case in the UK, where recent inquiries have identified that children were placed in group homes or with potentially unsuitable carers ‘because there is a bed there rather than due to proper care planning’ (APPG 2012a:15). When confronted with a lack of personal information about the child, including essential details such as birth certificates, Medicare cards, health concerns and previous (possibly abusive) history (Wood 2008; NSW Ombudsman 2009b) it is hardly surprising that foster carers report that their charges could be ‘difficult’ to manage.

### Reliance on casual and temporary staff

The impact on vulnerable children of inappropriate employment practices is also evident in the historical reliance on casual and untrained workers – especially when they are employed alongside former custodial staff. McCulloch had exposed the detrimental effect of this practice back in 1934, when his inquiry into allegations of abuse at Yanco revealed that staff had been kept ‘on tenterhooks by threats of the termination of their employment for years.’ Officers alleged that the feeling of uncertainty this created ‘prevented them making disclosures in regard to the now condemned system of punishment’ that had operated at both Yanco and at Gosford (McCulloch 1934a:51).

The Community Services Commission’s investigation into the Ormond Centre sixty years later (NSW CSC 1999b; 1999c) also demonstrated that reliance on inappropriate staff inevitably criminalised vulnerable children in OOHC and allowed chaotic institutional practices to remain unchecked. The devolution from institutional to community-based programs saw ‘many of the experienced and skilled staff moved...[which] resulted in the employment of casual staff, many of whom were inexperienced’ (Dalton 1990:2).<sup>34</sup> Although institutional over-reliance on casual, poorly-trained staff had been identified as a key characteristic of the ‘systems abuse’ that permeated both the NSW child welfare and CJS systems (Cashmore et al., 1994:52), managers had continued to depend on

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<sup>34</sup> In 1987, as part of the department’s reorganisation of young offender services, all but one of the large, congregate care institutions were closed down and replaced with smaller regional facilities.

unqualified casual staff to provide care to vulnerable children in residential homes (NSW CSC 1996a). Despite these ‘hair-raising findings’ (Horin, *SMH* 25 October 1997) three years later it was revealed that casual staff at the Ormond Centre, which purported to provide specialist, tailored support to high needs children in order to stabilize them for re-integration into the foster care program, had ‘received no training or induction’ (NSW CSC 1999b:8). More alarming still, the resulting inquiry confirmed that untrained, inexperienced backpackers had been recruited in Friday afternoon ‘raids’ on the local employment office (NSW CSC 1999b).

The situation at Ormond was exacerbated by the tendency of the more experienced staff to regard children in OOHC as delinquents. Ormond had closed as a juvenile detention centre in the late 1970s, but many of the staff employed at that time had remained with the department and indeed, had continued to work at Ormond itself. Although the philosophy and purpose of the Centre had changed, these staff ‘could not make the adjustment required of them to care and support emotionally damaged children.’ They invariably ‘resorted to what they knew best...adopting a custodial model of care’ that was entirely inappropriate for the vulnerable children now under their control (NSW CSC 1999b:8). As with staff recruited from the Aborigines Welfare Board, the longevity of corporate memory exerted a strongly negative influence that influenced new and casual staff. At Ormond it manifested in criminalising practices and attitudes that led to children who had never been in trouble before being charged with offences within just weeks of arriving at the Centre (NSW CSC 1999c). Incredibly, despite the Commission’s scathing assessment of the quality of the Ormond staff, the same workers were then deployed in the crisis short-term unit and transition houses that were established following the Centre’s closure (NSW CSC 1999c).

In an effort to break their reliance on casual workers, Australian authorities across the country attempted to hire English and Scottish care staff in order to cope with demand. Ironically a similar recruitment drive was also operating in reverse as English staff turnovers of up to 26% (Colton and Roberts 2006) saw Australian workers recruited to fill long-standing child protection vacancies (Johnson, *ABC* 2004). Notwithstanding the danger and children’s clear preference for trained, caring workers (Hayden and Gough 2010), the recent UK *Joint Inquiry into Children Who Go Missing From Care* (APPG

2012a) found that care homes were still relying on casual workers who just a week previously were employed in retail or in fast food outlets.

Warnings from the NSW Children's Guardian that 'particular care should be taken in employing casual and temporary staff due to the itinerant nature of this employment practice' and directions that agencies should avoid 'any more disruption than is necessary' in staff arrangements (NSW CG 2010:5), casual staff are still deployed to care for high needs, vulnerable children. In 2013 for example, University students on volunteer placements at the Department were supplementing the duties of properly qualified child protection caseworkers (Olding, *SMH* 29 August 2013). In 2014 the Victorian Auditor General (VAGO 2014) reported that casual staff comprised up to 55% of the residential care workforce.

## **CONCLUSION**

As shown in this chapter, factors known to facilitate criminal activity amongst children in care - such as exposure to delinquent peers; inappropriate placement of vulnerable with delinquent youth; inadequate staff training and reliance on unsuitable or inexperienced and casual workers – have characterised the NSW child welfare system from its origins as a penal colony. These forms of systems abuse have increased children's vulnerability to involvement in the criminal justice system.

The Department's belief in the inherent delinquency of the children in its care is another form of systems abuse, which increased the likelihood that girls would become involved in the CJS. It allowed the brutality within its institutions to continue. Just as the offending histories of women prisoners raises questions about 'the relationships between classes, racism, genders and imprisonment' (Carlen and Worrall 1987:17), so too the authorities' moral judgments about girls' sexuality helped fuel perceptions of girls as 'bad' or 'deviant' (Carlen (1985; 1996; Naffine 1987; Lloyd 1995): a view which was taken to an extreme by the NSW child welfare sector.

Along with the influence of respectable clergy on wayward children (which was considered essential to break the criminal influence of convict parents), 'early and prolonged incarcerative schooling' (Kociumbas 1997:43) was designed to counter girls' tendency towards promiscuity and delinquency. To this end, the Reverend Richard

Johnson, the colony's first clergyman, established a school less than four years after the first ship landed. His successor, the Reverend. Samuel Marsden – whose reputation of excessive severity as a Magistrate earned him the epithet of the 'Flogging Parson' – had a seat on the Board of the Female Orphan School alongside the wives of the Governor and Lieutenant-Governor, where he was able to impose a harsh discipline upon wayward and difficult children (Kociumbas 1997). The Christian belief in the immorality of female sexuality also led to the establishment of asylums for girls far earlier than those created for the colonies' convict boys and Indigenous children.

Girls in care not only suffered the ignominy of being labeled as promiscuous but endured severe sanctions, including detention, for non-conformist behaviour or the commission of indisputably minor offences. This double bias, based on gendered views of morality and class, saw girls who had run away from abusive home situations or care placements catapulted into the CJS. Stigmatising attitudes towards girls in care persisted in the treatment of girls throughout the twentieth century. For example, according to a Superintendent of the Parramatta Industrial School, while boys committed offences of a temporary nature that were 'incidental to adolescence', girls' delinquency came about because they were 'predisposed to prostitution' (Thompson 1914 cited in Quinn 2004:259). Even Judge Allard, the progressive thinker whose *Royal Commission into the Public Service in New South Wales* indicated more than a superficial understanding of the criminalising processes of OOHC, expressed little sympathy for 'fallen' girls. Indeed, his concern was reserved solely for the 'girl found guilty of a first offence of stealing, and whose character was not otherwise affected'. A girl convicted of this type of minor infraction, he opined, 'should not be sent to consort with girls who have been convicted of moral and sexual delinquency' (Allard 1920:6).

Such official attitudes remained static and emphatic despite the passage of time. The Department's annual reports from the late 1960s and early 1970s<sup>35</sup> for example, declared that 'it would be unrealistic to regard female delinquency as crime only' (NSW CWD 1972:24). Rather, offences committed by girls in care were to be regarded 'as crime *plus* "moral delinquency", the main component of which was 'sexual promiscuity, which is

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<sup>35</sup> The NSW Child Welfare Department produced four such reports, with near identical wording and pictures, but varying coloured covers (NSW CWD 1966; 1968; 1970; 1972). The brochure was an adaption of an article written for the International Union of Child Welfare, November 1964 (NSW CWD 1966:1).

usually associated with general waywardness and irresponsibility' (NSW Child Welfare Department 1972:25 – original emphasis). Girls were regarded as more dangerous than boys, not only because they were thought to be less amenable to treatment and 'reclamation' but because their sexuality swept otherwise law-abiding young men to immorality and delinquency (Musgrove 2010).

The Department also apparently believed that only men could exact compliance with institutional rules from troublesome, delinquent and sexually promiscuous girls in OOHC. As the Under-Secretary of the Department, Walter Bethel declared in 1901, 'women cannot be trusted to supervise girls...unless working under a man' (Quinn 2004:117). Men predominantly staffed homes catering for girls, although this directly contradicted the accepted Victorian view that the reformation of women was a matter for women themselves. Strict discipline was considered necessary if girls' supposedly inevitable tendencies toward wanton behaviour were to be controlled. Accordingly, places like Parramatta operated on a system of military-style discipline which included musters and forced marches and - despite the findings of institutionalised abuse at Yanco and other institutions for boys – allowed staff to continue to carry canes and inflict corporal punishment well after these tools had been abandoned in institutions for boys (Quinn 2004). In the aftermath of the 1961 Parramatta riots for example, evidence emerged that the male Superintendent and his deputies had been selected solely because they were known to be tough disciplinarians, despite a lack of formal training and their dubious management histories at the notorious Tamworth and Gosford Boys Homes (Quinn 2004). My analysis has also established that the child welfare Department had long been aware that former custodial and military personnel rarely made appropriate carers for children. The current *Royal Commission into Institutional Responses to Child Sexual Abuse* (McClellan 2014) has exposed the widespread cover-up and denials of sexual abuse within some of the nation's most respected institutions. In the light of the Commission's findings, the likelihood that systems abuse continues today must be acknowledged.



## CHAPTER FOUR: THE LITERATURE

This literature review presents the findings of key Australian and international studies that have explored the out of home care (OOHC) cohort's involvement in the criminal justice system (CJS). It discusses what I have termed the 'care-criminalisation' that has been identified in studies of arrested, charged or detained populations of juveniles and adults. It also presents the findings of studies into the criminalising practices of child welfare, by examining research into the delinquency outcomes of children in or leaving OOHC and studies comparing the generally poor outcomes of the cohort when measured against the general population and/ or other socially or economically disadvantaged groups. Focusing on the experience of New South Wales' ('NSW'), the chapter presents an assessment of the limitations of the literature and critically discusses the tendency to 'avoid issues that might be critical of responsible officials and management' and which caters instead 'to facilitating the efficient and smooth operation of established systems' (Platt 1977:180). Care-criminalisation is an under-researched area that has received little academic attention (Taylor 2006:14; Sinclair et al., 2004), particularly in Australia. Nor have there been many studies that have sought to analyse the literature and to place its key themes in a critical context. As such, this chapter constitutes an original contribution to the literature.

### THE STATISTICS

#### Involvement with the CJS

The overwhelming bulk of evidence indicates that few children ever become involved with the CJS. Of those that do, very few continue to offend (Cain 1993; 1994; 1995; 1996; Chen et al., 2005). However, the OOHC experience is associated with a greater likelihood of involvement in the justice system and with juvenile recidivism (Weatherburn et al., 2007). In England for example, children in care aged ten and above are twice as likely to be cautioned or convicted of an offence than children of same age who have not been in care (HoC 2013).<sup>36</sup>

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<sup>36</sup> It appears these figures have recently grown worse: in June 2015 the UK Prison Reform Trust announced that Lord Lamington would conduct an independent review into the links between OOHC and custody, to determine why children in care aged 10-17 are five times as likely to be convicted or receive a final warning or reprimand, than children not in OOHC ([www.prisonreformtrust.org.uk/carereview](http://www.prisonreformtrust.org.uk/carereview)).

The correlation between an experience of OOHC and subsequent criminal activity has been identified in Australian studies (Carrington 1991; 1993a; 1993b; O’Sullivan 1991; Maunders et al., 1999; Stewart et al., 2002; Raman et al., 2005; Morgan Disney Associates 2006; AIHW 2008a; 2008b; Wise and Egger 2008; Wood 2008; McFarlane 2008; 2010; Mendes et al., 2012; 2014). Children involved with the child welfare system have long come into contact with the CJS at ‘alarming rates’ (ALRC/HREOC 1997:4.43), especially when compared to children with no care experience. For example, the Victorian Department of Human Services reported that over 37% of children in residential care had been arrested or charged, compared to under 1% of the general juvenile population (Victorian Government 2001). Nationwide, approximately 19% of children in care report some involvement with the CJS (McDowall 2008). This contact extends beyond the OOHC system: a national survey of 15-21 year old young people who had recently left care found that over a fifth of female and almost half of the males had received a warning, caution or charge, compared to just 5 per 1000 children (0.5%) in the general population (McDowall 2009). In NSW, research conducted between 2009 and 2014 found that between 19% (Wong et al., 2009)<sup>37</sup> and 34% (Fernandez et al., 2014:36) of children appearing in the criminal jurisdiction at Parramatta Children’s Court were in care. Almost 70% of children in a wider study undertaken in 2010-11, comprising samples drawn from the Parramatta Children’s Court, a regional NSW Court and the NSW state-wide weekend Bail Court were thought ‘extremely likely’ to be in OOHC (McFarlane et al., 2011:62).<sup>38</sup>

There is evidence that the justice system responds differently to children who offend while in OOHC. In one study, 21% of the charges brought against a cohort of children in OOHC had led to a custodial sentence, compared to just 7% of charges brought against other juveniles (NSW CSC 1999a). Males in care were 13 times and females were 35 times more likely to be detained than their non-care peers. Children in OOHC were also 6.5 times more likely to be placed on supervision orders in the community compared to the general juvenile population. While somewhat dated and subject to methodological

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<sup>37</sup> The authors acknowledged the likely inaccuracies in this figure: the sample excluded children previously in OOHC.

<sup>38</sup> As discussed in Chapter One, this assessment was based on positive identifications of children who were currently or had recently been in OOHC based on the court papers and those deemed ‘extremely likely’ to be or have been in OOHC based on identification by a Children’s Court Magistrate, Department of Juvenile Justice records, lawyers’ submissions and other documentation (but for whom no official agency documentation was on file) (McFarlane et al., 2011).

limitations,<sup>39</sup> these findings are consistent with those reported in the more recent Canadian Turpel-Lafond study (2009) and in other international research.

### Persistent or chronic offenders

The impact of early involvement with the CJS can be profound. Children who begin offending at a young age are more likely to become persistent or chronic offenders, that is, to offend repeatedly and often (Moffitt 1993; Farrington and West 1993; Farrington et al., 1998; Loeber and Farrington 1998). In the UK for example, children in OOHC are so disproportionately represented amongst recidivist offenders on both community orders and in juvenile detention (Liddle and Solanki 2002; Arnull et al., 2005; Moore et al., 2006) that the Youth Justice Board expressed surprise ‘that social services recording of interventions...is so patchy’ and recommended the care history of a child ought to be considered a risk factor for offending (Arnull et al., 2005:38). In Scotland, the tendency of residential care staff to bring children’s challenging behaviour to the attention of police, rather than responding to it ‘in house’ was found to increase the likelihood that children will accrue charges and to exacerbate their offending (Cruickshank et al., 2008).

In Canada too, ‘high rate chronic offenders’ (who begin their criminal careers at an early age and account for a large number of court appearances and serious violent offences) are disproportionately likely to be in OOHC (Day et al., 2011). Within this recidivist cohort, children in OOHC come into contact with the CJS earlier than all other groups, have the largest number of court contacts and the longest criminal careers. The combination of a lack of support services, placement instability, multiple and changing caseworkers as well as the accumulation of trauma, displacement and loss associated with the loss of family, home, friends and community that ‘permeate the lives of these young people’ (Day et al., 2011:17), led to OOHC constituting a significant risk in both childhood and adolescence. This ‘clearly highlight[ed] the role of child welfare involvement as a significant risk factor of not only contact with the CJS but also contact that involves a high rate of offending that is maintained over a protracted period of time’ (Day et al., 2011:17).

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<sup>39</sup> Such as under-stating the extent of care-criminalisation by excluding first offenders aged 16 or over and children not currently in care. It is also probable that, due to the definitions of the day, children in kinship or voluntary care were also excluded.

### Recidivist offenders

Little research has been conducted into recidivism amongst the OOHC cohort in the Australian context. Nonetheless, the *Burdekin Royal Commission* (HREOC 1989) heard that children in OOHC were ‘160% more likely to *reoffend* than non-wards’ (Moira Raynor cited in HREOC 1989:112 – my emphasis). Departmental evidence at the *Special Commission into Child of Inquiry into Child Protection in New South Wales* (Wood 2008) indicated that the 4% of the OOHC cohort with high and complex needs (Wood 2008:607 FN512) was likely to have a disproportionate impact on the justice system, with comparisons being made to United States studies indicating that 80% of the children in OOHC were involved with the CJS (Howell et al., 2004 cited in NSW DoCS 2006:3); 40% had been re-arrested and 75% re-admitted to a mental health placement or juvenile detention centre (Walreth et al., 2001 cited in NSW DoCS 2006:3).

### Violent offenders

In the UK some attention has focused on the role of young women in OOHC and the commission of violent offences. The Youth Justice Board has identified a possible link between young women’s care background and violent offending, with 67% of girls living in children’s homes or institutions having a current conviction for violence. The commission of violent offences was significantly associated with being a resident of a home or institution, with 9% of violent incidents linked to the care environment (Arnall and Eagle 2009:68). This confirmed earlier research that children were more likely to commit violent offences in communal settings such as institutions and children’s homes (Arnall et al., 2007) and sometimes, but not commonly, offended against those in authority such as residential care staff or social workers (Pettersson (2005) cited in Arnall and Eagle 2009).

Disproportionate rates of violent offending were also recorded amongst a Canadian care cohort that reported that one-third of children with a history of violence had spent time in care (Turpel-Lafond 2009). Within the care cohort, approximately one-third of those involved with the justice system had a history of violence, compared to less than one-fifth of their non-care offending peers. Almost 40% of males in care and the justice system had a history of violence, in contrast to just 22% of males from the general population who were also involved with the justice system. While it was an extremely infrequent event, children in care were also either the majority or near majority of those charged with the

most serious offences of homicide, attempted murder, arson and sexual assault (Turpel-Lafond 2009).

### Juvenile detention

International research has established that children in OOHC comprise approximately a third (30%) of the UK juvenile detainee population (Jacobsen et al., 2010; HM Inspectorate of Probation 2011). Estimates of the OOHC numbers in the UK have been estimated as 73% of juvenile detainees (Stewart and Tutt 1987) and up to 41% of children on community-based orders have a care background (Hazel et al., 2002:7). The UK Government's *Green Paper (Care Matters: Transforming the Lives of Children and Young People in Care)* noted that while the situation of children overall had improved, those in OOHC were at 'greater risk of being left behind than was the case a few years ago – the gap has actually grown' (DfES 2006:25). For example, while numbers of children in detention fell by a third between 2008-2011 (Allen 2011 cited in Schofield et al., 2012:25), children in care continued to be incarcerated rather than being diverted to non-custodial options. This was the case even though successive governments had committed to ending the three-fold disparity between the caution and conviction rates of the OOHC cohort and the general population. In 2010 the largest UK prison survey conducted in the last 25 years reported that children in care had been incarcerated for reasons unrelated to their offending, such as homelessness or absconding and warned this constituted a breach of the child welfare authorities' statutory duty 'to protect and promote child welfare' (Jacobsen et al., 2010:iii). In 2013 the House of Commons drew further attention to this disparity, noting the 'effective abandonment of children and careleavers in custody by children's and social services' and warning of the 'devastating implications' for children's outcomes on release from custody (HoC 2013:47).

Australian children in OOHC are also over-represented amongst juveniles in custody, although there is a significant variation in the published figures. Estimates have ranged from a low of 2.3% in NSW in 1995 (NSW Ombudsman 1996) to a high of 86% in Victoria in 2002 (Victorian Government 2002) – with both studies reliant on figures provided by the government agency responsible for child welfare and juvenile justice in

each respective State.<sup>40</sup> More recent figures reveal that this apparent inter-state discrepancy has continued, with JusticeHealth stating that 27% of the NSW juvenile justice population have been in care (Indig et al., 2011) while the Victorian Youth Parole Board (Victorian Government 2013) maintains that the figure is closer to 51% in that State. It is apparent nonetheless that children in OOHC have long comprised a significant proportion of the juvenile justice population. For example, at a time when the OOHC population comprised under half a percent of all Australian children, a study of 1000 girls detained in NSW from 1960 to 1982 found that 20% were State wards (Carrington 1991). The magnitude of the discrepancy between the OOHC cohort and those who had never been in care was evident in a NSW longitudinal study that concluded that wards were more likely to have spent time in a detention centre than other children. Approximately 22% of males had been incarcerated, compared to just 0.07% of the general male youth population (Cashmore and Paxman 1996:13). In other words (although the authors did not do the maths), a male in OOHC was 314 times more likely to be imprisoned than a youth who had never been in care.

The figures have not improved in recent times. In 2003, children in OOHC comprised approximately 30% of juvenile detainees (NSW DJJ 2003). Similar figures were reported in 2013 (Indig et al., 2011). Approximately one quarter of children on community orders have been shown to have been in OOHC before the age of sixteen (Kenny et al., 2006). As was the case in both the UK and Canada, the overall number of children in detention in Australia has fallen in recent years (Richards et al., 2013:xi). This renders the high proportion of careleavers within juvenile custodial populations ‘particularly alarming’ (Mendes et al., 2012).

### *Additional disadvantage associated with care status*

Children involved with the CJS are a disadvantaged group that experience high rates of trauma, abuse and neglect, drug and alcohol dependency, mental illness, intellectual disability and cognitive impairments, poor educational attainment and histories of school

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<sup>40</sup> The two States though cannot be directly compared because at that time the Victorians had a far lower rate of incarcerating young people than NSW. The high over-representation of OOHC children in custody in Victoria may provide particular evidence of the residualisation and concentration of OOHC children in the criminal justice system; that is the NSW rate may have been diluted by the propensity of NSW to lock up more children whether in OOHC or not, whereas Victoria may have more strenuously attempted to keep children out of custody but with less success for children in care.

exclusion. Research has indicated that the OOHC cohort is an especially vulnerable group within this already disadvantaged population. In the UK for example, where the treatment of children in prisons and youth detention centres has been described as ‘institutional child abuse’ (Goldson and Cole 2005:52) a series of studies has highlighted the special vulnerability of incarcerated children in care. For example, the HM Inspectorate of Prisons found that children in care were more likely to report problems on arrival to custody, to have problems with drugs and alcohol and poor mental health, to feel unsafe and to report being victimised, to be disproportionately housed in specialist protection units within institutions and to have been physically restrained and placed in segregation in custody (Summerfield 2011a; 2011b). Children in care are less likely to receive social work assistance while in custody and are disadvantaged and exposed to bullying because of inconsistent institutional policies – for example, such as care workers withholding financial support while children are in custody. The National Children’s Bureau reported that agencies’ failure to plan for their release leave children without accommodation, education or other support, which exposed them in turn to a greater risk of placement breakdown on release (Hart 2006). Banardos (Glover and Hibbert 2009), the Prison Reform Trust and the Institute for Criminal Policy Research (Jacobsen et al., 2010) made similar findings. The House of Commons reported that the cohort is also less likely to be granted the benefits of early release<sup>41</sup> from custody than their non-care peers, generally because children are unable to demonstrate the settled accommodation and family support known to reduce the risk of recidivism (HoC 2013). The OOHC group is also more likely to reoffend and to return to custody than children who have not been in care (Hart 2006; Summerfield 2011b). These risks are intensified if children are placed out of their local area<sup>42</sup> (HM Inspectorate of Probation 2012). Finally, a series of reports commissioned by the independent UK charity INQUEST (Goldson and Cole 2005; Edmundson and Cole 2012; Coles and Carmouche 2015) has identified that children in OOHC and young adults who had previously been in care are disproportionately represented amongst those who die in custody. Many of the children are failed by poor interagency practices: the needs

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<sup>41</sup> Children serving a custodial sentence of 8-24 months can be released up to two months early if they wear an electronic monitoring device. A determinate sentence of between three months and four years can lead to home detention. While certain sentences are excluded, there is otherwise a presumption *in favour* of early release unless there are good reasons not to grant it (HoC 2013).

<sup>42</sup> It is expected that children will be placed close to their families and local neighbourhoods. However, nearly two-thirds of the cohort were placed more than 50 miles away from home and over one-third more than 100 miles away (HM Inspectorate of Probation 2012).

of children in care are ‘often not met’ and ‘the position for care leavers, a long neglected group in society, is often worse’ (Edmundson and Cole 2012:42). According to the latest report published in 2015 for example, 30% of the young adults<sup>43</sup> who died between 2011 and 2014 in UK prisons ‘were care leavers or had suffered some kind of family breakdown which required them to live outside of their immediate family home’ (Coles and Carmouche 2015:15).

NSW research has also identified that children in OOHC are a particularly vulnerable cohort within the juvenile justice system and some aspects of life in custody have been shown to have significant impact upon the OOHC cohort. As the NSW Ombudsman has identified, children in OOHC constitute a group ‘deserving special attention’ (NSW Ombudsman 1996:133). For example, children in care undertaking community orders are significantly more likely than their non-care counterparts to display a raft of social disadvantage indicators, including: familial incarceration, experiencing a physical injury requiring medical treatment, experiencing unwanted sexual experiences, having no close friends, unsettled accommodation and unemployment. They are also more likely to have received special education (suggesting cognitive impairment), had treatment for substance abuse and to be in receipt of government benefits (Kenny et al., 2008:11). Children in OOHC may also be negatively affected by the withholding of financial allowances whilst in custody and they are less likely to receive visits from family, friends and caseworkers. Pre-release planning and post release accommodation has been identified as particularly problematic, especially when there are no family members or others to advocate on children’s behalf to the Department.

### Adult custody

In NSW, 30% of adult prisoners report being placed in OOHC before the age of 16 (Indig et al., 2009a). The proportion may be growing, as a 2001 survey reported an OOHC history for just 21% of respondents (Butler and Milner 2003:8). The Australian experience is generally consistent with that reported internationally. In the US, a quarter of mentally ill prisoners, one in six probationers, approximately 20% of the adult female prison population (US DJJ 1991; 1999) and nearly 17% of inmates of local jails (US DJJ 1991) have lived in a foster home, agency or institution for a period of time as a child. In

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<sup>43</sup> The analysis of the deaths of 47 young adults included three children (one aged 15 and two 17-year olds).



Canada, over 20% of the jail population (Mason 1988) and over half of those in federal prisons (Trevethan 2001; 2002a; 2002b) have been in care. This suggests the OOHC cohort is disproportionately represented amongst repeat offenders and/or those incarcerated for more serious matters, for local jails house people serving less than two years while federal prisons accommodate those serving longer sentences. England and Wales have also consistently reported that approximately one third of adult prisoners have been in OOHC (HoC 1998; SEU 2002a; HM Inspectorate of Prisons / Youth Justice Board 2012). In Scotland - where regular surveys of the prison population have been conducted since 1990 and are regarded as a means of informing and supporting business planning - prisoners' care histories were examined for the first time in 2011. This revealed that 28% of prisoners had been in OOHC during their childhood. Female prisoners reported higher rates (at 37%) than males and significantly, in that it suggests the over-representation may be increasing, so did younger offenders (at 38%) (Carnie and Broderick 2011). A more recent study revealed that a third of young offenders have been in care (McCoard et al., 2013a).

#### *Additional disadvantage associated with care status*

The particular vulnerability experienced by children in OOHC who are involved with the CJS has also been identified amongst adult prison populations. Recent Scottish studies (Carnie and Broderick 2012; McCoard et al., 2013; Carnie et al., 2014a; 2014b; 2014c) have presented concrete evidence of the differences between adult prisoners with an OOHC background and the broader prison population. Compared to their non-care peers, the OOHC cohort presented with higher rates of drug, alcohol and nicotine dependency and illegal drug use in custody, had poorer mental health, poorer numeracy and literacy skills, greater likelihood of both pre and post-custodial homelessness and was more likely to have witnessed parental or carer violence. Adding to the little that is known about differences in the offending patterns of careleavers, the OOHC cohort was more likely to have both carried and to have injured someone with a knife, to have received a custodial sentence as a result of breaching a community sentence and to have been incarcerated on multiple occasions both on remand and under sentence. Gender differences within the prisoner population were also identified. A higher proportion of female prisoners had been in OOHC as a child: approximately one-third of women compared to just over a quarter of male prisoners (Carnie et al., 2014c). As previously noted in respect of

incarcerated children in care, young adults who have been in OOHC are also disproportionately represented in deaths in custody (Coles and Carmouche 2015:15).

Predating the Scottish prison surveys by over a decade, NSW research has also identified significant differences between the prisoners with OOHC experience and the general adult prison population. This is limited in that it applies only with respect to Indigenous prisoners – no comparable research has been conducted into the experiences of the OOHC cohort more broadly. For example, adult Aboriginal prisoners removed from their families as children experienced significantly worse outcomes with regard to mental health than their non-removed Aboriginal peers (Egger and Butler 2000). They were significantly more likely to have been gaoled more than five times and to have been victims of child sexual assault. Reflecting the particular vulnerability of the OOHC cohort identified in the UK research discussed earlier in this chapter (Goldson and Cole 2005; Edmundson and Cole 2012; Coles and Carmouche 2015), Aboriginal prisoners who had been removed from their families were more likely to have attempted suicide (Egger and Butler 2000). Indeed, half of the deaths of prisoners investigated by the 1991 *Royal Commission into Aboriginal Deaths in Custody* (RCIDIC 1991) were of people who had been in care as children. Recently, the OOHC sub-cohort (N=300) in a study of NSW prisoners and complex support needs found that 90% had cognitive disability, 84% had multiple and complex support needs and as a group were significantly more likely to have earlier and more police contacts (Baldry 2014:375).

### The significance of comparison studies

The additional disadvantage attaching to the OOHC cohort is further illustrated in comparison studies that have compared the outcomes for an OOHC cohort with those of other groups commonly regarded as disadvantaged. In one mid 20<sup>th</sup> century study, involvement in crime was regarded as ‘evidence of social adaption’. The study compared the offending rates of children in OOHC with a cohort of early school-leavers and another group educated in special schools for the ‘educationally sub-normal’ (Ferguson 1966:127). The groups were regarded as equally disadvantaged and thus equally likely to be exposed to the CJS. Noting although ‘fostering has an extensive literature of its own...it is a curious fact that little attempt to been made to ascertain how children fare after they have passed out of care’ (Ferguson 1966:125), Ferguson found high rates of offending amongst children from a care background: with 21% of the cohort (31% of

males and just over 7% of females) convicted by their 20<sup>th</sup> birthday. The group also had high rates of convictions, especially the males, who had 80 convictions between them - all of which occurred *after* the young person had been placed in care (Ferguson 1966 - my emphasis). By the age of 20, the OOHC cohort had been convicted at a higher rate than their similarly disadvantaged peers. The study is significant in that it also examined the conviction rates of various types of OOHC cohorts: revealing that children in foster care were convicted at almost half the rate (17%) of their peers in kinship or institutional care (30% in both cases), and the conviction rate was higher where the young person had experienced changes in placement or carer (Ferguson 1966).

Over forty years later a Canadian study employed a similar methodology in order to better understand the risk factors and circumstances that propelled vulnerable youth, especially those living in OOHC, into the justice system. The 2009 Turpel-Lafond study examined the involvement in the CJS of over 50,000 children aged between 12 (the age of criminal responsibility in Canada) to 18 years, comparing the offending outcomes of wards of the state<sup>44</sup> with children from the general population; the general Aboriginal population; and children living with a relative but not regarded as being in OOHC.<sup>45</sup> The differences between the cohorts were striking. Wards were 8 times more likely than children in the general population to appear before a criminal court (Turpel-Lafond 2009:28) and were more likely to become involved with the justice system than to graduate from high school (36% : 25%). Over two-thirds had spent time in detention, compared to just over 4% of those who had never been in OOHC (Turpel-Lafond 2009). As had been observed in the UK (DfES 2006a) this happened in Canada even as the numbers of children in detention overall had declined. By the age of 18, 10% of children in the cohort who had been in OOHC had been sentenced to custody compared to just half a percent of the general study population. Further analysis revealed that 1 in 7 males in OOHC had been sentenced to custody compared to just under 1 in 100 males in the general study population. Girls in OOHC were also much more likely to be sentenced to custody compared to the general female cohort. By the age of 21, approximately 41% of the OOHC group had had some involvement with the justice system, compared to under 7% of the general population.

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<sup>44</sup> A child can be made a ward of the state pursuant to either a continuing custody order (under the Government's sole guardianship until aged 19 or until adoption) or a temporary care order (where the Government retains custody of and full parental responsibility for the child for a specific period only).

<sup>45</sup> The government also provides financial assistance to relatives to support placements made by parents when the parents are unable to assume full responsibility for supporting the child.

One in 6 of the OOHC cohort had been incarcerated, compared to less than 1 in 50 of the overall study population. The Canadian study also found that children in OOHC were involved in the justice system at a younger age; penetrated more deeply; and remained in the system for longer, than offenders without an OOHC background (Turpel-Lafond 2009). The study's author, former Saskatchewan provincial court judge and British Columbia's first representative for children and youth, declared that children in OOHC are 'over-represented in terms of the population that's going on into the adult [criminal] system' (Turpel-Lafond, cited in Culbert, *Vancouver Sun*, 26 June 2008). She attributed this over-representation to criminalisation by caregivers and children's vulnerability to biased and discriminatory policing practices, noting that police were more likely to bring charges against this group than against children who had never been in OOHC.

The Massachusetts Institute of Technology (Doyle 2007a; 2007b) reported similar findings when comparisons were made between US children in OOHC and those who remained in the family home. Hailed as 'the largest study into the effects of foster care', the study tracked the progress into early adulthood of up to 30,000 children who had been subject to abuse and neglect notifications. The study found that children taken into OOHC were at least three times more likely to be arrested, convicted and imprisoned as adults than abused children who had not been taken into OOHC. Doyle also found that the OOHC system itself played a role in the criminalisation of its charges. This was confirmed by another US study that compared the adult outcomes of so-called 'cross-over youth' – children involved with both the juvenile justice and child welfare systems – with other disadvantaged populations, namely, those who graduated from the child welfare system at 16 and those who been in the CJS but who had never been in care. Culhane et al (2011) found that cross-over youth were three times as likely to be incarcerated and placed on probation than disadvantaged children with no child welfare experience. They had significantly worse outcomes than either of their peer-groups, with more frequent and multiple placement changes. Significantly, cross-over youth were much less likely to age out of OOHC and more likely to exit due to incarceration in either the juvenile or adult correctional system (Culhane et al., 2011). They also expended a disproportionate amount of agency resources and, as was identified in the Canadian Turpel-Lafond (2009) study, penetrated more deeply into the CJS than their peers.

## REASONS FOR INVOLVEMENT IN THE CJS

Several factors are commonly posited for the OOHC cohort's involvement in the CJS. One view is that children enter care already bearing an increased exposure to risk factors for delinquency. The 'significant risks' inherited from their families of origin are exacerbated by key transition points, such as moving into or exiting the care system, which initiate or aggravate offending (Schofield et al., 2012). While the existence of multiple risk factors across family, community and individual levels is said to place any young person at risk of offending, the *accumulation* and *interaction* of these risk factors is considered highly significant for children in OOHC (Schofield et al., 2012:30 – my emphasis). The criminogenic nature of various models of care has also been presented as a factor in care-criminalisation, while 'system's abuse' (Gil 1982; Cashmore et al., 1994), particularly the escalation and punitive responses to children's behavioural issues within the OOHC system, has been shown to facilitate children's exposure to the justice system (Taylor 2003; 2006; McFarlane 2008; 2010; Cruickshank et al., 2008; Darker et al., 2008; Fitzpatrick 2009).<sup>46</sup> The leaving-care period has also been seen as a time of risk: children ageing out of OOHC are generally expected to negotiate their way through the challenges posed in early adulthood without agency support, including financial assistance (Mendes et al., 2014). This places them at an increased risk of engagement in survival offending behaviour brought about by homelessness, or because they lack essential skills needed to survive in the adult world. Most recently, care-criminalisation has been conceptualised as a trauma-related outcome comprising four key elements: children become involved in the CJS through the display of challenging behaviour that constitutes criminal offences; exposure to offending during attempts to fund substance use (itself an attempt to self-medicate trauma); exposure to offending peers and family, exacerbated by placement in residential units and custodial environments; and limited supports in the post-care period (Mendes et al., 2014). These theories or points of entry to the CJS, are discussed further below.

### Pre-existing conditions

It has been argued that any correlation between OOHC and offending is primarily a result of the abundance of risk factors common to the OOHC population that lead to delinquency (Schofield et al., 2012). The wide variety of biological, psychological and

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<sup>46</sup> Note that Fitzpatrick is Clare Taylor's name post her marriage (discussion with the author).

social risk factors associated with the development of delinquency include: the prospects of conflict within the family, a lack of supervision of a child's activities, attachment issues, poverty, schooling risks including a lack of commitment to education, negative peer group influences and 'individual problematic issues to do with attitudes, abilities and behaviour' (Hayden 2010). Other factors such as: low socio-economic status, family instability, physical and /or sexual abuse, anti-social parents, aggressive behaviour before age 12, delinquent peers, poor educational attainment, unconstructive use of leisure time, stress and anxiety, depressive symptoms, impulsiveness, attention problems, motor restlessness, attention-seeking behaviour, coercive or authoritarian parenting and a lack of child supervision have also been associated with the development of criminal behaviour generally.

### *Models of care*

#### *Residential care*

Large-scale residential care has been associated with a higher risk of offending and incarceration than other placement types (McDonald et al., 1993; Taylor 2006; Wise and Egger 2008; Cruickshank et al., 2008; Fitzgerald 2009; Hayden 2010; Hayden and Gough 2010). The 'world-wide disenchantment with institutionalised care, fed by the massive evidence of its failure and the growing literature of the inhuman conditions so often entailed' (Chisholm 1985) saw it virtually abandoned in Australia too, where the decline was particularly pronounced and occurred to a greater extent, and more quickly, than in any other western country (Bath 2002). The model's unpopularity has meant that it is now often regarded as a placement of last resort for children unable – for whatever reason - to live with their natural parents (Colton and Roberts 2006; Hayden 2010; Hayden and Gough 2010). It is often said that residential care accommodates more 'challenging' clientele (Colton and Roberts 2006; Osborn and Bromfeld 2007b; Ryan et al., 2008) who exhibit high levels of mental health difficulties, intellectual and cognitive impairments, educational difficulties and other challenging traits (Wood 2008; Berridge et al., 2012) and have experienced multiple placements (Delfabbro 2005).

#### *Group homes*

The modern version of residential care, group homes, have been shown to be generally detrimental because they expose children to high risk peers, increase truancy, limit involvement in social and school activities and increase social anxiety and increase the

risk of arrest for children in care (Ryan et al., 2008). Questions have also been asked about the optimum size of care facilities. In England, Sinclair and Gibbs (1998) unequivocally support smaller units but others have argued that smaller homes prevent children from developing the ability to support one another (Clough et al., 2006). In Australia, children in smaller residential arrangements - particularly if they are placed in a single unit – have been shown to experience social isolation and to have difficulty in forming attachments due to short staff shifts and changing staff rosters. They are vulnerable to abuse and stigmatisation from carers and risk the placement being viewed as a means of containment rather than a therapeutic setting. They may also experience greater uncertainty regarding when the placement will conclude and what will happen next (Flynn et al., 2005). There has been very little research conducted into the effect on children of smaller or individual placements, especially in relation to delinquency. It has been suggested however that such placements may actually pose an increased risk of involvement in challenging behaviour (Flynn et al., 2005; Ainsworth and Hansen 2008; Shaw 2012). For example, single resident units, generally highly intensive and staffed with two or more adults at all times, have been viewed as potentially very claustrophobic for young people, with young people being subject to intense scrutiny and a so-called ‘hothouse’ atmosphere. Some workers have felt that this environment could lead to young people acting out or engaging in offending behaviour as a way of asserting some independence, or as a natural, almost inevitable reaction to continual adult supervision in NSW.

As indicated in the previous paragraph, some group home placements have been found to be criminogenic. While workers believe that they always provide a supportive environment for children in their care, this may not be the case (Berridge et al., 2012:5). Children consistently report that continuity of care is particularly important to them and place great importance on having a safe adult to whom they can turn (NSW CSC 2000d; NSW CCYP 2002; QLD CG 2006; 2008; 2013). In contrast, carers and particularly front-line residential staff, often regard their role as temporary and short-term (Moses 2000) and seldom have the time (or the inclination) to develop long-term substantive relationships with children in their care (Shaw 2012). The relationships between children and their carers are also inevitably compromised by heavy workloads, administrative burdens and high staff turnover (HoC 2009a). Workers’ rejection can intensify children’s feelings of neglect (Colton and Roberts 2006) and lead children to become aggressive,

violent and resistant to therapy (US GAO 2003; UK CfSJ 2008). This then feeds staff views that children in OOHC are difficult to manage and fuels worker resentment towards children who are thought to have rebuffed the many opportunities for assistance that staff have offered (Shaw 2012).

The combination of hard-to-manage children, disempowered staff with low morale and poor police attitudes has been shown to unnecessarily inflate the offending rates of children in care. As the Australian Law Reform Commission noted, ‘child welfare workers routinely use the CJS as a treatment, punishment and holding mechanism for children they find difficult to manage’ (ALRC 1997:4.50). Workers’ refusal to have a young person return to a residential setting where an alleged offence occurred has also resulted in children remaining in custody for a short period even after being granted police bail. In some circumstances absconders have ended up in detention after the service provider or department argued that they were unable to cope with their charges’ behaviour (Carrington 1993a; NSW CSC 1996b; 1999a; Parliament of Victoria 2009). This is consistent with the findings of the US Vera Institute, which reported that foster care children faced a higher risk of arrest than other youth (Ross et al., 2002) and were more likely to spend at least one night in custody even when police had authorisation to release them to a guardian’s care (Congers and Ross 2001). Not only did caseworkers initiate arrest by calling police to regulate children’s behaviour, they also either failed to ‘understand young people when arrested are still their responsibility’ or deliberately avoided attending the police station despite legislative obligations to do so, considering detention ‘an appropriate punishment for the alleged crime’ (Conger and Ross 2001:10). This is problematic, for research indicates that police involvement in residential units can be reduced when there are strong relationships between workers and children and a low turnover of both staff and other residents (Paul 2008).

### *Foster care and kinship care*

Foster care is generally regarded as less criminogenic than residential or group home care, producing better functioning adults in terms of criminal arrest and conviction than those who have spent some or all of their time in group settings (Ferguson 1966; Festinger 1983). Therapeutic foster care (TFC) in particular has been associated with decreased involvement in the CJS and produced ‘significant reductions’ in both violent behaviour and in criminal convictions amongst an English cohort (Glover and Hibbert 2009). Young



Americans receiving TFC also reported lower delinquency rates than those in traditional foster care (Baker et al., 2007) or in group homes (Jonson-Reid and Barth 2000b; Leve and Chamberlain 2005; Ryan et al., 2008). Nevertheless, children in these TFC models were still involved with the CJS at fairly high rates (Ward and Skuse 2001), giving cause for concern (McFarlane 2010). For example, just under a quarter of one TFC cohort engaged in delinquency during the study period compared to 37% of the foster care group (Baker et al., 2007). More recent research has described the gains associated with TFC as ‘limited’ (Pollack et al., 2012).

The apparent success of foster care in minimising contact with the CJS seems to depend on what it is measured against. For example, a Colorado study found that children in foster care were over 6 times as likely to be involved with the CJS as those living in kinship care with relatives (Winokur et al., 2008). Another study found however, that kinship care was associated with a *greater* risk of involvement with the CJS compared to non-kinship foster care (Ryan et al., 2008 – my emphasis). Perhaps the most that should be said is that the evidence in support of any one model, is limited and variable.

### **‘Systems abuse’**

Another explanation for the disproportionate involvement of the cohort in the CJS holds that the OOHC system itself is criminogenic. This has been attributed to ‘systems abuse’ (Gil 1982): ‘preventable harm [that] is done to children in the context of policies or programs which are designed to provide care or protection’ and which undermines children's welfare, development or security ‘by the actions of individuals or by the lack of suitable policies, practices or procedures within systems or institutions’ (Cashmore et al., 1994:11). Systems abuse is evident in practices such as exposure to delinquent peers, inadequate staff training, institutional reliance on unsuitable or inexperienced and casual workers, poor placement decisions and poor interagency relationships.

Systems abuse is also evident in institutional responses to children who display behaviour which may have constituted a survival strategy in their previous placements but which is deemed unacceptable or ‘challenging’ in the care setting (Pollack et al., 2012). Studies have also found that children in care are ‘more likely to be criminalised by typical teenage behaviour’ than other children (Moore et al., 2006:100). For example, children have been charged with criminal offences and remanded in custody for incidents as minor as:

spraying whipped cream on a building; breaking pens; swearing at a carer; marking walls; damaging doors; ‘pushing someone back with a finger’; ‘flicking a towel’; breaking a window; getting involved in playground fights; spitting at a care worker; breaking a photo frame; kicking a tree; and ringing a door bell (Paul 2008; Gentleman 2009). It is often assumed that children enter care with an already entrenched offending history (Schofield and Beek 2006; 2009; Sinclair et al., 2007; Biehal et al., 2010; Stein 2010; Schofield et al., 2012). According to a survey of Scottish adults carried out by the children in care advocacy group *Who Cares? Scotland* for example, almost a third of British adults believe that children are placed in OOHC ‘because they have done something wrong’ rather than because their home life is unsatisfactory or unsafe (BBC 2010). Yet less than 2% of British children enter care because of their prior offending or other socially unacceptable behaviour (DfCSF 2007). Similar findings in the US (Conger and Ross 2001) and Canada (Turpel-Lafond 2009) have confirmed that children do not tend to enter OOHC with already entrenched offending behaviour.

Concerns regarding the criminalisation of children in OOHC are supported by the discovery that children in NSW without any history of offending acquired a record very shortly after admission to care (NSW CSC 1999c; Ward and Skuse 2001). So too, between 13% (Victorian Government 2001) and 25% (VAGO 1996:26) of Victorian children in care received a police warning or caution or were charged with a criminal offence in just 6 months of being in care (Wise and Egger 2008).<sup>47</sup> Similar findings were noted in the UK, where between 40% (Sinclair and Gibb 1998) and 65% (Berridge et al., 2012) of children who entered OOHC with no convictions or cautions ended up with a criminal record within months of admission to care: within a year, an astonishing three-quarters of one cohort had been reported to police (Hayden 2010).

The tendency of workers to rely on the CJS as a ‘treatment, punishment and holding mechanism for children they find difficult to manage’ combines with other personal and social factors to ‘create an alarming flow of children in care into the juvenile justice

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<sup>47</sup> Methodological limitations were observed: the 614 children had been in care for at least three months and represented approximately one-third of the care population *with placement support* (Wise and Egger 2008:15 – my emphasis). This is likely an under-reporting of the issue for children without agency assistance such as the homeless were excluded. It also failed to account for the 20% of respondents who did not answer this question on behalf of the child featured in the survey (Wise and Egger 2008:126, Fig 143).

system' (ALRC/HREOC 1997:17.91). This was graphically demonstrated in a series of reports in NSW in the late 1990s, which revealed that poorly trained and frustrated residential staff at the Ormond home for children routinely used the police as a disciplinary tool when dealing with the challenging behaviour exhibited by high-needs residents (NSW CSC 1999b; 1999c). Most children received their first arrest and conviction within a matter of weeks (NSW CSC 1999b). Workers' reliance on police to enforce discipline led to 42 arrests being made amongst the 25 residents in just one month – and accounted for an astounding one third of all arrests made in the Hornsby police area of 85,000 residents (NSW CSC 1999c). The Queensland Child Protection Commission heard similar evidence over a decade later: the Logan District Child Protection Unit revealed one residential care home had received over 140 police visits in just six months (Madigan, *The Courier Mail* 11 October 2012). It appears that concerns that children in OOHC are charged and taken into police custody when carers responsible for their care and protection are of the opinion that being in a restrictive juvenile justice facility is in their 'best interests' (ALRC/HREOC 1997), remains a significant concern today.

### The post-care experience

A final explanation for the involvement of the OOHC cohort's involvement in the CJS is seen in the link between discharge from care and subsequent criminal offending. In the UK for example, between 2 and 3% of the OOHC population - 100 to 150 children on average each year – leave the child welfare system only to end up in custody by their 19<sup>th</sup> birthday (DfES 2002; 2006a). One of the most significant pieces of research in the leaving care field is the US longitudinal study conducted by the University of Chicago's Chapin Hall Center for Children, which tracked 17 year-old careleavers and conducted follow-up interviews every two years. Careleavers were consistently shown to experience disproportionate rates of criminal justice involvement throughout early adulthood (Courtney et al., 1995; 2004; 2005; 2007; 2010a; 2010b; 2011a; 2011b). By age 26, the 'majority' of young women and over 80% of young men had been arrested and one third of the women and over two thirds of the men had spent at least one night in custody (Courtney et al., 2011b). Australian research has reported equally concerning findings (HREOC 1989; Cashmore and Paxman 1996; NSW CSC 1996b; ALRC/HREOC 1997). For example, a Victorian study of young careleavers (Raman et al., 2005) reported that every individual bar one had been questioned by police. Almost 80% of the group had

been charged and a quarter had spent time in detention. In just 12 months, 37% of the children had been charged with an offence and 12% had been incarcerated.

Some commentators have attributed the adverse outcomes experienced by young careleavers to them having ‘left care at an earlier age when they were not emotionally mature’ (Mendes et al., 2011:69). Pointing to the fact that children generally are now remaining with their families for longer due to financial, educational and housing unaffordability,<sup>48</sup> it is argued that extending care could ensure a more equitable playing field and enable children to ride out the difficulties of adolescence supported by financial and emotional support. It is also argued that services would have longer to overcome the difficulties children bring with them to care, so that the protective factors of an effective welfare system could offset the impact of children’s early disadvantage. In the UK and some jurisdictions in the USA, the age of leaving care has been extended to 25. Other studies have supported the benefits of children who had been removed remaining in care for longer periods of time in order to access rehabilitative services (McDonald 1993:125) and have found longer time in OOHC to be associated with improved adult (Zimmerman 1982) and psychological functioning (Palmer 1976; Fanshel and Shinn 1978; Frost and Jurich 1983); higher degree of life satisfaction (Jones and Moses 1984); and significantly for this study, *reduced criminal activity* (Kraus 1981; Zimmerman 1982 – my emphasis).

In NSW, aftercare services are theoretically accessible to careleavers up to 25 years of age, but have been criticised for being severely limited and staffed by workers who are not specifically trained in careleaver’s issues. Young people seeking assistance must also compete with the juvenile cases for attention from the overworked caseworkers. For example, as the *Wood Royal Commission* stated ‘[a]dults who disclose abuse may find they are unable to access support or treatment because of the competing demands for crisis work with children, or prevention and early intervention focus’ (Wood 1997:1189). Many people who have been in care also refuse to access post-care services as they are run by the same agencies responsible for administering the child welfare homes in which they suffered emotional, physical and sexual abuse (Australian Senate 2004; 2005; 2009; 2012). The legacy of the institutional child welfare practices remains in the deep distrust

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<sup>48</sup> In 2015, 60% of Australian young people aged 18-24 were living at home, up from 50% in 1997. The common main reason given for young people remaining at home is financial (AIHW 2015:136).

of government departments (NSW Parliament 1992) and welfare agencies (Wrennall 1986) exhibited by those who have experienced the child welfare system. For example, many Aboriginal people are reluctant to approach non-Indigenous services for assistance (Australian Senate 1982; ACSAT 2006; PoC 2011) and former residents of children's homes whose own children have been removed are often 'so emotionally scarred by their childhood experience with DOCS that they refuse to work with the Department [believing it] is discriminating against them and monitoring them because they were wards themselves' (Sanders 2002:2).

## **DISCUSSION: LIMITATIONS OF THE LITERATURE**

The quality, scope, methodology and findings of studies into OOHC vary enormously across multiple jurisdictions (McDonald et al., 1993; Barber and Gilbertson 2001; McNeish et al., 2002; Thorpe 2003; Cashmore and Ainsworth 2004). Some commentators have argued that there is a clear need for controlled outcomes evaluations and randomised controlled trials in order to establish outcomes (Barber and Gilbertson 2001). Decades earlier, others argued that OOHC is itself a random experiment, for 'it is not an exaggeration to say that it is virtually by accident if a child, presenting as needing to be taken into care, will be placed appropriately' (Puren Report 1979:7 cited in Bell 1981:9). For example, it was stated that 'the child may or may not receive professional assessment, care or professional counselling; his placements, surroundings and conditions may or may not be appropriate; he may or may not have access to a range of options (restoration, small family group home, fostering, adoption etc); the agency may or may not be equipped to promote and work towards his restoration' (Puren Report 1979:7 cited in Bell 1981:9).

While there is a role for experimental, innovative and qualitative analysis of the OOHC system, it is difficult to extract hard evidence about causation and what actually works for children from their limited applicability (Berridge 2002). Much of the research comprises descriptive studies with small unrepresentative samples, high dropout or non-response rates and correlational or associative connections. For example, an extensive literature review of US and UK studies into adult functioning of former foster children found that most of the research was retrospective, seldom employed a comparison group, featured varied sample sizes and utilized predominantly young subjects in their early twenties (McDonald et al., 1993). In the UK, Thorpe (2003) found that studies were

seldom replicated and findings seldom reconsidered, despite service and practice evolution that could render earlier findings no longer relevant. She also noted that there were few national or international studies; few that permitted before/after outcome evaluations or randomized control trials and few studies that possessed samples of a sufficient size to enable useful conclusions to be drawn. Limited sample size has proven particularly problematic: the cohorts need to be of sufficient statistical significance and relevance in order to protect against the OOHC population being excluded altogether, as illustrated by the disappearance of the care cohort of 35 children from the Canadian *National Longitudinal Survey of Children and Youth* due to its tiny sample size (Courtney 2008:286).

In Australia, research impediments such as restricted access to Departmental and agency files and inadequate funding have limited large-scale longitudinal studies (Cashmore and Ainsworth 2004). Studies have been of variable quality and are heavily limited by reliance on just one sample taken from a single jurisdiction (Bromfield and Osborn 2007). Research has generally been undertaken for management purposes rather than for decision-making or policy-generating reasons and accordingly (as has been noted in international studies) ‘often contain only the data necessary to keep track of how many young people are in care at any one point in time and to describe them in very basic demographic terms’ (Courtney 2008:282). A series of Commissions and Inquiries<sup>49</sup> has shown that the lack of quality research in the OOHC field has allowed the development of welfare services that are ‘fragmented, reactive, lacking in well thought out policies and rarely subject to evaluation’ (McCotter and Oxnam 1981:11). Australia has only limited jurisdictional data on the experiences of those who have been in OOHC generally, for while ‘it is the responsibility of out-of-home care services to enhance the life conditions and, in turn, development of these most vulnerable children...very little data is routinely collected in order to evaluate child progress and plan for effective service delivery’ (Wise and Egger 2008:15). Indeed, as is the case in the US, the sector has generally been ‘silent on government data used for research and data drawn from population-based studies’ (Courtney in Stein and Munro 2008:279), particularly in relation to aspects of the OOHC

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<sup>49</sup> Citing the *Royal Commission on Australian Government Administration* 1975; *Commission of Inquiry into Poverty* 1974-77; *Royal Commission on Human Relationships* 1977; *Task Force on Co-ordination in Welfare and Health* 1978; *Review of Post-Arrival Programmes and Services to Migrants* 1978; and the *Senate Standing Committee on Social Welfare* 1979.

experience such as incarceration. Without this type of information, ‘policy development and decision-making are more likely to be crisis-driven and politically motivated...[and] resources are allocated less effectively’ (Cashmore et al., 1994:64).

The lack of quality research is particularly pronounced in relation to care-criminalisation. The involvement of the OOHC population in the CJS is a particularly under-researched area that has received little academic attention (Taylor 2006; Sinclair et al., 2004). The studies that have been conducted into offending have seldom sought to understand why children offend while in care (Shaw 2012) or examined the criminogenic processes that propel them into the CJS at such disproportionate rates. While some studies have reported on OOHC representation rates as one of a range of outcome measures, few have methodologies that permitted, or encouraged, follow-up, particularly in relation to persistent, chronic or adult onset offending (Doyle 2009b; DeGue and Widom 2009). Moreover, while the international prison literature has revealed the presence of the OOHC cohort in staggering numbers (up to 75% of detainee populations in some studies), this has received little attention from scholars. Even in those jurisdictions where the over-representation has been acknowledged – such as England and Wales, Scotland, Canada and the US – the figures have tended to simply be reproduced year after year (Sinclair et al., 2004; Taylor 2006). For example, despite the series of inquiries principally initiated by predominantly criminal justice-based agencies that have highlighted the special vulnerability of the OOHC cohort within the CJS in the UK (see for example: HoC 1998; 2009a; Goldson and Cole 2005; Summerfield 2011a; 2011b; Jacobsen et al., 2011; HM Inspectorate of Probation 2012; APPG 2012a; 2012b; 2012c; Edmundson and Cole 2012; HoC 2013; Coles and Carmouche 2015), academic consideration of this issue has been minimal.

As will be discussed later in this thesis, there is also minimal quality Australian research into the involvement of children in OOHC in the justice system. For example, there is a lack of empirical data regarding the effectiveness of a police response to children’s behaviour, particularly in residential group homes (Mendes et al., 2014) and little on the criminalising impacts of criminalising practices of the OOHC system (McFarlane 2008; 2010). There is no published data on the proportion of young people cautioned, warned or charged by police with current OOHC involvement, the outcomes or effectiveness of youth justice interventions relating to OOHC status, or the involvement of those leaving

care with the police or adult justice system (Mendes et al., 2014). Indeed, OOHC status is not even included as a factor for consideration in the most recent research assessing the early onset of crime and delinquency amongst children partaking in the *Longitudinal Study of Australian Children* (see for example, Forrest and Edwards 2014:131).

### Focusing on pre-care experiences

The importance placed on the pre-care experience in influencing subsequent criminal behaviour largely rests upon an assumption that children in OOHC have experienced abuse or neglect ('maltreatment'). Placement in care is regarded as indicative of the most serious cases of maltreatment (Stewart et al., 2002; Petro 2006a; Wundersitz 2010) as it is assumed that less serious cases do not warrant such intrusive State intervention. However, this argument fails to acknowledge that maltreatment is just one reason for placement in OOHC. Moreover, as the Australian experience of the *Stolen Generations*, *Forgotten Australians* and the *Child Migrants* (discussed previously in this thesis) has exposed, official reasons for child removal may be artificial and misleading. For example, 15% of respondents in a NSW survey (CLAN 2008) of adult careleavers had entered OOHC due to parental separation or divorce, rather than for maltreatment. Over 43% of respondents entered care in the post-war periods of the 1930s-1950s and were the children of returned servicemen. Rather than providing evidence of the abuse that the children experienced at the hands of their parents, this indicates the lack of support provided to men on their return from war and suggests these children were the 'unrecognised casualties of war' who bore 'the brunt of their fathers' inability to return to civilian life and the consequent breakdown of family life and the inevitable entry of the children into 'care' (CLAN 2008:3).

The focus on pre-care maltreatment also downplays the significance of parental poverty as a major reason for entry into care (Maas and Engler 1959; Kadushin 1967; Gil 1974; Rein et al., 1974; Jenkins 1975; Courtney 1997). As the US National Coalition for Child Protection Reform ('the Coalition') has argued, labelling a child as 'neglected' can obfuscate why many children enter care. The Coalition noted that while the proportion of children deemed 'substantiated' victims of child abuse in the US peaked in 1993, 'for more than a decade afterwards, states kept taking away more and more children. Now, finally it's sinking in that in most cases labelled 'neglect' – the single largest category of



maltreatment – are really poverty, and it makes more sense to try to deal with the poverty than destroy the family’ (Wexler in Crary, *Associated Press* 31 August 2010).

My analysis suggests this is a common failing of the maltreatment-offending literature. For example, in her examination of the link between a history of childhood maltreatment and subsequent involvement in offending, Wundersitz contends that a high proportion of Australian Indigenous female offenders have experienced childhood abuse and trauma. The very first study cited however - a 2006 Western Australian report of interviews with 133 incarcerated women - is evidence not of abuse *per se*, but only of the fact that a sizeable proportion of the women (22% of the Indigenous population and 11% of the non-Indigenous cohort) had spent time in OOHC as children (WA DCS 2006:45 in Wundersitz 2010:56). Reliance on studies of this type implies either that OOHC is a follow-up to a childhood experience of maltreatment or that maltreatment occurred once the child was in OOHC. Alternatively, it is possible that OOHC itself is being used as a proxy for abuse, as seen in the Northern Territory Department of the Attorney-General and Justice, whose finding that a maltreated child was more likely to both offend *and* re-offend as a juvenile compared with a child who had not been the subject of a child protection notification was premised on the assumption that a court-ordered child protection notification could be used as a proxy for maltreatment (Yick 2013).

In any event, while there is an association between maltreatment and subsequent criminal activity, the link is not clear-cut. While a large number of children who offend have experienced maltreatment, the majority of abused and neglected children do not offend (Cashmore 2011:33). Some studies have found that abused children were no more likely to engage in criminal behaviour than their non-care peers (Runyan and Gould 1985). Others suggested that while children who enter the OOHC system because of maltreatment *are* more likely to engage in criminal behaviour than their non-abused peers (Festinger 1983; Fanshel et al., 1990; Stewart et al., 2002; Ryan and Testa 2005) the link is prone to over-simplification. They argued that placement in OOHC is *not* responsible for the development of delinquency. Instead, those who offended were deemed to comprise a specific ‘subsample of placed maltreated youth who demonstrated an early involvement in delinquent activity’ (Widom 1991).

A possible explanation for the discrepancy between these findings lies in the study parameters: the early studies were based in the United States whereas Stewart drew on an Australian cohort. Problematic timeframes also played a part: the Runyan and Gould and Widom studies took place before US mandatory-notification laws and may have meant that only the most serious cases of maltreatment came before the court and so were included in the studies. There was also a lengthy period of time between the early studies and Stewart's work (Petro 2006a:4). Both Runyan and Gould and Widom measured the delinquency effect of foster care (generally considered to be a more protective type of care than residential or group home placements and which caters for less 'problematic' children) against a group of children receiving services inside the home. Finally, the studies also employed different designs: the earlier research included cases where delinquency had preceded maltreatment, whereas Stewart excluded these from her sample (Petro 2006a:4).

The importance of maltreatment is a complicated issue. Clearly more information is needed regarding the type of abuse or neglect: when it was perpetrated and by whom. Although earlier studies reported that there was no connection between the *type* of abuse and neglect experienced and subsequent criminal behaviour (Kraus 1981; Festinger 1983; Fanshel et al., 1990) it is an oversimplification to assert that maltreatment per se equals subsequent delinquency. It has been found for example, that victims of sexual abuse are *less* likely to be delinquent, suggesting either that they may have received mental health services earlier or that they enter the justice system directly and without passing through the welfare system (Jonson-Reid and Barth 2000a:506). It also appears that re-occurrence of maltreatment may play a role in determining future delinquency, although the extent of the re-occurrence differs by gender. For example, re-occurrence of maltreatment was predictive of future delinquency for both males and females, but for females in the community, this was the case only after three or more substantiated incidents had been recorded (Ryan and Testa 2005). Maltreated boys admitted to care had more criminal convictions as adults than other boys of a similar background who were not admitted to care and those admitted at a young age and who stayed longest were less likely to have multiple convictions and less likely to have convictions for violent crime than boys admitted later who stayed for shorter periods (Minty 2000). Jonson-Reid and Barth's (2000a) assessment of delinquency outcomes for an OOHC and non-care cohort based on gender, race and the age at which children were maltreated initially suggested that

maltreated youth placed in OOHC were no more likely to be incarcerated than maltreated non-care youth. However, multivariate analysis identified that while the rate of incarceration for maltreated African-Americans in OOHC was lower than for those not in care, the inverse was true for maltreated Caucasians in OOHC, who were *more* likely to be incarcerated than their non-care peers. A gender discrepancy was also identified, with maltreated girls in OOHC more likely to be involved in the CJS than maltreated girls who had never been in care.

The US Department of Health and Human Services' *National Survey of Child and Adolescent Well-Being* (US DoHHS 2005) suggests that much depends upon the official response to child maltreatment. Just under a quarter of the cohort had ever lived in OOHC. My analysis of the report revealed that maltreated children in OOHC reported higher rates of involvement in illegal activity across almost all forms of delinquency compared both to maltreated children who had been reported to child protection authorities but who had remained with their families and those who had been adopted (RTI International 2010:45).<sup>50</sup> They were more likely to commit relatively minor matters such as status offences and theft, almost twice as likely to be involved in damage property and serious property crime and over twice as likely to be involved in an assault, than children who were not in care. They were also slightly more likely to have appeared in court during the previous 12 months, to have been placed on probation and to have been incarcerated. Significantly, this data was all confined to the tables – and despite the variations between the OOHC cohort and those who had never been in care, the authors made no comment to this effect in the body of the report.

It is clear that the exact nature of the relationship between childhood experiences of abuse and subsequent offending is not fully understood (Herz et al., 2012). Moreover, rigorous examination into the sequelae of maltreatment and OOHC 'remains limited [and] very few studies have addressed the effectiveness of child welfare placement' in safeguarding children from involvement in the long-term consequences of childhood maltreatment (DeGue and Widom 2009:345).

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<sup>50</sup> It is not known whether the OOHC group experienced higher rates of maltreatment, different forms of abuse or multiple forms of maltreatment.

### Focusing on models of care

Focusing on the model of care provided to children in OOHC has also tended to allow the systemic issues that exist irrespective of the model used to be overlooked. This was clearly demonstrated in NSW in the 1990s, when Ormond and Minali - large residential Departmental facilities for high-needs children – were promoted as therapeutic flagships providing intensive support to up to 45 children with behavioural problems (NSW Parliament 1995). The homes provided, in theory, high-level services including emergency care (up to 72 hours), assessment care (up to 6 weeks) and therapeutic care (for up to 3 months), as well as personalised treatment programs. However, instead of delivering an ‘enhanced substitute care system’ (NSW Parliament 1995:340), Ormond and Minali offered little in the way of either therapeutic care or support (NSW CSC 2000e). Residents – many of whom had identified intellectual disabilities or disorders such as ADHD - received a very poor standard of care. Criminalising practices saw children who had never previously been in trouble with the police receive criminal convictions for property damage and assault within just weeks of entering the purported specialist facilities (NSW CSC 1999b; 1999c).

In 1997 an anonymous letter detailing 38 allegations - including serious accusations of the sexual abuse of young residents at the hands of a paedophile network of tow-truck drivers - was published in the media and subsequently tabled in the NSW Parliament. Shortly thereafter the Minister, the Hon. Ron Dyer, announced that the Centres would close. Headed by Robert Fitzgerald (now a Commissioner on the *Royal Commission into the Institutional Response to Child Sexual Abuse*), the NSW CSC published a series of reports into the institutions, the closure process and the outcomes for a cohort of residents (NSW CSC 1999b; 1999c; 2000e). The Commission found that staff failed to respond appropriately to children with hard to manage behaviour, although the facilities were designed to provide specialised care for precisely this type of resident. Workers also failed to develop adequate caseplans or implement appropriate management strategies. Instead, they relied on the police to control children’s behaviour. As a result, almost 60% of residents were involved with the CJS (NSW CSC 1999c). As a former resident stated:

*‘At Ormond I mucked up and got heaps of charges for assault and damage. They were only little things and I was just a kid. I get upset when people don’t believe me or rip me off. At Ormond, I was locked*

*up for a while and when I came back, they had moved [another young person] into my unit even though they knew I didn't like her. She'd been through my room and all my things. I hated that and went berserk and threw her out, then smashed up the kitchen.'*

(Robert, NSW CSC 1999c:58)

The family of another child who had incurred 22 charges while at Ormond was in no doubt that the care system was to blame for his deteriorating behaviour and declared that the homes 'were dreadful. They dealt with issues by charging children with criminal offences. Luke's charges escalated when he went to Ormond' (NSW CSC 1999c:64).

According to the Commission, when proper systems were implemented most children's behaviour (and staff responses to it) noticeably improved (NSW CSC 1999c). For example, some children's contact with police after their discharge from Ormond was for very minor, isolated matters that did not result in convictions. For other children however, the Department's poor planning, lack of staff coordination and poor leadership continued to affect them even after they left the institutions. For example, of the 37 children affected by the closure, over half (two-thirds of the males and one-third of females) were arrested within the review period. Some had been detained for serious assault charges and two had been imprisoned in adult gaols – one at just 16 years of age (NSW CSC 2000e). Although some offending was situational and an indicator of vulnerability (NSW CSC 2000e), the system continued to initiate criminal charges in response to minor incidents that occurred within the care environment. At least two children were prosecuted for malicious damage charges brought against them by staff of the residential services where they had been placed after leaving Ormond (NSW CSC 2000e). In the main, offences occurred because of 'a lack of support or effective professional intervention, a lack of suitable educational and remedial services and in some instances...a lack of medical services' (NSW CSC 1999d).

Despite the identification of these serious systemic flaws in the OOH system, the Department distanced itself from responsibility by blaming the model of care, and not its own administration. Announcing Ormond's unceremonious closure after the scandal broke, the Director General declared that 'world experience has shown that this model of care, which starts with the best intentions and the best staff, can deteriorate over time to

the worst model of care for troubled youth' (NSW DoCS/NSW CSC 1999). Moreover, while it would be reassuring to believe that the poor outcomes for many children have improved with the abandonment of large-scale residential care, this has not proved to be the case. Although governments have been urged, given past experience, to ensure that the new alternatives to conventional institutional care 'receive deep consideration to ensure that the mistakes of the past are not repeated in the future, and that the alternatives do not create a new set of problems' (Australian Senate 1982:16), these warnings appear to have fallen on deaf ears. As will be demonstrated throughout this thesis, the rapid criminalisation of many children in OOHC in NSW continues despite system and policy changes.

### The problem of 'agency-sponsored research'

Another possible reason for the relative obscurity of the care-criminalisation and a real limitation of the literature lies in the prevalence of 'agency-sponsored research' (Platt 1977:181). Despite repeated attempts to define why children enter OOHC and what affects how well they come out again, the abundance of contradictory approaches, each based on what initially appears methodologically sound arguments, suggests that success or failure in care is very much a lottery. The conclusions drawn from the studies examined in this thesis must be considered in the light of the considerable qualifications imposed by the very nature of the child welfare research field. Much of this school of research has been commissioned by agencies funded to run services that arguably have a vested interest in the outcomes on which they report. As Platt has criticised, this type of 'agency-determined research adds respectability to methods engineering - with the result that most of what passes for scholarly research tends to avoid issues that might be critical of responsible officials and management, and instead caters to facilitating the efficient and smooth operation of established systems (Platt 1977:181).

This goes some way to explaining the heavy qualifications and cautions against the 'potential for spurious associations' (McDonald 1993:77) that have been placed on findings that have indicated that an experience of OOHC is more likely to be associated with subsequent criminal activity than for those who have not experienced OOHC. The argument against the association is two-fold: it is said that 'it is extremely unlikely that single risk factors lead directly to any individual offending' (Darker et al., 2008:134) and, if acknowledgement of the nexus is conceded, it is often argued that 'the care episode

itself was unlikely to have been the *sole* cause of their delinquency' (Darker et al., 2008:1 – my emphasis). Such studies invariably take some pains to establish that the problems those in OOHC experience are not necessarily a consequence of having been in care (Minty and Ashcroft 1987; Darker et al., 2008.) Rather, offending in care is said to be the consequence of a child's pre-existing characteristics (Darker et al., 2008:135). Combined with the trauma of the removal process, this 'may explain to some extent why offending *appears to be* more common among these children than their peers in the general population' (Darker et al., 2008 - my emphasis). Even when the high offending rate of the OOHC population compared to the general population is acknowledged, it is also often argued that this does 'not mean that *all* children and young people in care will offend' (Darker et al., 2008:135 – my emphasis. The most that is said, is that in these circumstances, the services offered once the young person had entered care 'did not succeed in combating established offending behaviour' (Darker et al., 2008:1). This viewpoint was illustrated in the comments of Martin Narey, former director general of the Prison Service and later head of Barnardo's in the UK: 'When I used to run prisons I was guilty of thinking that care was a gateway to crime, because so many young people in prisons spent time in care' he told *The Guardian*. 'But what kids wanted was stability. I now accept that is the problem rather than care itself. In the long term we have to think about ways of stopping them bouncing around the system. That means more fostering and residential care' (Randeep, *The Guardian* 28 June 2010).

English researcher Carol Hayden encapsulated all of these objections in a critique of studies that proffered comparisons between children in OOHC and those in the general population. She pointed to the 'massive contrast' in life chances between those in care and their peers as evidence that the care system played a role in children's criminalisation. 'Implicit in this sort of data is a suggestion that this is due to the actions (or inactions) of those working in the state care system, rather than the way the system is used and regulated' she said. 'Furthermore this sort of data does not compare like with like: children in care...mostly come from the most disadvantaged and problematic families and circumstances but are then compared to the general population...It is also important to emphasise the very small number of young people involved when considering how to respond to this complex dynamic of disadvantage' (Hayden 2010:4).

Another recent example of ‘agency-determined research’ in the area of offending by children in OOHC is the UK’s TACT report (Schofield et al., 2012). Heralded as the ‘most extensive study into crime and the care system undertaken in the UK’ the report by the University of East Anglia’s Centre for Research on the Child and Family and TACT, the UK’s largest charity and voluntary agency providing fostering and adoption services, was funded by the UK’s Big Lottery Fund. ‘Prompted by concerns about the relationship between the care system and the risk of offending’ (Schofield 2012:1), the authors set out to identify the risk and protective factors that increase or decrease the likelihood of offending by children in care.<sup>51</sup> The report found that ‘running contrary to many preconceptions about the care system’ being taken into OOHC could protect *against* involvement in crime (TACT Media Release 16 January 2012 – my emphasis).

The report was warmly welcomed by the sector. Politicians too were highly enthusiastic about its findings: the Opposition Shadow Children and Young Families Minister Catherine McKinnell MP, enthused that it ‘shines a light on the issue of the over-representation of looked-after children within the criminal justice system’ (TACT Media Release 16 January 2012). No doubt much of the rapturous reception stemmed from the welfare sector’s relief at not being held chiefly to blame for the poor outcomes of children in their care, for ‘too often, care is portrayed as a part of the problem’ (TACT Media Release 16 January 2012). According to TACT CEO Kevin Williams, the report provided ‘a powerful counterbalance to assumptions that entry into care leads to a life of crime’ (TACT Media Release 16 January 2012). Yet notwithstanding the high public profile given to the TACT report, care-criminalisation continued in the UK. Just three years later, in an attempt to determine why children in care are five times as likely to be convicted or receive a final warning or reprimand than children not in care, Lord Laming was announced as the Chair of an independent inquiry into the links between OOHC and custody ([www.prisonreformtrust.org.uk/carereview](http://www.prisonreformtrust.org.uk/carereview)).

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<sup>51</sup> It also looked at identifying resilience factors to reduce the likelihood of offending; features of the care and justice systems that might contribute to offending and the criminalisation of children in care; key transitional or turning points (potential opportunities for intervention); an evidence-based typology for children in care and offending; and with making recommendations for policy and practice (Schofield et al., 2012:2)



### Considering the views of children in care

The inclusion of the views of children in OOHC in contemporary research studies provides another example of agency-determined research. Most commentators acknowledge that notwithstanding the difficulties of obtaining access and the sensitivity of the issues raised in talking to children in OOHC, there are ethical, practical, therapeutic and legal reasons to incorporate children's views in research (Berridge 1994; Munro 2001; Poulson 2000; CREATE 2004; Sinclair et al., 2004). Despite international safeguards on children's right to be involved in matters affecting them however,<sup>52</sup> children in care repeatedly report not feeling involved in decision-making (Wilson and Conroy 1999; NSW CSC 2000d;). Moreover, the few studies that have been undertaken of OOHC cohorts generally involve unrepresentative or small sample groups and inadequate response rates of below 10% (Sinclair et al., 2004).

Talking with children has been posited as providing a particularly useful means by which to understand the complex relationship between care and offending (Schofield et al., 2012:30). My analysis of the literature however, strongly suggests that in this area, historic concerns that the child welfare system is one 'in which the voice of those it claims to serve are least likely to be heard' (Sari and Hasenfeld, cited in Platt 1977:191), may be a valid criticism today. The lack of children's views is particularly noticeable in the context of offending in OOHC in NSW. Very few studies incorporate this perspective. For example, Australia's peak agency representing children in OOHC - the CREATE Foundation - has published just a handful of reports that touch on the over-representation of children in care in the CJS. A paper purporting to examine the 'issues regarding children and young people in OOHC who may, or have, come into contact with the NSW Juvenile Justice System' (Poulsen 2000) was written at the direction of the child welfare Department as part of the agency's funding agreement to address recommendations arising from a 1998 evaluation of the service. Far from analysing the systemic issues however, the report was preoccupied with CREATE's internal operations and external reputation and made few practical suggestions on how to improve the situation for incarcerated children. Moreover, the report was based on a very small number of interviews. Only ten stakeholders were interviewed: just two had been in OOHC.

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<sup>52</sup> For example, Article 12 of the United Nations *Convention on the Rights of the Child (UNCROC)* enshrines the right of children to express their views and for these to be given due weight in accordance with their age and maturity. See too the NSW *Children and Young Persons (Care and Protection) Act 1998*.

Although, as will be discussed later in this thesis, the paper was written in the midst of an intense focus on care-criminalisation brought about by a series of independent inquiries (see for example NSW CSC 1996b; 1999a; NSW Ombudsman 1996; Wood 1997; NSW Government 1997) the report did not canvass the views of children in detention. This was attributed to ‘time constraints, lack of organizational research policy, departmental research requirements and a lack of information on demographic data about young people who have experienced joint juvenile justice and care experience’ (Poulsen 2000:6). Almost a decade later, CREATE’s *2008 Report Card*, which *did* include feedback from children in care, found that 19% of the careleavers sampled had been involved with juvenile justice (McDowall 2008:44). The following year CREATE reported that over 45% of male and almost 22% of female careleavers had been involved with the CJS, compared to 5 in 1000 children in the general population (McDowall 2009:62). No comments were made regarding the differences in the figures reported in the two reports. CREATE has not published any further research on care-criminalisation, although the statistic on male involvement in the justice system has been repeated in virtually every media release and funding drive the agency has produced since then.

### *Knowledge of the issues*

Even when children’s views are canvassed, much depends on the questions presented to them and the interviewers’ own knowledge of the subject matter. Children’s own awareness and knowledge and of the issues involved cannot be guaranteed. This is demonstrated by a recent English study whose qualitative research of the views of children in care aged 13-17 regarding the care–crime connection provides very little reassurance on this point. Blades et al., (2011) interviewed 23 children who had been in care for at least 12 months. While almost 80% of the cohort had had some contact with the CJS and over half had been incarcerated at some point, the sample also included some children who had never been involved with the CJS (Blades et al., 2011:55). Unsurprisingly, ‘children’s views on whether being in care might contribute to the likelihood of offending were diverse and often complex or contradictory’ (Blades et al., 2011:2). While they presented a clear picture of the problems of the care system, in terms of infrequent contact with family and friends, poor relations with social workers, peers and carers and the effect of frequent placement breakdowns, there was ‘less clarity about what helped in relation to preventing reoffending’ (Schofield 2012:30). In Blades’ study, the reasons given for offending and the role that the children attributed to the care

environment as a catalyst for crime, depended on when the offending had commenced. For example, almost all of the children who had *not* offended prior to coming into care in early adolescence, typically at age 10-13 years of age, ascribed their offending to the influence of the care system. They pointed to the loss of or infrequent contact with parents and siblings, poor relationships with some carers, difficult relationships with peers (including peer group pressure) and multiple placements of varied type and quality, as reasons for their involvement in delinquent behaviour. Some also indicated that their offending arose because their needs for items such as toiletries were not being met by the care system (Blades et al., 2011:3). This group tended to have had experiences of residential or group home care, with some experiencing multiple placements. Significantly, the children were predominantly in custody when interviewed – suggesting either that they had been remanded in detention, that they had committed more severe offences that attracted a custodial sentence, or that they were negatively affected by the ‘foster-care bias’ identified by Conger and Ross (2001) such that they received disproportionately harsh sentences for minor offences because of their care status. Regrettably, the study failed to explore these possibilities further, ignoring the opportunity to enquire into the type of offence committed and whether the care system itself was a trigger for the offence through, for example, engaging in criminalisation of children in care by reporting minor conduct to police or initiating arrest - as has been identified in other studies (HoC 2013).<sup>53</sup>

### *Politics and selection bias*

My analysis of the literature revealed that the issues and the questions asked of children – and the researchers’ response to revelations – can be highly political. This is demonstrated in a study by the UK Office of the Children’s Commissioner, *‘I think I must have been born bad’* (Berelowitz and Hibbert 2011). The report examined the emotional wellbeing and mental health of children in the youth justice system. Citing prison staff estimates that between 30-50% of the gaol population came from a care background, the

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<sup>53</sup> In contrast, those who had offended prior to coming into care (comprised those who had experienced both foster and group or residential care) cited peer pressure, difficulties controlling anger, lack of money, boredom and living in a high crime area as key factors in their offending (Blades et al 2011:3). A minority – who had typically offended prior to entering care in their early teens and had experienced a mixture of group home and foster care placements - believed that being in care had had no influence on, or had actually reduced, their offending. They blamed a lack of money and peer pressure – from siblings and children outside the care system – as drivers for their offending (Blades et al 2011:3).

authors commented that ‘none of the young people we spoke to sought to blame others for their criminality. All saw themselves as responsible for the trouble they had caused and several stated explicitly that they were simply “bad” and had been born so and therefore there was nothing that anyone could have done to prevent their offending’ (Berelowitz and Hibbert 2011:61). Comments such as these should alert researchers to the stigmatisation and hopelessness experienced by children in care, however this is only infrequently discussed in the literature. Indeed, other than the NSW Community Services’ Commission’s examination of the pathways from care to involvement in the CJS (NSW CSC 1996b; 1999a) there are no known studies or reports that have examined the impact of adult provocative or abusive behaviour on a child’s subsequent offending. The Commission found that staff behaviour is often a significant factor in the escalation of incidents in OOHC (NSW CSC 1999a). Workers may provoke disputes, insulting or ‘hassling’ children until they react. Staff then respond by calling police and insisting on criminal charges for assault to be laid. Interviews with children have also indicated that many children feel deep anger and frustration at not being listened to, and which if it spills over into outbursts directed at staff or co-residents (UK CfSJ 2008) can spark a confrontation that may ultimately lead to police involvement and to the criminalisation of an already victimised child. While children’s views on aspects of the care system have been investigated in some government and watchdog agency reports (NSW CSC 2000d; QLD CG 2006; 2008; 2013; NSW CG 2010a) the factors giving rise to their criminal activity in care in NSW are rarely explored in any depth – if at all.

Research can also closely mediate or translate the views and experiences of children in care. Methodological difficulties in attracting and retaining a highly transitory study population that invariably encapsulates many of life’s challenges - such as mental health problems, poor literacy, homelessness, addiction and delinquency - and who often have few community or social ties, can persuade the researcher to rely on less problematic cohorts for information. Heavy reliance is also placed on caseworkers to vet potential recruits into research studies. While this is undoubtedly intended both to provide an easy access point for scholars and to shield vulnerable children, it places tremendous power in the hands of the worker or agency by positioning them as a gatekeeper to children’s experience. As Australian researchers Cashmore and Paxman (1996) acknowledged in their longitudinal study of wards leaving care, differences ‘in the level of enthusiasm and encouragement expressed by District Officers when asking the wards to participate’ could

have led to a bias in the interview sample. 'Although the staff were generally very cooperative' the researchers noted, 'a few District Officers were not so helpful. One office denied us access to a state ward deciding on their behalf that they would not be interested in participation... In several other offices it took quite a lot of persistence to get access to the state wards; often telephone calls and faxes were not returned' (Cashmore and Paxman 1996:12). This was also seen in the 2012 *TACT* report (referred to previously in this chapter), where children in OOHC were accessed through their social workers or youth offending teams and offered gift vouchers in exchange for their participation (Schofield 2012:17).<sup>54</sup>

A serious limitation of this methodology is that the children's involvement is entirely dependent on their connections with the Department or non-government agency responsible for their care - excluding those children with whom the Department or agency does not have a relationship or regular contact. It is probable that those children deemed too 'difficult' by an agency, such as those in custody or with a mental health problem, those incapable of understanding the consent form or procedures (for example those with an intellectual disability), and those without a caseworker, runaways and the homeless - in fact, the very children most at risk of being involved with the CJS - like most similar research, were excluded from participation in the study. Children who are 'more disenchanted with the Department' may also be cynical about research studies, or unwilling to cooperate. As was found in NSW, the resulting self-selection may leave researchers 'with the 'very best' cases, in which case the needs expressed by the young people in the study may well under-estimate the needs of young people' in general (Cashmore and Paxman 1996:12). As acknowledged in the Canadian longitudinal studies of children leaving care, this selection bias can mean that the experiences of an 'alumni' group - those in touch with services and who, presumably, owe them some goodwill - may present substantially better results than might be the case if all children in care were

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<sup>54</sup> The authors adopted a 'multi-level, multi-method approach' that comprised a literature review, survey of local authority services (who provide the care in England) and youth offending services, as well as semi-structured interviews with 100 children from four areas. The children had been in care for at least 12 months and from a variety of placements eg foster care, independent living and residential unit. They were drawn from two urban areas with ethnically diverse populations, and two smaller shire counties. The children included those with no contact with the CJS (32); those who had 'significant' contact with the CJS, had been convicted and appeared before a court (33); and a comparison group of 35 offenders who were not in OOHC. There was a ratio of 70:30 male to females (Schofield 2012:16).

surveyed (Pecora et al., 2005:11fn33).<sup>55</sup> This may skew the results and present a false picture of the extent of the involvement of children in care in the justice system.

Selection bias is also evident in the South Australian study *Children in Foster Care* (Barber and Delfabbro 2004). The study examined placement movements and psychosocial outcomes of children in foster care and involved data analysis for 235 children in care who had been referred for a new placement between May 1998 and April 1999. Although the authors originally intended to examine re-offending behaviour by children aged 10 or older, they ultimately determined to exclude this measure, arguing that there was little point in including the analyses as it occurred so rarely in their sample. Barber and Delfabbro's analysis however, was flawed by their methodology and their own apparent lack of understanding of criminology and youth justice. They excluded children on detention orders and those in supported accommodation services from their sample (Barber and Delfabbro 2004:64),<sup>56</sup> essentially the children already involved in CJS as well as those most likely to offend. The ramifications of this decision in respect to the offending data were not however, discussed in the study. Furthermore, the study relied on departmental child welfare staff to identify the frequency of children's conviction rate in the 12 months prior to the study and to complete a checklist indicating the type of offence that had occurred. The researchers seem not to have considered the limited awareness such staff might have about these children, particularly those who had undergone frequent placement changes. Caseworker knowledge of children in OOHC must be seen as heavily qualified given the frequent worker turnover, lack of caseworker allocation in care and poor official record keeping. Moreover, the pressure that could be placed on caseworkers' by the Department not to report negative offending outcomes, was not considered. Barber and Delfabbro's dismissal of offending outcomes is particularly remarkable given the emerging evidence from contemporary international studies, of which it must be assumed the Australian researchers were familiar. US researchers had published several significant longitudinal studies that described the criminal involvement of children leaving foster care (Courtney et al., 1995; Courtney et al., 2004) while the over-representation of foster children in the CJS was also known

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<sup>55</sup> The Casey Foster Care Alumni studies omitted involvement in the justice system as a measure, recording however, parental delinquency to determine differences in child outcomes based on reasons for entry to care.

<sup>56</sup> It also excluded young children; those whose placements were of less than two weeks duration or those referred for family preservation services.

(Ross 2001; Conger and Ross 2001; Ross and Conger 2002). In the UK, the disproportionate rates of delinquency among children in care had led to a whole-of-government move to reduce the discrepancy, with the announcement of national targets to address the problem. Given these international findings and program initiatives, the dismissal of the offending data by the Australian researchers is puzzling.

The Barber and Delfabbro study has been highly influential in the Australian context. According to the National Child Protection Council Clearinghouse (Bromfield and Osborn 2007) of the 21 Australian studies that have examined the outcomes for children and children in care to 2006, 11 were based on data collected for the South Australian longitudinal study. While the Clearinghouse determined that the resulting studies were ‘methodologically rigorous’, it was noted that the studies were limited by the fact that so much of the evidence comprised a single sample drawn from one jurisdiction (Bromfield and Osborn 2007:6). The downplaying of the offending data in the original study therefore must be seen as having influenced the findings of subsequent outcomes research, perhaps explaining why Australian commentators have been so slow to identify the care-criminalisation that has been the subject of considerable international speculation and analysis. It also renders the conclusions of both the original study and those derived from it as suspect: if the groups most likely to experience negative outcomes in care are excluded from analysis, this must colour the positive outcomes reported for the remaining cohort.

Children in OOHC, in detention or those who are homeless are less likely to achieve on a range of measures, whether education, mental health, placement stability and well-being or connection to foster families and communities. Removing them entirely from consideration in research studies downplays their experience while artificially inflating the success of their peers, and rendering the care system less accountable for the outcomes it produces. Ironically, such selection bias is encouraged by ethical research guidelines that seek to protect highly vulnerable potential study participants from invasive research. Excluding mentally ill or incarcerated populations from consideration however, renders them invisible to the researcher and effectively denies their experience. This may well make the researcher feel better, but it is a uniquely academic exercise. Children in this situation experience the worst invasions of their privacy – they may be monitored 24 hours a day and regularly strip-searched as a pre-requisite to receive visits - but their

reality is not examined by the researcher. They may not be asked the questions so that they are not disturbed by the research process, but their experiences of violation continue regardless of such academic censorship.

## CONCLUSION

The child welfare sector's reaction to research studies can reveal much about the highly political nature of the profession. The US Massachusetts Institute of Technology reports (Doyle 2007a; 2007b) were welcomed for providing 'the first viable, empirical evidence' of the benefits of keeping children with their families (Strangler, Executive Director of the Jim Casey Youth Opportunities Initiative, in Koch and Ghianni, *USA Today* 3 July 2007). Critics of the system however, used its findings to argue that the Department was too quick to remove children and failing to evaluate families' needs and provide monitoring to ensure children's safety. As Richard Wexler, the Director of the non for profit advocacy group, National Coalition for Child Protection Reform said, the Department's welfare mentality 'can be boiled down to one sentence – take the child and run' (in Proctor, *Courant* 29 July 2007).

In contrast, the UK's TACT report was championed by those who believed that the system ought not be blamed for the high offending rates of children in care. This view was encouraged by the report's methodology, which presented only a handful of studies that focused specifically on care-offending outcomes (Taylor 2006; Darker et al., 2008; Hayden 2010; Blades et al., 2011) and was localised to the UK. Compelling academic material on the nexus between care and crime that has emerged from the USA, Canada and Australia was not examined. The omission of this material renders the report's key message – that the care system is a stabilising or protective factor that can protect against the likelihood of offending behaviour – of limited worth. If the positive characteristics of the care system that are said to counter against the development of offending behaviour were guaranteed, the argument that the system is a mitigating factor against offending would be compelling. But more often than not, in care systems across the world, good practice is the exception rather than the norm. The system's practical shortcomings have the potential to be so undermining that it is doubtful how it's supposedly protective mechanisms, however argued, could in reality ever operate to inoculate against the development of offending behaviour. Thus, while 'sensitive parenting in a stable placement with good professional support from a range of agencies, including education



and health' (TACT *Media Release* 16 January 2012) might well reduce the risk of offending, it is too often the case that a stable care experience is not the common experience of many children in OOHC. Accordingly, for those children who have experienced abuse or neglect, who present with emotional and behaviour problems that 'overwhelm carers' best efforts to help' and who do not receive 'sensitive and committed care ...the prospects are likely to be bleak' (Schofield et al., 2012:7).

While the cautions outlined in the research above are valid, what is not valid is assuming that the OOHC system is *not* associated with crime. The best that can be said is that there are difficulties to be faced in trying to establish causation.

As the following chapters explore, there are limitations in the literature that need to be acknowledged when considering the role played by the OOHC system in the criminalisation of children. For example, while the OOHC population's 'backgrounds of deprivation, poor parenting, abuse and neglect [are] factors that together are risk factors for a range of emotional, social and behavioural difficulties, including anti-social and offending behaviour' (Schofield et al., 2012:1) and have an important effect on what happens to children (Sinclair et al., 2004), this should not be seen as the whole story. Concentrating on child or even family characteristics can confuse the issues that should be examined and so is a flawed or at least unhelpful approach (McDonald 1993; Fanshel and Shin 1978). For example, in 2001 the UK's Youth Justice Board (YJB 2001) reported that children in OOHC were disproportionately likely to leave school without qualifications, become unemployed, become young parents and to commit offences that result in prison sentences. The report concluded that this was due to the intensity in which the risk factors cluster together in children's lives, rather than their OOHC status being an additional risk factor in itself. More sophisticated studies undertaken in recent years however, have concluded that the difference in offending rates may, to some extent, be attributable to differing responses to certain behaviour by the corporate parent.

Even if one accepts the view that children in OOHC, because of traumatic experiences and disrupted backgrounds, are essentially a pre-selected at-risk group, the State has an obligation to ensure that such disadvantage is addressed while children are in its care. As the British Columbian Ministry of Children and Family Development has stated, children's prior disadvantage does not excuse the State from the special responsibility it

owes to those in its care. '[T]his special relationship, of being 'the parent' entrusted with shaping the futures of these vulnerable youth, demands more careful assessments, so that plans of care reflect not only the past experiences of these children and youth, but their future potential' (Turpel-Lafond 2009:49). In fact, 'extra precautions must be made to avoid early criminalisation of such vulnerable young people' (UK CfSJ 2008:129). As the UK Inspector of Prisons, Nick Hardwick has stated, '...the state has few responsibilities greater than its statutory responsibility towards looked after children. Even allowing for the damage they have sustained before coming into the state's care and the challenging behaviour they may present when they do, that so many end up in custody is a cause for real concern' (in Summerfield 2011b:10). Yet, as the UK Government has concluded, 'far from compensating for their often extremely difficult pre-care experiences, certain features of the care system itself in fact make it harder for young people to succeed' (HoC 2009a:13).

In NSW, the *Task Force into residential and alternate care* (NSW Parliament 1982) rejected suggestions that children's poor outcomes were the result of pre-existing conditions and dismissed welfare agencies argument 'that they have not contributed' to the damage suffered by children in OOHC. The Taskforce considered that *such claims cannot be supported* by the available evidence within the field of out of home care research' (1982:79 – my emphasis). In Australia, the 'appalling state' (ALRC/HREOC 1997:5) of care and protection systems noted almost two decades ago, systems that often failed 'to provide an environment conducive to a child' (ALRC/HREOC 1997:4:46) and were shown to contribute to the over-representation of children in OOHC in the CJS, may still pertain.

## CHAPTER FIVE: THE NSW CHILDREN'S COURT FILE AUDIT

### METHODOLOGY

This chapter presents the findings of a review of 180 children's criminal court matters and observational research conducted at the Children's Court located in the western Sydney suburb of Parramatta, New South Wales ('NSW'). As discussed in Chapter One, 180 files were selected from an 18-month period spanning 2008-2010. A number of the static risk factors (i.e., fixed characteristics that cannot change over time) that have been associated with juvenile offending were examined, including age at first contact with the justice system, the number of contacts with the justice system and offence type (Chen et al., 2005).

As an experience of trauma is also strongly associated with subsequent criminal activity, the prevalence in the sample of traumatic incidents was also examined (Widom 1991; Weeks 1998; Ardino 2011; 2012). A 'trauma incident' was defined as bereavement due to the loss of a parent or significant person in the child's life and/or witnessing or experiencing physical, sexual or emotional abuse. This was based on an official Departmental determination or a statement to that effect made in a written report. For the purposes of this study, the child's placement in OOHC, a history of parental imprisonment, bullying by other children or homelessness were not included in the definition of abuse or neglect. An experience of 'disadvantage' was also assessed: this was defined to include a diagnosed mental illness, intellectual disability or cognitive impairment, drug and/or alcohol dependency, poor educational attainment and/or a history of school exclusion (truancy, suspension or expulsion) and homelessness.

Given the anticipated prevalence of the cohort who had been in OOHC, specific attention was paid to 'care-specific trauma' – that occurring within or peculiar to the OOHC environment. This was defined as including abuse in OOHC<sup>57</sup>, separation from siblings and placement instability. While running away was not anticipated to be restricted to the OOHC cohort, running from care has particular negative consequences, which, as will be

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<sup>57</sup> As was the case for abuse generally, 'abuse in care' was defined as the child witnessing or experiencing physical, sexual or emotional abuse. A determination of 'abuse in care' was based on an official Departmental determination or a statement to that effect made in a written report.

discussed later in the chapter, suggested that it should be included in this definition. For this reason, running from care was defined as ‘absconding’.

While NSW research has established that most children do not commit offences and of those that do offend, very few will continue to commit crimes (Cain 1993; 1995; 1996; Chen et al., 2005) an experience in out of home care (OOHC) has been associated with juvenile reoffending (Weatherburn et al., 2007). Accordingly, close attention was paid to identification of OOHC status. Identification was based on official documentation such as copies of final care orders, caseplans and leaving care plans, a letter provided to the Court by the Department or a non-government care provider or a positive identification contained in police facts, lawyer’s submissions or judicial notes. Detailed analysis of various key pathways through the criminal justice system was undertaken to identify whether the OOHC cohort had a different experience of the justice system compared to other children. The files were closely reviewed to determine whether police and / or the Court treated the OOHC cohort differently when bail, breach of bail, referral to diversionary programs and sentencing decisions were made. Quantitative analysis was undertaken to determine whether these differences were statistically significant: chi square tests were utilised.

The chapter also contains a qualitative assessment of the file material to identify whether criminalisation of children by workers or system factors had occurred, such that certain cohorts of children were either arrested for minor matters that ought not have incurred a police response (Moore et al., 2006; Taylor 2003; 2006; Fitzpatrick 2009; Wong et al., 2009; 2010; 2014) or progressed quickly and inexorably into the criminal justice system when their peers did not. A series of vignettes are used to illustrate these common themes and to describe the key differences between the cohorts.

Demographic and key pathway information was obtained by analysing a multitude of documents commonly contained on the files. These included criminal histories tendered to the Court by the NSW Police, which contain details of all police or Court-initiated cautions, youth justice conferences (YJCs), criminal charges, bail conditions, breaches of bail and previous sentence dispositions. Warnings, which are police interactions with children for non-violent, relatively trivial offences such as swearing in public, are recorded on the police computer system but do not comprise part of this criminal history.

A Court Attendance Notice (CAN) is an alternative to arrest, issued by police to advise a person when they need to attend court. The CAN generally contains: the police version of events immediately before the person was arrested or charged (the Police Facts), details of the alleged offence[s], any existing Court orders, information on the child's social history and circumstances such as family background and employment status (the 'Antecedents'), Criminal History (including dismissed matters and sentences imposed) and the 'Reason for Bail Decision by Authorising Officer'. This is a police determination of bail and includes details of any bail granted, refused or imposed with conditions. Since 1998 it is meant to be signed or countersigned by a Youth Liaison Officer (YLO) – a police officer appointed 'to communicate effectively' with people under 25 years of age - who operate from every local area police command and deliver cautions to children and determine whether to refer them to a Youth Justice Conference (NSW Police 2014). Children's files also contained a 'Bail CAN Coversheet' which lists the alleged offence[s] and contains basic demographic information, details of Court Orders, date of Court, details of the defence lawyer and police prosecutor and whether an agency support person or family representative was in attendance. A 'Bail Undertaking Form contains the details of the conditions of bail imposed by the Court and are agreed to and signed by the young person.

For children before the Court for sentencing (n=154), additional file material was available for analysis. For example, judicial officers frequently make handwritten notes on the court papers, particularly regarding sentencing arguments put forward by both prosecutor and defence lawyers. Background reports prepared by the Department of Juvenile Justice (DJJ) also provide useful information. A background report is prepared for the Court and sets out static risk factors deemed relevant to the circumstances surrounding the commission of an offence as well as information regarding a child's family background, employment, education, friends and associates, involvement in the community, disabilities, antecedents and any other information required by the Court or thought necessary by the prosecutor (cl 34 *Children (Criminal Proceedings) Regulation* 2011). A custodial sentence should not be imposed unless the report has been considered (s25(2)(a) *Children (Criminal Proceedings) Act* 1987).

As Table 5.1 below indicates, the majority of the sample (64%) had at least one background report on file. The information contained in these reports was of a uniformly

high standard and often provided the only indication of the child's motivation to offend or explained the circumstances of an alleged bail breach such that the Court could develop an appropriate bail or sentencing response.

**Table 5.1: Reports and other information on file**

Document	Not in OOHC n=81 %	OOHC n=79 %
DJJ Background Report	68	61
DJJ Background report (delay recorded)	20	35
Other report	16	39
Character references	15	4
Letter from young person to Court	4	4

**Notes:** Percentages are to the nearest decimal point and may not add up to 100

Another 28% of files included at least one agency report from another source: these reports are requested by the judicial officer or submitted by the defence or the prosecution to assist the Court understand the background and issues affecting the child. They are commonly provided by non-government agencies that interact with the child (such as the Salvation Army; or a drug rehabilitation service) or from the Department of Community Services if a child is in care or has otherwise been reported to child protection services. Reports were also provided by health services such as JusticeHealth and various psychologists, psychiatrists and other health professionals. Finally, 4% of the files contained letters written by a child to the Court and 9% contained character references - brief statements attesting to a young person's previous employment, academic or sporting background – which are tendered by the defence and written by the accused's family, friends or employer.

## DEMOGRAPHICS

### Gender

As shown in Table 5.2 below, males comprised 71% (n=113) and females 29% (n=47) of the total sample. This is a slightly higher rate of female representation than that reported in the court statistics for the same period, where females appeared in approximately 23% of all finalised matters (NSW BOCSAR 2010b).

**Table 5.2: Demographics – total sample**

<b>Demographics</b>	<b>Total sample n=160</b>	<b>% 100</b>
Male	113	71
Female	47	29
<b>Total children</b>	<b>160</b>	<b>100</b>
<b>Where born</b>		
Indigenous	46	29
Indigenous male	27	17
Indigenous female	19	12
<b>Indigenous total</b>	<b>46</b>	<b>29</b>
Non-Indigenous male	71	44
Non-Indigenous female	24	15
<b>Non-Indigenous total</b>	<b>95</b>	<b>59</b>
<b>Australian-born total</b>	<b>141</b>	<b>88</b>
Overseas-born male	15	9
Overseas-born female	4	3
<b>Overseas-born total</b>	<b>19</b>	<b>12</b>
<b>OOHC</b>		
Non OOHC	81	50.5
OOHC	79	49.5
<b>Total children OOHC/nonOOHC</b>	<b>160</b>	<b>100</b>

**Notes:** The term 'Australian-born' cohort includes those whose country of birth was unknown. The 'non-Indigenous' cohort includes overseas-born individuals.

### Age<sup>58</sup>

The average age of the sample at the alleged commission of their current offence was 15.4 years. This was approximately 13 months younger than the average age of children with finalised matters in the Court (NSW BOCSAR 2014:84 Table 5.11). There was little difference relevant to gender, with males an average of just 2.4 months older than females (15.5 : 15.3 years). Nor was there much difference between the ages of Indigenous and non-Indigenous children, with the former just over a month older than their non-

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<sup>58</sup> The age of the current sample was determined by analysis of the age at the commission of the current alleged offence, based on police factsheets and charge material. This method was chosen to ensure consistency with the Court's practice, which determines matters based on the child's age at the time the offence was committed, rather than the age at which they appear in court. To act otherwise could result in a child being regarded as considerably older - and possessed of greater maturity and thus culpability - than was the case when the offence was committed. Thus, the Court occasionally deals with matters where the defendant is over 18 years of age, having allegedly committed an offence when he or she was still a juvenile.

Indigenous peers (15.3 : 15.2 years).

### Country of birth

The vast majority of the sample was born in Australia (88%, n=141). Twelve percent (n=19) was born overseas: children from New Zealand and the Pacific Islands comprised almost three quarters of this group (n=14). There were two refugees, both from Afghanistan, although this likely reflects an under-reporting or data gap rather than an accurate count as the family backgrounds of the offenders suggest that several of the overseas-born cohort left unsafe or war-torn environments to come to Australia.

### Aboriginality

Indigenous children comprised 29% of the sample (n=46). This rate is identical to that identified in a study of children before the Parramatta Bail Court (Wong et al., 2009) and is lower than DJJ figures that indicate Indigenous children comprised almost 36% of children remanded in custody in 2008-09 (NSW DHS 2010:28). The Indigenous group was disproportionately female compared to the Australian-born non-Indigenous group (41% : 25%).

Inaccuracies regarding Indigenous status were observed in 30% of files. In most cases the error was evident on police documentation and involved forms being left blank or erroneously recording a child as being non-Indigenous. The data from the case audit were recoded to adjust for these errors, to ensure an accurate depiction of Indigenous status was provided. This was done only after independent confirmation of status had been identified, for example, following documented involvement of the Aboriginal Legal Service (ALS), referrals to an Aboriginal-specific program or course, DJJ background reports and other agency information. Inaccurate recording of Aboriginality carries potentially adverse implications for the individual child involved and renders suspect policy and planning based on an apparent under-reporting of Indigenous status. Twenty years on from the *Royal Commission into Aboriginal Deaths in Custody* (RCIDIC 1991) that ushered in the mandatory recording of Indigenous status in the CJS, mistakes of this type should be avoided.



### Out of Home Care

An important finding was that almost half of the sample (49.5%) had been, or were currently in OOHC.<sup>59</sup> This was a higher proportion than the 34% recently identified at Parramatta Children's Court (Fernandez et al., 2014) but lower than the 69% of children deemed 'extremely likely' to be in care in a slightly earlier study comprising the Parramatta Children's Court, a regional Children's Court and state-wide bail court (McFarlane et al., 2011). The finding is important for the very small number of children in OOHC in NSW means this constitutes a gross over-representation before the Court. For example, in June 2009 just 1% of the NSW child population - approximately 18,300 children - was in care (Zhou 2010). It is not known how many children were aged 10 or above, which is the age of criminal responsibility in NSW.

There were several statistically significant differences between the OOHC and non-care cohorts in the sample. For example, the OOHC cohort was on average, six months younger than their non-care peers (15.1 : 15.6 years  $p < 0.05$ ). There was also a statistically significant difference between the cohorts in terms of Indigenous status ( $\chi^2 = 13.525$ ,  $df = 1$ ,  $p < 0.01$ ).

As seen in Table 5.3 below, almost half (44%) of the OOHC cohort identified as Indigenous compared to 14% of the non-care group ( $n=35$  :  $n=11$  respectively). This is higher than the proportion of Indigenous children in OOHC generally, of whom approximately one third identify as Indigenous (Zhou 2010). There were no significant age or gender differences between Indigenous children based on care status. However, non-Indigenous children in OOHC were over 7 months younger than their Indigenous peers in care (14.9 : 15.5 years). This was particularly pronounced amongst non-Indigenous males, who were almost 9 months younger than Indigenous males in care (14.8 : 15.5 years). There were slightly more females in the OOHC cohort than the non-care group (32% : 27% respectively) although this was not statistically significant.

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<sup>59</sup> The vast majority (90%) of the children had current legal orders while 10% of the sample had previously been in care.

**Table: 5.3: Demographics - the cohorts**

<b>Demographics</b>	<b>Not in OOHC n=81</b>	<b>% 100</b>	<b>OOHC n=79</b>	<b>% 100</b>
Male	59	73	54	68
Female	22	27	25	32
<b>Australian-born</b>	<b>65</b>	<b>80</b>	<b>76</b>	<b>96</b>
Indigenous male	6	7	21	27
Indigenous female	5	6	14	18
<b>Indigenous total</b>	<b>11</b>	<b>14</b>	<b>35</b>	<b>44</b>
Non-Indigenous male	39	48	32	41
Non-Indigenous female	15	19	9	11
<b>Non-Indigenous total</b>	<b>54</b>	<b>67</b>	<b>41</b>	<b>52</b>
Overseas-born male	14	17	1	-
Overseas-born female	2	-	2	-
<b>Overseas-born total</b>	<b>16</b>	<b>20</b>	<b>3</b>	<b>-</b>

**Notes:** The term 'Australian-born' cohort includes those whose country of birth was unknown (n=3). The 'non-Indigenous' cohort includes overseas-born individuals.

### The prevalence of trauma incidents and disadvantage

As shown in Table 5.4 (below) and according to the Children's Court files (which may underreport these incidents) a number of the sample had experienced at least one 'trauma incident' or 'disadvantage' in their life. The high rates of loss, grief and disadvantage experienced by the cohort are striking. For example, 16% experienced the death of a significant person such as a parent, sibling, carer or mentor and 39% had experienced abuse or neglect. The nature of the documented abuse varied considerably and ranged from witnessing domestic violence through to undergoing repeated episodes of serious physical and sexual abuse. Neglect most commonly involved the failure to be provided with adequate food or accommodation, a lack of appropriate adult supervision and reports of parental alcohol and drug use. Children before the Court had high truancy (44%), suspension (22%) and expulsion (13%) rates and just 27% had remained engaged in education. At least a third had attended a special behavioural school, suggesting cognitive disability. Over 20% had familial involvement with the CJS and 50% were known to use alcohol or other illegal drugs. Approximately 35% had experienced insecure accommodation or homelessness.<sup>60</sup>

<sup>60</sup> Adopting the definition used by the *Strategic Review of the New South Wales Juvenile Justice System* (Murphy 2010), homelessness was defined as staying at a friends' place, moving between relatives, living

Given the incomplete nature of the information available on the files, it is likely that these proportions are a conservative estimate of such events. For example, rates of substance use were lower than those reported by detained juvenile populations, where almost 90% reported having used cannabis and / or alcohol in the 12 months before entering custody (NSW DJJ 2003) and lower than the rates of identified clinical disorder or cognitive impairment identified amongst young people in detention (88% and 17% respectively) (NSW DJJ 2003; Kenny et al., 2006; 2008). As Baldry et al (2013) found, the majority of prisoners in their sample who had been a DJJ client and who had a disability at the time (verified from other administrative sources) had not been formally identified in DJJ or court records as having a disability.

**Table 5.4: Trauma events and disadvantage**

Characteristics	Total cohort (=160) %	Not in OOHC (=81) %	OOHC (=79) %
Abuse /neglect	39	25	53
Death of significant person	16	12	19
Mental health impairment	35	22	48
Prescribed medication	24	14	35
Intellectual disability/cognitive impairment	10	4	16
Suicide attempt / self harm	11	5	18
s32 Dismissal (Mental Health Act)	13	6	20
Alcohol or other drug use	50	49	51
Homelessness (ever)	35	22	48
Homeless at time of current offence	11	9	14
Family involvement in the CJS	21	12	29
Currently in education	27	31	23
Has attended a behavioural school	33	28	38
Truancy	44	47	41
Suspension	22	6	38
Suspension equates to end of education	u/k	u/k	8
Expulsion	13	0	27
Employment (ever)	29	31	28

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on the streets or having no fixed abode (primary homelessness); accommodation at a motel or a series of crisis services such as refuges (secondary homelessness); and long-term residence in a boarding house (tertiary homelessness).

**Notes:** Familial involvement in the CJS did not necessarily equate with imprisonment and included step-parents and siblings.

As shown in Table 5.4 (above), the OOHC cohort consistently reported higher rates of trauma incidents than their non-care peers. For example, rates of both mental illness (48% : 22%) and cognitive impairment (16% : 4%) were more pronounced, as were rates of self-harm and suicide attempts (18% : 5%), particularly for those under 14 years of age. Children in care also had a much higher rate of familial involvement in the CJS than the non-care group (29% : 12%): this was not surprising as parental incarceration has been identified as a tipping factor for placement in the care system (Phillips and Bloom 1998).

### *Care-specific trauma*

It was evident from the file audit that many of the children in the current study had not received the benefits potentially available in a protective welfare system. Care-specific factors were additional trauma incidents specific to the OOHC cohort. For example, analysis of the files revealed that 24% of the OOHC cohort had been abused in care<sup>61</sup> and 43% had absconded from care. Key transition points ‘such as moving from school to work, from family to care or from care to independent living’ (Schofield et al., 2012:30) were observed to initiate or aggravate offending. Those of leaving care age for example, were likely to experience homelessness or unstable accommodation and to have poor education outcomes as they exited the care system. However, care-specific trauma and disadvantage was not restricted to children leaving care: children experienced problematic care throughout their time in OOHC. Placement instability was particularly noticeable. For example, the OOHC cohort spent 7.3 years in the welfare system on average and almost a third (n=22) of the children had experienced three or more placements during their time in care. In contrast to local and international research which has found that older children are much more likely to experience placement breakdown (Pardeck 1983; 1985; Hartnett et al., 1999; Webster et al., 2000; Smith et al., 2002; Barber et al 2001; Ward and Skuse 2001; Wulzyn et al., 2003; Sinclair et al., 2004) almost half of the cohort with multiple placements had entered care before the age of five. This group averaged just under nine placements: or approximately one new placement every year they were in the child welfare system. This finding was concerning, for placement

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<sup>61</sup> As discussed previously in this chapter, ‘abuse in care’ was defined as the child witnessing or experiencing physical, sexual or emotional abuse. A determination of ‘abuse in care’ was based on an official Departmental determination or a statement to that effect made in a written report.

instability increases the risk of delinquency (Ferguson 1966; Kraus 1981; Widom 1991; NSW CSC 1996b; Jonson-Reid and Barth 2000a; 2000b) at least for males (Ryan and Testa 2005) and has been associated with incarceration for a violent or serious offence during adolescence (Jonson-Reid and Barth 2003).

Additional trauma was evident in the OOHC cohort's separation from family, particularly siblings. Over half (57%) of the children had been separated from their siblings – either because they had been placed separately in care, or in a minority of matters (5%), because the other siblings had remained with their parents although the child in question had been removed. While their siblings had also been placed in care in 47% of cases, few of the cohort had been placed together. Just 4% of children were living with their siblings in their current placement.

Young children in the sample appeared particularly at risk of poor outcomes. For example, as shown in Table 5.5 (below), the *doli incapax* group (those aged 13 years and under) experienced a multitude of trauma incidents both prior to entering care and afterwards. Taken into care at approximately 6 ½ years of age, they remained in OOHC for an average of 6.75 years. They experienced an average of eight placements - more than one a year - during that time. A third of the group had been abused in care and a quarter had attempted suicide. Over 90% of the group had committed a care-related offence, that is, they had offended in and because of, the OOHC environment. Having come into contact with the CJS, they were likely to be remanded in custody: 75% of the cohort had spent time on remand.

While caution should be exercised given the small size of the cohort (n=12), the poor outcomes for this age-group suggests that great care needs to be taken if young children are not to be further disadvantaged by the OOHC system that is meant to protect them. This is supported by the lack of agency involvement in the lives of these vulnerable children: although 58% of the children were under the Minister's Parental Responsibility until age 18, in over a third of the files there was no evidence of assistance being provided by the child welfare department or non-government organisation (NGO) at all. That is, the children were not supported at the police station or at Court and no background report or other documentation was on file. In another third of cases, this had led to complaints about the departmental inaction by other agencies, such as police, juvenile justice or a

legal service. Just six (50%) of the doli incapax cohort were accompanied at Court by a departmental or NGO worker and an agency report or letter was evident in just five cases (42%).

**Table: 5.5 Care-specific trauma and disadvantage – the doli incapax cohort**

Characteristics	Doli incapax cohort n=12
Male	66%
Female	33%
Indigenous	42%
Family involvement with CJS	50%
Age at entry to care	6.3 years
PR till 18	58%
Time in OOHC	6.75 years
No. of placements (average)	8
Experienced abuse in OOHC	33%
Care-related offending	67%
Age at commission of current offence	12.6 years
Absconding history	67%
Attended a behavioural school	42%
Truancy	50%
Suspension	42%
Expulsion	42%
Homelessness	42%
Death of significant person	8%
Suicide attempts / self-harm	25%
s32 dismissals (Mental Health Act)	17%
Young person in custody (remand)	75%
Separated from siblings	50%
Siblings in OOHC	50%

## PATHWAYS THROUGH THE CRIMINAL JUSTICE SYSTEM

### Age at first contact with the criminal justice system

As discussed earlier in this chapter, the OOHC cohort was six months younger than the non-care group when they allegedly committed the offence that brought them before the Children's Court. This was a statistically significant difference ( $p < 0.01$ ).

Another statistically significant difference between the OOHC and non-care cohorts was observed in relation to the mean age of first contact with the CJS ( $p < 0.01$ ). As discussed previously, the age of first contact with the CJS was determined by examining each child's criminal history. In most cases, a child's first contact with the CJS was by way of a police caution or police referral to a youth justice conference. In some cases however, a child's first contact with the CJS was by way of a charge, with no diversionary option utilised. The reasons for this and its consequences, are examined later in this section.

As shown in Table 5.6 below, the OOHC cohort first became involved with the justice system an average of 9 months earlier than the non-care group (13.4 : 14.2 years). The OOHC cohort also comprised twice as many young children than the non-care group. While almost 11% of the overall sample was 13 years of age or younger, this *doli incapax* group (discussed above) comprised 15% of all children in the OOHC cohort in this study, compared to just 6% of the non-care group.

Analysis by gender revealed further differences: males in OOHC were involved in the CJS one year earlier than non-care males (13.3 : 14.3 years): this was statistically significant ( $p < 0.01$ ). Females in OOHC were involved with the justice system 2.4 months earlier than non-care females (13.8 : 14 years) however this was not statistically significant. In an unexpected finding, Indigenous children in OOHC were 3.6 months *older* than Indigenous children not in care (13.5 : 13.2 years) whereas non-Indigenous children in OOHC were almost 11 months *younger* than their non-Indigenous, non-care peers (13.3: 14.2). It is possible that the OOHC system may have acted as a protective factor in respect of Indigenous females, for unexpectedly, this group was 6 months older at first charge than Indigenous females who were not in care (13.9 : 13.4 years).

**Table 5.6: Average Age of 1<sup>st</sup> contact with the Criminal Justice System (CJS) (in years)**

1 <sup>st</sup> contact with the CJS	Not in OOHC n=81 Years	OOHC n=79 Years
<b>Total cohort</b>	<b>14.2</b>	<b>13.4</b>
Male	14.3	13.3
Female	14.0	13.8
<b>Indigenous total</b>	<b>13.2</b>	<b>13.5</b>
Indigenous male	13.0	13.3
Indigenous female	13.4	13.9
<b>Non-Indigenous total</b>	<b>14.2</b>	<b>13.3</b>
Non-Indigenous male	14.3	13.3
Non-Indigenous female	14.0	13.4
<b>Overseas-born total</b>	<b>14.3</b>	<b>13.0<sup>62</sup></b>
Overseas-born male	14.4	12.0
Overseas-born female	13.5	13.5

Evidence of these age discrepancies warrants further investigation as to their effect, notwithstanding the small sample size involved. The difference between the cohorts is concerning, for the age of first contact with police is a key indicator of ongoing contact with the justice system: the earlier contact, the more contact over a child's lifetime is likely (Chen et al., 2005; Vignaendra and Fitzgerald 2006; Baldry and Dowse 2013). It is also an unexpected finding, given that the doctrine of *doli incapax* provides that a child under 10 years of age in NSW is 'incapable of crime' (s5 *Children (Criminal Proceedings Act)* 1987) and that the prosecution is required to dispel this presumption for a child aged between 10 – 14 years of age.

### Age at 1<sup>st</sup> charge

Analysis of the criminal histories also provided information on the age at first criminal charge. As shown in Table 5.7 (below), the OOHC cohort was considerably younger on average – by almost 10 months - than other children in the sample when children incurred their first charge (13.9 years : 14.7 years). This difference was statistically significant ( $p<0.01$ ). Males in OOHC were also younger than their non-care peers: again, the difference was statistically significant ( $p<0.01$ ).

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<sup>62</sup> The OOHC overseas-born cohort comprised just 3 individuals: one male and two females.



**Table 5.7: Average Age at 1<sup>st</sup> charge (in years)**

Age at 1 <sup>st</sup> charge	Not in OOHC n=81 Years	OOHC n=79 Years
<b>Total cohort</b>	<b>14.7</b>	<b>13.9</b>
Male	14.8	13.9
Female	14.5	14.1
<b>Indigenous total</b>	<b>13.7</b>	<b>14.0</b>
Indigenous male	13.7	13.9
Indigenous female	13.8	14.1
<b>Non-Indigenous total</b>	<b>14.7</b>	<b>13.9</b>
Non-Indigenous male	14.8	13.8
Non-Indigenous female	14.5	14.1
<b>Overseas-born total</b>	<b>14.8</b>	<b>13.0</b>
Overseas-born male	14.9	12.0
Overseas-born female	14.0	13.5

### Time from first contact to first charge

As indicated in Table 5.8 (below), groups within the sample varied in the time they took between their first contact with the CJS to their first charge. The OOHC cohort progressed from first involvement in the justice system to first charge more quickly than their non-care peers (4.8 : 6 months) although this was not statistically significant. In fact, the OOHC cohort incurred their first charge almost 4 months before the non-care group had come to the attention of the CJS.

**Table 5.8: Average Time between 1<sup>st</sup> involvement with the CJS and 1<sup>st</sup> charge (in months)<sup>63</sup>**

Age	Not in OOHC n=81 Months	OOHC n=79 Months
Total cohort	6.0	4.8
Male	6.0	7.2
Female	6.0	3.6

**Notes:** Where a child's first contact with the CJS was by way of a charge rather than an alternative disposition such as a caution or referral to a youth justice conference, this was coded as 0 months in terms of time taken to move from 1<sup>st</sup> CJS to 1<sup>st</sup> charge.

<sup>63</sup> Further analysis was not conducted for the OOHC overseas-born cohort due to the small number (one male and two females).

While it had been assumed that a child's first formal involvement with the CJS would, in the vast majority of cases, begin with a police caution, a hierarchical progression from police caution to charge was not observed in the current study. Rather, many children did not receive the benefit of a police caution before incurring their first charge, as seen in Table 5.9 (below).

**Table 5.9: Criminal History**

<b>Criminal history</b>	<b>Not in OOHC %</b>	<b>OOHC %</b>
No alternate Court history	16	25
Prior cautions only	11	13
No prior involvement	30	6
Previous charges	60	81

For a quarter (n=20) of the OOHC cohort, their first involvement with the justice system led to a charge rather than to the imposition of a police caution – this compared to just 16% (n=13) of the non-care group. The OOHC cohort had considerably higher rates of previous charges than the non-care group (81% and 60% respectively); that is, they had a prior criminal conviction on record. Just 6% of the OOHC cohort had no prior criminal record, compared to 30% of their non-care peers.

This initially suggested that the OOHC cohort was more delinquent than the non-care group. However, further analysis revealed that the severity of offence was not sufficient to account for the cohort's exclusion from a caution or a referral to a pre-Court diversionary option.<sup>64</sup> Indeed, the OOHC cohort's offences were broadly consistent with those committed by the non-care group: with the most common charges incurred by both cohorts comprising assault, damage property and assault, break and enter and damage property.<sup>65</sup> These offences were generally consistent with the most common offences heard in the NSW Children's Court (NSW BOCSAR 2014) and in terms of severity of

<sup>64</sup> This finding should be interpreted with caution as it is based on an assessment of the severity of the current offence. Children could however, be excluded from diversionary options such as police cautions if they had exceeded the number permitted under legislation or if their individual criminal histories contained violent offences. It was not possible in this current study to assess each child's criminal and/or bail histories to determine whether this was the case.

<sup>65</sup> The most serious offence only has been recorded, although children may have been charged with multiple offences.

offence, would not necessarily have warranted exclusion from the police caution or YJC diversionary schemes.

### Care-related offending

There were other differences between the cohorts. At the time of the current offence that brought them before the Court, almost half (46%) of the OOHC cohort was living in a group home residential placement and another 30% were in kinship placements.<sup>66</sup> A key observation was that many children in OOHC came into contact with the CJS, were arrested and charged and subsequently remanded in custody, for offences that arose out of and were unique to the care environment. In all, 65% (n=51) of the OOHC cohort had engaged in care-related offending (discussed in detail in the next paragraph) at some point in their criminal histories.

The type of offence that occurred in the care environment is set out in Table 5.10 (below). Of the OOHC cohort's current matters before the Court, 35% (n=28) involved offences that were directly attributable to the child's placement. Almost half of these matters involved damage to property and one-third involved assaults against staff, co-residents or kinship carers. In 14% of these cases the disturbances in the care environment also led to additional charges of assault police and/or resist arrest being laid.

**Table 5.10: Offences in the care environment**

Offences	Number of OOHC cohort involved in care-related offending (n=28)	% of OOHC cohort
Assaults	8	29
Damage property	8	29
Assault and damage property	4	14
Take and drive vehicle	4	14
Larceny	3	11
Offensive language	1	1

**Notes:** Percentages are to the nearest decimal point and may not add up to 100. The most serious offence only has been recorded, although children may have been charged with multiple offences.

Only one of the children convicted of a care-related offence received a custodial sentence.

<sup>66</sup> Another 8% had remained in their parent's daily control and custody (although this group was generally under the Parental Responsibility of the Minister for Community Services). The remaining children were living in refuges (6%), in foster care (4%), had self-placed (4%) or were in custody (1%).

Three matters were dismissed at hearing or withdrawn – but not until two of the children had spent at least three days in custody. Care-related offences were dismissed pursuant to s32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW)<sup>67</sup> in 15% of matters, indicating that those involved were more properly responded to by the mental health system rather than the CJS. Two of the children (girls aged 12 and 16 years) had spent in excess of three weeks in custody by the time their matters were dismissed. Both of the children had attempted suicide in custody. Between them, they had accrued sixteen s32 dismissals in the previous six months alone. As will be discussed later in this chapter, these cases raise concerns about the suitability of mental health diversion and the level of appropriate support in the community needed to make them work.

Care staff commonly cite work health and safety legislative and regulatory requirements to argue that they have no choice but to call the police in response to children's challenging behaviour. The perverse implications of this regime of reporting are also discussed later in this chapter.

### Custodial remand

The current study assessed whether a child had spent time in custody on remand in order to determine whether 'the decision to remand anticipates (or perhaps influences) subsequent sentencing decisions' (King et al., 2005:9). Almost 70% of the total cohort in this study had spent time on remand for the current offence that brought them before the Court. Yet just 14% of the children who were remanded in custody ultimately received a control order for the offence. This low remand-to-sentence rate suggests, as some commentators have argued, 'that remand is being used inappropriately...or serving as a substitute for sentenced imprisonment' (King et al., 2005:9).

As seen in Table 5.11 (below), children in OOHC were more likely to be placed on remand than the non-care cohort (75% : 62% respectively). This was a statistically

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<sup>67</sup> The Act operates as a de facto 'relief valve' to permit the humane disposition of cases through the mental health system rather than through the blunt instrument of the criminal law (Howard and Westmore 2010:718) and permits a Magistrate to adjourn proceedings, grant bail or dismiss a charge either unconditionally or on certain conditions (which generally require the child to be placed into the care of a responsible person, attend a medical assessment or both). A s32 or s33 order can be made in respect of defendants thought to be suffering from a mental illness or condition, including a developmental disability and for those deemed 'mentally ill' and who require care, treatment or control to protect either themselves or others from harm.

significant difference ( $\chi^2= 8.002$ ,  $df=1$ ,  $p<0.01$ ). Certain groups within the OOHC cohort were further disproportionately represented amongst the children on remand. For example, 75% of the OOHC cohort aged 10-13 years (the *doli incapax* group) were remanded for their current alleged offence compared to 60% of the non-care group.<sup>68</sup> Given the observation of the *Wood Special Commission of Inquiry* that 10-12 year olds spend more time in detention than other children (Wood 2008:558), further investigation of the impact on detention on very young children is warranted.

**Table 5.11: Custodial remand**

Total cohort n=160	Not in OOHC n=81	OOHC n=79	Non-OOHC Doli incapax n=5	OOHC Doli incapax n=12
68%	62%	75%	60%	75%

### *Remand following a breach of bail*

It was observed that the majority of remand episodes in the current study arose after a breach of bail. In an important finding, it was observed that police did not grant bail on a single breach of bail incident, even where the original charge was relatively minor or the breach was a technicality rather than the commission of a new offence. There was no observable difference between the cohorts in why they were breached. Children in both the OOHC and non-care cohorts were predominantly remanded after they failed to comply with a curfew, were not in the company of a parent or appropriate adult, had associated with a co-offender, failed to report to police, entered an exclusion zone, failed to reside as directed, failed to follow the directions of a parent or guardian or consumed alcohol. Children under 14 years of age were particularly affected by bail breaches: as will be explored later in this chapter, it is likely that this is due to the greater number of conditions imposed on them, the greater surveillance and reporting of breaches by both police and carers and the welfare-based nature of conditions which essentially criminalised non-criminal behaviour.

The observation that children were remanded for a breach of bail conditions rather than the commission of a new offence is consistent with NSW studies that have examined bail

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<sup>68</sup> This finding should be interpreted with caution given the limited sample size of the respective *doli incapax* cohorts i.e., 17 individuals or just under 11% of the overall sample.

refusal in NSW Children's Courts (Wong et al., 2009; Vignaendra et al., 2009). Under s50 of the *Bail Act 1978* (that was the law at the time of the study), police had the power to arrest children who have not met their bail conditions, regardless of whether the breach was brought about by the commission of a new criminal offence or a so-called 'technical breach' (Murphy 2010:102). There is no legislative provision stating that arrest on a breach of bail should be a matter of last resort (Bargen 2010:9). This has deeply offended some children's advocates who have argued that 'although police have discretion whether or not to arrest a person for breach of bail, they seldom exercise it' (Shopfront Legal Centre, cited in NSW Government 2010). Bail enforcement activity has been blamed for the growth in the juvenile remand population that occurred in the five years to 2010. This was seen in the substantial increase in the number of Court procedures for non-observance of conduct requirements that occurred although the total number of procedures against children remained static. In 2001, 6% of children coming before the Court were detained for a breach of bail: in 2010-11 it had risen to 23% (NSW LRC 2012). It has been argued these orders reflected targets in the NSW Labor Government's *State Plan* (NSW Government 2006) that sought to reduce re-offending by 10% by 2016. While it was intended that the target be met 'through extended community monitoring of those at high risk of re-offending, through more random home visits and electronic monitoring', it had a particular impact on children charged with relatively minor offences (Uniting Care Burnside 2009a:7).

### *Time on remand*

The current study revealed that the OOHC cohort spent a mean of 33.9 days on remand – almost three times longer than the mean of 12.2 days for their non-care peers. This was a statistically significant difference ( $p < 0.05$ ).<sup>69</sup> For the purposes of this study, a child was deemed to have spent one day on remand if refused bail by police, notwithstanding that the Court might have granted bail the same day and regardless of whether they were ever accommodated in a juvenile detention centre. This is because a child in such a position would have spent at least some hours under arrest in police custody, subject to deprivation of liberty and movement and may have been handcuffed or otherwise restrained. Awaiting

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<sup>69</sup> Caution should be exercised however, given the relative small sample size: analysis on length of time on remand was able to be completed for just 64 files (or 40% of the overall sample) due to limitations in the original file documentation. Of the files where sufficient information for analysis was contained, 67% (n=43) of the files were of children in OOHC and 33% (n=21) were of children not in care.

bail determination in the Court, they would have been housed in a cell; subject to video surveillance and monitoring by uniformed officers; possibly handcuffed or otherwise restrained; and subject to strip-searches.

The difference between the cohorts is consistent with the discrepancy identified by *Wood*, who found that children involved with the child welfare department spent almost twice as long in custody than those with no previous departmental involvement (Wood 2008). It also suggests that the NSW Community Services Commission's complaint – made a decade previously - that children in care experience considerable difficulty obtaining bail because of the lack of available accommodation and the 'slow response times of [District Officers]', such that children in OOHC remained 'in custody for weeks despite bail being available should suitable accommodation arrangements be made' (NSW CSC 1999a:75) – holds true today.

### Sentencing

Information on sentences imposed by the NSW Children's Court was available for 96% (n=154) of the total cohort. The remaining 4% (n=6) of matters were bail only files and had not progressed to the sentencing stage. As Table 5.12 (below) shows, the most common sentence imposed by the Court in this study was a Good Behaviour Bond, to which a range of conditions and Juvenile Justice supervision is often attached. That penalty was imposed in 42% of finalised matters. A control order or sentence of imprisonment - the most serious penalty available to the Court - was imposed in just 14% of matters. As discussed above, this low remand to sentence rate suggests that remand had been imposed unnecessarily and, as the NSW Law Reform Commission has stated, in such circumstances it is hard to see the detention of a child on remand 'as anything other than unjust' (NSW LRC 2012:71). In 12% of cases the offence was withdrawn by the prosecution, dismissed at hearing or invoked no penalty. Eighteen percent of matters in the sample were dismissed with a caution: in 34% of these cases the caution was imposed following a youth justice conference. This caution rate is generally consistent with the outcomes reported for the Children's Court: the latest comparable figures revealed that cautions comprised 13% of sentences imposed by the Court (NSW BOCSAR 2014:9).

**Table 5.12: Sentence type based on current offence – total**

Sentence	Total cohort n=154 n	Total cohort n=154 %
Matters withdrawn	19	12
S32 Dismissal (Mental Health Act)	6	4
Caution	19	12
Good Behaviour Bond	65	42
Community Service Order	5	3
Control order (custody)	21	14
Other (inc Rising of the Court / unknown)	19	12

A difference between the cohorts was observed at this point, as shown in Table 5.13 (below). The OOHC cohort received a caution in 18% of matters, the non-care group in just 8%. This suggests that a larger proportion of the OOHC offences were less serious than those committed by their non-care peers.

**Table 5.13: Sentence type based on current offence – by cohort**

Sentence	Not in OOHC n=85	Not in OOHC %	OOHC n=69	OOHC %
Matters withdrawn	10	12	9	13
S32 Dismissal (Mental Health Act)	-	-	6	9
Caution	7	8	12	18
Good Behaviour Bond	33	39	32	46
Community Service Order	5	6	-	-
Control order (custody)	11	13	10	14
Other (inc Rising of the Court/unknown)	19	22	-	-

It was also observed the cohort did not receive a single Community Service Order (CSO), compared to the 6% of the non-care group. This can be attributed to the frequency with which DJJ recommended against such an order on the basis of an offender's homelessness, mental and cognitive impairment, substance use or youth. For example, the Court was urged not to impose a CSO on a 16 year-old male in OOHC who was living in a youth refuge because of his unstable accommodation while a 17 year-old Aboriginal



girl was deemed unsuitable for a CSO because of her child-care responsibilities to her young son.

## **DISCUSSION: THE IMPACT OF OUT OF HOME CARE**

This study's finding that children in OOHC were disproportionately negatively impacted upon at various stages of the criminal justice system compared with their non-OOHC peers is consistent with Australian research that has found many charges laid against the cohort comprise matters almost exclusively arising from the care environment (Carrington 1993a; NSW CSC 1999a; McFarlane 2010; McFarlane et al., 2011; Richards et al., 2013). It is also consistent with international findings (NACRO 2003; Taylor 2003; 2006; Fitzgerald 2009; HM Inspectorate of Probation 2012). There are several factors that could account for this. In addition to pre-existing trauma experienced by many in the cohort, factors specific to the care experience, such as accumulated trauma arising from the removal process itself, could be traumatic. The NSW Department of child welfare has long been aware of this risk. In a submission to the Senate Standing Committee on Social Welfare Inquiry (1984), the Department advised that unless appropriate forms of care were given to children in OOHC, separated children typically were likely to develop the following characteristics:

*...Tries to be the centre of attention; low language skills; anxiety reactions to criticism and punishment; emotional aloofness; behavioural deviancies; behavioural outbursts; tension; nervous symptoms; excessive fears; difficulty in peer relationships; apathy; lack of drive; self-gratification behaviours...feelings of inadequacy; personal and familial identity confusion; lack of insight into adjustment problems; resentment; self-consciousness...[and a] need for dependency/distrust of adults.*

(Berry, M et al., submission to the Senate Standing Committee on Social Welfare Inquiry (1984:61).

Another care-specific factor previously identified by the NSW Department as a trigger for offending behaviour by children in OOHC was 'unhappiness in a placement leading to "acting out behaviour" (NSW DoCS 1993:10). This may result in charges of assault or malicious damage, a training manual provided to Departmental officers warned, and when

‘coupled with a unit manager’s (sic) decision to refuse to care for the ward, incarceration in a Juvenile Justice Centre may be the consequence’ (NSW DoCS 1993:10).

Separation from siblings also could cause a child great distress and contribute to a child becoming involved in the CJS. In the present study for example, several cases demonstrated that the bond between siblings was often extremely strong and that some children reacted with great hostility to being separated. This was illustrated in the example of a 13 year-old boy whose offending, according to DJJ officers, was primarily welfare-related. The boy was granted bail on condition that he stay away from his brother’s refuge (where he had been sleeping on the floor) and not contact his siblings. The child promptly breached his bail by running away to be with his 16 year-old brother, who had previously attempted suicide reportedly because of the separation. In another example, separation from their respective siblings led a 15 year-old girl to commit hundreds of dollars of property damage in her group home and a 13 year-old boy to constantly breach his bail by absconding. Children in OOHC have also blamed the loss of or infrequent contact with parents and siblings as a reason for their subsequent involvement in delinquent behaviour (Blades et al., 2011).

The nexus between OOHC and offending behaviour highlights the importance of a coordinated response from both welfare and justice agencies to the cohort’s involvement in the justice system if the accumulation of risk factors - including those peculiar to the OOHC system – are not to increase the cohort’s risk of involvement in crime and chances of recidivism. However, as the following section discusses, criminalising practices operating within the OOHC system escalated children into the CJS for offences that would not have led to police involvement if they had occurred at home. The two factors - being in OOHC and offending – then exacerbated each other. Agencies’ failure to work effectively together in the child’s best interests further contributed to their poor long-term outcomes. These included the failure to allocate children’s cases, provide reports or attend court in support, lack of interaction with other agencies and the Department’s active lobbying for children to remain in custody ‘for their own protection’, further disadvantage children in OOHC involved with the CJS.

### Criminalisation - kinship care

Some children in OOHC were criminalised due to their carers' responses to their behaviour. For example, tensions within the family unit could lead to police being called in to settle down minor incidents, only to result in children facing charges. This was demonstrated in the police response to a family argument about the treatment of head lice, where malicious damage charges were laid against a 12 year-old after he smashed a china ornament belonging to his grandmother. While police bail was granted on condition that the child refrained from destroying other property, he was thought to be excluded from the caution scheme because of the severity of the offence. Other children offended in apparent response to carer's inappropriate punishment regime, but then were faced with a punitive police response. For example, police imposed an interim Apprehended Violence Order (AVO)<sup>70</sup> on both a 13 year-old girl whose aunt had subjected her to 'unreasonable discipline' and on a 14 year-old, mentally ill boy whose grandfather had complained he was no longer permitted to use corporal punishment against the boy.

These cases illustrate the danger in assuming that relatives happily assume a carer/giver burden and harbour no resentment or ill-feeling towards a child in their care. Indeed, research has demonstrated that the opposite may be the case. As one study reported, 'assuming responsibility for a relative's children can disrupt work, marriages, plans for retirement, and the lives of other children in the household' (Philips and Bloom 1998:532). Kinship carers are more likely to lack support from their immediate families and report a significant degree of conflict with birth families (Sykes et al., 2002). They must also help children deal with their own ambiguous feelings about their family and the resulting confusion, anger, feelings of abandonment, guilt, betrayal and fear for their parents can impact on the quality of the placement (Phillips and Bloom 1998). Placement with relatives may therefore inadvertently complicate the quality of care as well as the planning process for the child (Fein and Maluccio 1992).

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<sup>70</sup> An Apprehended Violence Order (AVO) is an order of the court that restricts a person's behaviour and can be applied for by either the police or by someone who is afraid for their safety. Police make the vast majority of applications and usually there are no accompanying charges – the AVO stands on its own (NSW Parliament 2012:419). There are two types of AVO: an apprehended domestic violence order which is sought when the person in need of protection and the other person are in a 'domestic relationship' (including co-residents of residential care) and an apprehended personal violence order for those not in a domestic relationship, such as neighbours (NSW Parliament 2012:221). Every order has a common condition that prohibits intimidation, harassment or stalking of the protected person. The Court, depending on the circumstances, can impose additional conditions.

### **Criminalisation – residential care**

Children in residential care were particularly vulnerable to being placed on custodial remand. This has been attributed to both the tendency for children to ‘fall through the cracks’ (Richards et al., 2013:100) of the justice system and to the higher levels of scrutiny in residential care facilities which are more likely to identify and report breaches to police (Cruickshank et al., 2008). This pattern was confirmed in the current study, where group home staff called police for very minor matters and repeatedly reported breaches of bail conditions in circumstances where similar behaviour in a family home might go largely unremarked. It was also observed that the inappropriate placement of children with new, unfamiliar carers or co-residents could trigger offending amongst previously stable residential placements. This was seen in the case of ‘Damian’, an autistic 17-year old with a severe intellectual disability, whose stable 12 month group home placement was eroded by the introduction of a 15 year-old girl. Just one month into the arrangement, Damian accused ‘Stephanie’ of stealing his mobile phone. ‘Fred’, a new carer, called the police and Damian was served with an interim AVO.

Difficulties could arise when group home staff actively advocated that a child be returned to their original placement, notwithstanding that the carers had involved police in the first place. While this may have ensured the child has a bed outside of the juvenile detention system, the failure to implement behaviour management plans or devise alternative ways of responding to a child’s behaviour invariably led to the child appearing before the court within days, having breached their bail conditions by committing a similar offence - sometimes against the same carer or co-resident. This was seen in the case below:

#### ***DEBBIE***

*16 year-old Debbie - a non-Aboriginal girl - had been in the Minister’s care from 18 months of age. She lived in a non-government agency group home. Medical and DOCS reports said Debbie was a ‘vulnerable young person’ who had been abused and neglected in care. She had a lengthy history of mental and emotional issues, which experts testified, gave rise to her offending.*

*Debbie was charged with assault police and damage property following an altercation with her carer Linda. Police applied for an AVO on*

*Linda's behalf to allow her to continue working at the home, but prohibited Debbie from approaching her. Linda and other carers continually called the police when Debbie's behaviour became too 'difficult' for them to manage. As a result Debbie was arrested and appeared before the Court on multiple occasions.*

### *The significance of the 'domestic relationship'*

The interpretation of the legislative definition of a 'domestic relationship' may be responsible for the criminalisation of children in residential care or group home placements. In NSW, the term includes someone who is living or has lived in the same household, is living or has lived as a long-term resident in the same residential facility at another time (excluding a juvenile detention centre or correctional centre) and/or is or had been dependent on the ongoing care of the other person, whether that care was paid or voluntary (s5 *Crimes (Domestic and Personal Violence) Act 2007*). Police are required to seek orders where they believe there a 'domestic violence offence' has been or will be committed (s27). This has been interpreted to mean that police are compelled to seek orders on behalf of care workers against children (NSW DAGJ 2011:7) and has led to the situation observed in the current study where the use of family violence orders by carers has served to further disadvantage vulnerable children (ALRC/NSW LRC 2010). Agencies' occupational health and safety and internal policies also were interpreted as requiring a police response to minor incidents where no harm or threat was involved, as illustrated in the following vignette:

#### ***VIOLET***

*Violet was a 15 year old Aboriginal girl who lived in a non-government agency group home. She was charged with destroying property when she kicked her bedroom wall during an argument with her carer.*

*Police said that the matter was 'domestic-violence related' because it occurred in a residential setting. Under NSW law, this aggravated the offence. The court file revealed that Violet was arrested by police because they accepted that 'her carers have a policy that any damage caused must be reported and action taken.'*

As an author of the proposed legislative change that saw care relationships included in the Act<sup>71</sup>, I can attest that the outcomes described above were not the intended results of the legislation. Rather, the inverse was desired: to protect vulnerable children in care from abuse at the hands of their carers.

### The use of Apprehended Violence Orders (AVOs)

Another fundamental difference between the treatment of children in the cohort who were in care and those who were not is seen in the reliance by police and carers on AVOs to control children's challenging behaviour. So-called 'parenting by AVO' (Bradley, *Sunday Telegraph* 22 July 2001) – that is, for some parents to increasingly rely on formal police and judicial involvement to manage their children's behaviour – has been the subject of some concern in recent years and has been blamed for the steady increase in domestic violence matters heard by the Court (Browne, *SMH* May 26 2013).

While children in OOHC have reported that peer violence, bullying and abuse is a regular part of life in residential homes (Farmer and Pollock 1999; 2003; Gibbs and Sinclair 2000; Delfabbro et al., 2002; WA Ombudsman 2006; QLD CG 2006; 2008; SA CG 2008; Mulligan 2008; NSW CG 2010c), official departmental policy frowns on AVOs being brought against children, in recognition of their often complex 'challenging' behaviours and high levels of cognitive impairment (NSW LRC 2010). According to the Department, staff are discouraged from applying for AVOs against children in residential settings because of 'the need to maintain a relationship, the need for agencies to work closely with the police, and the need for police to build stronger relationships with children and staff' (NSW LRC 2010:57). The Department advised the Commission that 'police initiated the majority of AVOs against children in this situation, often against the wishes of staff members' and often for fairly minor matters (NSW LRC 2010:57).

The practice though appears to be at odds with official policy. The current study revealed AVOs and assault charges were commonly imposed on children in residential care for minor matters, at the carers' instigation. For example, an AVO was taken out by a carer

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<sup>71</sup> As a policy officer in the NSW Attorney Generals' Department from 2003-2010, I worked on legislative amendments to the *Crimes (Domestic and Personal Violence) Act* 2007. The amendment was designed to overcome the situation whereby the care environment was not recognised as a domestic relationship for the purposes of a child being able to seek an AVO against an allegedly abusive adult carer or staff member. It was not intended to be used against children.

against a 12 year-old who wrote on a carpeted stair with a texta, a 14 year-old who threw a DVD cover at her carer, and a 15 year-old who slammed her door during an argument, thereby putting ‘four small holes’ in the wall. The ABC’s *Lateline* program (ABC *Lateline* 30 May 2012a) suggested that carer reliance on AVOs may be quite common. For example, one accredited non-government youth service caring for up to 40 children with identified behavioural issues estimated that police would be called at least 18 times a month and that it would have six to eight AVOs in place at any one time. According to the agency, AVOs were viewed as an effective way of getting children to manage their behaviour (discussions with ABC *Lateline* journalist, June 2012).

The consequences for a child in OOHC of having an AVO imposed on them can be devastating. As the Department has observed, ‘Not only can many of the children not understand AVOs, especially those with intellectual disabilities, but also AVOs often add to the child’s feeling of abandonment in a crucial stage of creating bonds with a carer’ (NSW LRC 2010; see also NSW Parliament 2012). This is likely to lead to breaches and the child being refused bail and placed in a detention centre for a period of time. This is particularly problematic for unlike a breach of bail, the breach of an AVO is a criminal offence.<sup>72</sup> It was also observed that the requirement for a child to be placed in alternative accommodation away from an alleged victim frequently resulted in placement breakdown, homelessness, the end of involvement in education and the subsequent commission of further offences.

There is a terrible irony in the misuse of AVOs to control the behaviour of children in care. The *Children and Young Persons (Care and Protection) Act* 1998 was deliberately designed to facilitate the use of AVOs as a ‘creative’ tool in the child protection armoury. Intended as an alternative to the emergency removal of children who were experiencing violence at home, the Act mandated workers to consider whether to use the emergency removal powers to take a child from their family, or whether it would be more helpful to have police to issue an AVO to remove the alleged perpetrator instead. A decade on, the use of AVOs against vulnerable children demonstrates the way in which measures intended to protect children are misused by the very people responsible for their care.

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<sup>72</sup> The penalty for a breach of an AVO is currently a fine of up to \$5,500 and/or imprisonment for up to two years (s14 *Crimes (Domestic and Personal Violence) Act* 2007).

### Negative police attitudes

It became apparent in the current study that negative police attitudes also disadvantaged some children in OOHC. Australian commentators have raised concern regarding police reluctance to refer children away from formal court processes (NSW LRC 2005; Bagen 2010; PoC 2011). According to the Aboriginal and Torres Strait Islander Legal Services, ‘the entire issue of front-end entry to the criminal justice system as the result of decisions made by police at the point of first contact with...youth is a deep systemic problem’ (PoC 2011:11). The Children’s Court has also held concerns regarding the police ‘predilection... to proceed almost exclusively by arrest and charge’ rather than by way of a summons for decades (Blackmore 1984:3). Police themselves have conceded that a child’s cooperation, behaviour and even social background – such as whether children come from a ‘good home’ – are crucial factors in whether they decide to arrest or to proceed by another, less formal means (Alder et al., 1992:33).

Documentation regarding police bail refusals confirmed that police discretion played a significant role in the current study. While officially, children were charged because they were habitual, violent or serious offenders, had lengthy criminal records or a history of failing to appear at Court or of breaching bail or probation, in 30% of the study cohort cases police notes stated that the decision to charge was a direct response to legal advice provided to the children by the Aboriginal Legal Service and Children’s Legal Service telephone hotlines. These services consistently advised children not to admit to the offences and not to participate in an electronic record of interview (ERISP). Police interpreted this advice as evidence of a child’s ‘flagrant disregard for the law’ or their ‘poor attitude to authority’.

The current study also indicated that police bore the major burden of attending to people behaving in an anti-social or offending manner, despite limited police training on how to respond to such conditions. Baldry and Dowse observed that police often acted as ‘frontline manager[s]’ for people with long histories of disadvantage and trauma and who exhibited challenging, risky or dangerous behaviour (Baldry and Dowse 2013). When other services failed to respond, police often were forced to assume the role of ‘care managers’, despite their lack of skills, for those with complex needs (such as cognitive disability, mental illness and drug and alcohol use, poverty and homelessness). Police regularly held children in these circumstances in police custody overnight, progressing



their criminalisation as the police moved from viewing the children from being 'at risk' when they were young under 12 years to 'a risk' and wilfully offending by the time they were early teenagers (Baldry and Dowse 2013:230). Other services – such as social, health and child care services, also failed to assist these young people, regarding them as manipulative and aggressive (Baldry and Dowse 2013).

The current study also revealed however, that police often failed to assist or understand children, particularly those with a mental health and/or cognitive impairment. For example, officers dismissed the self-harm actions of a 14 year-old boy in police custody on a breach of bail and claimed he was 'deliberately headbutting' the wall and 'tensing his muscles to the point of cramps' so as to 'derive a benefit' from being scheduled. Although the fact sheets noted the boy had been diagnosed with Aspergers and a range of other mental health conditions, police regarded his actions as merely 'behaviour-orientated' and attention-seeking. In another case, police failed to accept the mental and cognitive limitations of two girls in OOHC who had a lengthy history of self-harm and suicidal behaviour. Police stated that the 12 year-old 'refuses to answer questions, treats matters as a joke and has a history of treating police with complete disrespect'. Their comments in relation to the 16 year-old were more dismissive: the factsheets variously stated that the child 'has little to no respect for authority...regularly breaches her bail and has no remorse for her actions [and] does not care about her bail conditions and if released would further breach them'. Police antecedents referred to the child as being 'well known to police'; continuing to 'show no regard for the law, the community or police'; showing 'serious disregard for any authority'; having 'no respect for authority figures'; having a 'blatant disregard for any bail conditions imposed on her'; displaying 'full disregard to police and to the law system [and being] a continuous nuisance offender'; as well as having 'little regard for the law, court orders and her own carers'. She was also described as 'a frequent nuisance to both the police and community...with her needlessly aggressive behaviour' and 'highly offensive [behaviour] towards police in a public area'.

Some attempts were made to involve police in a child's life so as to avoid future continued involvement with the CJS. For example, attending the local Police clubs and weekly police visits to a care home were viewed as an appropriate way to overcome a 12 year-old's propensity to threaten her caseworkers and 'build a more positive perception of Police...[with] the aim to see the police in a positive way and separate from chaos and

incidents'. According to DJJ, using the police to break up a placement was 'a tactic that [she] has learned from experience will have her removed from her placement, which is what she wanted...[she] will continue to employ sabotage techniques because she sees them as effective in getting what she wants [and] she lacks the skills required to negotiate her needs in a more pro-social manner'. In another case, meetings were held between the young male resident of a group home, his carers, the Department and police, 'to best determine how to support [him] and build a positive relationship with the Police Youth Liaison Officer'. Unfortunately, this did not prevent the boy (whose file testified to his having autism and difficulty with change) being charged with domestic violence-related assault after he threatened a new co-resident and carer just days after they had arrived at his previously stable placement.

While these examples showed some promise, international commentators have warned that increasing the level of contact between children in OOHC and police has the potential to backfire. The UK's *Bradford Protocol* (Bradford Police, undated) perfectly illustrates the attendant dangers of the increased adult surveillance of children that is associated with greater liaison and contact between children in residential units and the police (Hayden 2010). While the practice of regular police visits is counter-intuitive to the idea that group homes should resemble a 'normal' family home wherever possible, the risk that more children will face criminal charges once police know the identity and vulnerable status of local troublemaking children is a concern (Paul 2008). This fear led to the long-standing refusal of Ofsted (the Office for Standards in Education, Children's Services and Skills) to share its national list of children's homes with the police. The agency, which reports directly to the English Parliament and whose role is to 'inspect and regulate services which care for children and young people and those providing education and skills for learners of all ages' and whose website asserts its independence and impartiality, advised a Parliamentary committee that information exchange of this type was a mistake. Great care was required if police were to routinely access this data, Ofsted warned, for the list could be used to investigate crime by regarding children in care as a 'group of first suspicion', based on a hypothesis that children in residential care are more likely to offend than the general population (APPG 2012a:37).

This was observed in the current study. For example, police often sought to influence judicial decisions through the information initially provided to the Court, such as the

Criminal History Report (CHR) submitted during a child's bail application. The CHR contains details of all previous matters, including those that may have been dismissed or withdrawn, police-issued cautions and any warrants issued. It can also include information about care status if, for example, a warrant has been issued for a child who has run away from a placement (s109B *Children and Young Persons (Care and Protection) Act* 1998). While it is not supposed to be presented if the matter proceeds to a hearing, discussions with judicial officers conducted in the course of this research revealed that they were regularly presented with such extraneous material in breach of bail matters (personal discussions, Children's Court NSW). Police also included extraneous material in the Police Fact Sheet Antecedents presented on an application for bail or a plea of guilty. While this 'social history' of the child commonly contained factual information on care status and details of the child's family, education and social circle, adverse comments regarding a child's attitude towards police were observed. For example, stigmatising or derogatory police comments were noted in a quarter of the OOHC children's files. Children were commonly referred to as having no respect or a blatant disregard for authority and the judicial system and were criticised for failing to show remorse, not treating the matter seriously or ignoring bail conditions. Police frequently described children's attitudes as abhorrent or unacceptable and claimed children were being annoying or deliberately provocative. Some of the comments were extremely unprofessional: for example, a Magistrate was advised it was better to talk to a wall than to a child for all the sense they would get out of her; in another the child was referred to as a joke and a habitual time-waster. In only one case was there evidence that the defence had succeeded in having negative police comments struck from the Antecedents.

### *The treatment of absconders*

Negative attitudes towards children in OOHC were identified in the police response to children running away from care. While a quarter of the overall sample had run away at least once, the OOHC recorded twice this proportion (43%). Police generally viewed children who ran away from their parental home with concern that they were being exposed to violence and danger on the streets. Files revealed that police assisted children to find services; pleaded with the Court to 'order DOCS to get involved' to provide accommodation or therapy; and expressed concern about the families and homes from whom the children were running. In some cases officers made repeated 'child at risk'

notifications to the Department to highlight a child's vulnerability and risk of abuse. Children absconding from care placements however, were generally viewed as problematic and were described as 'nuisances' or 'habitual runaways' who disregarded authority and 'flouted the rules'. While some officers were troubled by their inability to contact Departmental caseworkers to support children at the police station, it was much more common for police to exhort the Court to 'do something' to prevent a child absconding and to 'send a message' or 'teach the young person a lesson'.

Police were commonly relied upon by Departmental and agency staff to apprehend children who had run away from care. Often, police involvement was deliberately initiated by the Department or non-government agency staff to control a child's behaviour and teach them a lesson. As illustrated in the vignette below, this effectively criminalised a child who may not have committed a criminal offence and arguably constitutes a form of institutional systems abuse.

### **JOHN**

*John was a 14 year-old boy under parental responsibility until 18 years of age, who lived in a non-government residential group home. He had been diagnosed with mental health disorders and prescribed a range of medications to help his carers manage his behaviour.*

*John was charged with 'failure to comply with a 9 month Good Behaviour bond' when he ran away to reunite with his natural family. The Court file revealed that although absconding from care was not a criminal offence, the Department believed that John was 'abusing his freedom' by running away. As a result, the agency 'actively resorted to Police intervention and search warrants' in order to get the young person back to his placement'.*

Police showed little sympathy for young runaways who offended, even though many of the offences committed were extremely minor. For example, a 14 year-old boy in OOHC who had run away from care was charged and refused police bail after shoplifting a can of deodorant and a pair of socks; and another spent at least one night in custody after he stole chicken and some bread. In both cases police refused bail due to 'the severity of the offence' and because the child was deemed to be 'a flight risk'. In another case provided

by senior Departmental staff, infuriated police told a 9 year-old persistent runaway they were really looking forward to his 10th birthday, because then he would ‘be old enough to charge.’ The child welfare system’s ongoing reliance on police to forcibly return children to care placements also escalated matters in some cases, culminating in children facing court for offensive language, resist arrest, minor property or assault charges. For example, police opted to charge a 15 year-old who was uncooperative when originally faced with a caution; laid malicious damage charges after a 16 year-old spat in the police dock; and charged a 14 year-old with assault police after he kicked out at officers when apprehended on a care warrant. The decision to issue a warrant to detain a child who absconded from a care placement ‘without lawful excuse’ or out of concern for a child’s ‘own safety, welfare or wellbeing’<sup>73</sup>, effectively guaranteed that runaways were remanded in custody. For example, police denied bail on the basis of an inter-state care warrant to a 15 year-old boy who had absconded from temporary care and over whom the NSW Department had a ‘watching brief’. The child was refused police bail although he had never committed a criminal offence.

This study’s observations are consistent with previous Australian and international research (NSW CSC 1996b; 1999a; UK CfSJ 2008; Parliament of Victoria 2009). In some cases, as the *Royal Commission into Institutional Responses to Child Sexual Abuse* (McClellan 2014) heard recently, NSW welfare authorities and government lawyers regarded a history of absconding from care or an instance of subsequent criminal behaviour as a legitimate reason not to settle compensation claims made by victims of institutional child sexual abuse (Fife-Yeomans, *Daily Telegraph* 28 October 2014). The potentially devastating outcome of poor police relations was graphically illustrated in recent events in the United Kingdom (UK), where absconders from care were three times more likely to be in trouble with the police than other children (SEU 2002b). A series of reports and Inquiries have exposed the failure of the UK care system to protect children from abusive situations (Browne and Falshaw 1998). For example, the UK Parliamentary *Inquiry into Young People Missing from Care* reported that police refused to believe complaints of sexual assault and referred to young female runaways as ‘slags’ and white trash’ (APPG 2012a:45). In 2014 the *Inquiry into Child Sexual Exploitation in Rotherham*

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<sup>73</sup> Section 109B of *The Children and Young Persons (Care and Protection) Act 1998*. The young person will be arrested and brought before a court, which can commit the child to ‘a detention centre or other place of security’ or place the child in the care of Community Services NSW.

1997-2013 (Jay 2014) exposed not only the widespread sexual abuse (including rape, torture and sexual trafficking) of at least 1400 children, but the systemic cover-up of that abuse by many in authority, including police. The *Rotherham Inquiry* reported that police regarded ‘child victims with contempt and fail[ed] to act on their abuse as a crime’ (Jay 2014:1) and resulted in the resignation of the Police Commissioner and investigations into at least seven other officers.

### The impact of judicial decisions

#### *Bail conditions*

In 2005 the NSW Law Reform Commission noted that ‘the practice of imposing harsh and inappropriate bail conditions on young people has been the subject of repeated concern over the last decade or more’ (NSW LRC 2005:248). Bail conditions have been described as often unreasonable, unnecessarily onerous and unjustifiable, with conditions being imposed indiscriminately and with scant regard to cultural sensitivities (NSW LRC 2005). Concern has been expressed that children do not understand convoluted or ‘conflicting, unreasonable or unrealistic’ conditions (Bargen 2009:470), which are generally more onerous than sentencing orders and are often imposed without adequate supports in place (Stubbs 2010). Children are likely to become deeply enmeshed in the CJS if they are expected to comply with multiple conditions, yet this is precisely what was observed in the current study. Consistent with previous research (McFarlane et al., 2011), in this current study police commonly imposed an average of two to three conditions on a grant of bail, in addition to the standard requirements to attend court; to be of good behaviour; and meet any requirements for a surety or an acceptable person. The Court generally imposed between three and four conditions, again excluding the standard requirements outlined above. Although bail is designed primarily to ensure that an accused person attends court on a specific day and in England and Wales is often granted without the imposition of any conditions (Hucklesby 2009), this is relatively uncommon in NSW (Murphy 2010). It has been argued that this should not raise concerns, because children ‘proceeded with via arrest will generally have a history of non-compliance, or be appearing for a serious offence’ (Murphy 2010:64). However, this was not observed in the current study, where the majority of children did not have a serious criminal history. The NSW Law Reform Commission also recommended that few conditions should attach to a grant of bail generally (and included children in its recommendations) (NSW LRC 2012). Many of the recommendations were amended,

only to be reversed almost immediately by the *Bail Amendment Act* 2014, following several high profile media incidents amid political and community concerns (*SMH* 27 June 2014).

The imposition of welfare-based bail conditions in NSW over the latter part of the 20<sup>th</sup> and early 21<sup>st</sup> centuries introduced a paternalistic element into children's lives and required adherence to conditions that would not be imposed if the offender were an adult. Such conditions frequently led to the further criminalisation of children because as they were unable to comply in many cases, they breached their bail orders. This was especially evident in conditions that sought to ensure children were appropriately supervised through curfews, the most common condition and one that affects half of all children in this study. A curfew requires a child to remain at home between certain hours unless given permission to be out by a responsible adult. Presumably the intention is to keep a child at home at night and out of public areas where offending may occur. It was observed however, that children who offended during daylight hours or in their own home, also were likely to have a curfew imposed. 'House arrest' is a more extreme form of curfew and means that a child cannot leave their home unless in the immediate company of an appropriate adult or for a specified purposes, such as to attend school or work. Associated with these curfew-type conditions is a requirement that children present at the door whenever required by police. This condition has been criticised on the grounds that it allows police the 'opportunity to go to a home several times a night' to check on a child without reasonable justification (NSW LRC 2005:252). Between 2007-2012 there was a 400% increase in the number of curfew compliance checks: resulting in a significant increase in the number of children arrested for breach of bail (NSW LRC 2012).

Bail or probation conditions that dislocated children from family or support workers were also problematic. While family support and a stable home significantly increases the likelihood of a child's compliance with a bail or probation condition (Hart 2011), children in care experience considerable difficulties, particularly if they are required to travel to various appointments and meetings (Blades et al., 2011) or if staff do not 'remind them of appointments or generally support their compliance' (Hart 2011:24). At times the Department was compelled to intervene to mitigate against what were clearly problematic bail conditions, as illustrated in the following vignette:

### **BRONWYN, SHIRLEY & MICHELE**

*Bronwyn and Shirley were 14 year-old Aboriginal girls who lived in a non-government agency group home. They stole a car and drove to McDonalds with Michele, another group home resident. After Bronwyn left, Shirley and Michele ended up in hospital after a serious car accident.*

*At Court, all three girls were ordered not to associate with each other, despite the fact that Bronwyn and Shirley had been bailed back to the same group home. The Department wrote to the Court asking for the order to be changed, arguing that due to the girls' challenging behaviours no other agency would take them. The Department argued however, that the rest of the order could remain – for 'there is no need for [the girls] to socialise together outside of the residential setting'.*

In another case onerous house arrest conditions had an unanticipated adverse impact on the carers of a 14 year-old boy with an identified intellectual disability and multiple mental health conditions. 'Tim' was charged with malicious damage and domestic-related assault matters but was released on bail subject to a house arrest condition that required him to be accompanied at all times by his elderly grandparents. This placed immense pressure on his carers and threatened the boy's long-term placement, requiring the Department to intervene to have the order modified.

Judicial concern for homeless children also increased the likelihood that children in OOHC would be remanded in custody. Homelessness could be a trigger for offending behaviour: in the current study, 14% of the OOHC cohort and 9% of the non-care group were homeless at the time of the commission of their current alleged offence. The commission of so-called 'survival offences' for example, such as shoplifting, burglary and robbery (NSW CSC 1996b; Chesney-Lind 1997; Taylor 2006; Kempf-Leonard and Johansson 2007; Cashmore 2011) has been regarded as 'almost inevitable' if homeless young people are 'to secure the basic needs of food, shelter [and] clothing' (Australian Senate 1982:11). This activity guaranteed conflict with police, who were likely to respond to children as if they are 'streetwise criminals' rather than as vulnerable children who require support (APPG 2012a:44).



Homeless children were often required to ‘to reside as DOCS direct’ – a bail condition that presupposed that the Department would then provide accommodation. This condition could result in a child being remanded in custody when no suitable accommodation was arranged (O’Sullivan 1991; NSW DOCS 1993; NSW CSC 1996b; Wood 2008; NSW Parliament 2009:188; Murphy 2010; Marien 2011; McFarlane et al., 2011). Between 2007 and 2008 the NSW juvenile remand population increased by a third (Vignaendra et al., 2009). The dramatic increase was attributed, in part, to the impact of welfare-based bail conditions designed to address the failure of support and care services (NSW Parliament 2009). According to ‘extrapolated’ figures from the Youth Justice Coalition’s 2009 survey of bail decisions at Parramatta Children’s Court (Wong et al., 2009) there were over 50 incidents per year of young homeless people being remanded in custody despite conditional bail having been granted. This confirmed advice provided to the *Wood Special Commission*, which heard that 90% of remand cases spent an average of eight days in custody after being unable to meet their bail conditions (Wood 2008).

As His Honour Judge Mark Marien, then President of the NSW Children’s Court observed, NSW has had a long-standing problem regarding the lack of bail accommodation for children. ‘[O]ften the young person will remain in custody bail refused until appropriate accommodation can be found’ he said, noting that ‘some argue (with justification) that these young persons remain improperly in custody essentially for welfare reasons rather than justice-related issues’ (Marien, 2011:7). According to His Honour, ‘the detention of such children (who would otherwise be released on bail) because they have no appropriate bail accommodation starkly demonstrates the ‘need’ v ‘deed’ dichotomy and how the CJS may be inappropriately used for essentially welfare issues’ (Marien, 2011:7). As Special Commissioner Wood noted however, ‘save in the case of those under the Minister’s parental responsibility [the Department] cannot be compelled to find accommodation for those within this group’ (Wood 2008:559). The cases of *Minister for Community Services and Anor v Children’s Court of NSW* [2005] 62 NSWLR 419 and *Police v Raymond* [2007] CLN 3 make it clear that the Department cannot be held responsible for providing services to children for whom it had no statutory responsibility. The practical result is that children remain in custody, ‘not because they are a danger to the public or unlikely to appear in court to face their charges, but because of family breakdown and homelessness’ (Bargen 2009:470). This is particularly true for

those for whom a history of sexual abuse, neglect or homelessness means they are unable to return to their families or carers or cannot meet bail conditions (Stubbs 2010).

There is a very strong relationship between homelessness and OOHC (HREOC 1989; PoC 1995; Norris et al., 2005; Flatau et al., 2015). Despite the assertion by Special Commissioner Wood that the Department cannot be compelled to find accommodation for homeless children ‘*save in the case of those under the Minister’s parental responsibility*’ (Wood 2008:559 – my italics), children in OOHC are not guaranteed stable accommodation. While Memorandums of Understanding and Protocols between the Department and DJJ agencies have been reviewed in an effort to minimise custodial remands (NSW LRC 2005), homeless children in OOHC continue to be placed in detention (personal discussion with NSW Attorney General Hazzard, 2014).

Little research has been conducted into the nexus of homelessness and OOHC and particularly, into the timing of the onset of offending behaviour by homeless children. For example a recent publication, *The Cost of Youth Homelessness* (Flatau et al., 2015) noted that two-thirds of the homeless youth surveyed had been in care. It was implied that the care experience was the result of family violence and breakdown and that homelessness occurred *before* a child was placed in care. No evidence was cited to support this assertion. The current study queried this assumption by analysing the files to determine when offending behaviour began – before the child was homeless, or afterwards. It was noted that twice as many of the OOHC cohort in the current study experienced homelessness at some point in their lives compared to the non-care group (48% : 22%). It was further observed that placement in OOHC was no guarantee of stable, secure accommodation. For example, a 15 year-old Aboriginal male on bail for larceny was placed in a motel which, the file noted, was ‘known by all agencies’ to be unsuitable for children. Placement of children in care in a youth refuge - which itself constitutes a form of secondary homelessness (Murphy 2010) - could also be dangerous: several children in the cohort were sexually or physically assaulted while living in such accommodation. Unsuitable accommodation also increased the risk of involvement in criminal activity, as illustrated by the case of a 16 year-old boy in OOHC who became involved in an argument with police who were investigating an un-related theft in the suburban pub where he had been placed by a non-government agency. He was arrested for using offensive language in a public place and breach of bail (having consumed

alcohol). Referred to a Youth Justice Conference (YJC), the boy was required to write an essay on why he shouldn't swear in public. No inquiry was undertaken into why the high-needs child had been placed alone in a hotel in the first place and there was no discussion about agency accountability or incompetent guardianship. In fact, the magistrate marked the file a 'Good Result'.

### *Custodial remand*

Early NSW research showed that children were propelled into the CJS for 'non-criminal behaviour for which adults cannot be punished' with a third of girls incarcerated simply because they had absconded from care homes and residential institutions (Carrington 1993a). While Carrington's research occurred under a different set of legislation and court structure, it was observed in the current study that judicial officers also disadvantaged children in OOHC, ostensibly for their own protection. This was particularly evident in the case of children who absconded from care: many of whom were then remanded in custody because they did not have appropriate accommodation. International studies have reported similar findings: for example, in some parts of the US young runaways are automatically regarded as 'status offenders' and invariably propelled into juvenile detention (Kempf-Leonard and Johansson 2007) and face an increased risk of being placed on remand notwithstanding that there is no evidence that absconding from care increases the risk that a child will fail to attend subsequent court appearances (Conger and Ross 2001). In the UK, children in OOHC are also likely to be remanded in custody 'for their own protection', particularly if the Court is unaware of research that has shown that repeated absconding episodes are a sign that the child is trying to escape abuse or maltreatment in care (SEU 2002b; APPG 2012a).

The custodial experience generally is criminogenic. Prisons are seen as 'universities of crime' where offenders can learn new criminal techniques from their peers. Prisons also fracture community and family ties, may harden and brutalise inmates and have a deleterious effect on mental health. The crime-producing effects continue post-incarceration through the influence of labelling; deskilling; reduced employability; reliance on criminal networks established in custody; and reduced access to benefits and social programs, while the third-party effects can have a criminogenic impact on the families of offenders and their communities (Brown 2010). The mixing of high risk-children with other, low-risk children and the unavailability of rehabilitation programs

also have a criminogenic effect (NSW LRC 2012). The adverse consequences can include physical and psychological hardship, including increased mental illness or depression and the risk of assault or of death in custody. Financial implications can attach to a child and their family, especially if the detention centre is located a considerable distance from the family home and a child's education, involvement in sporting or activities and general family stability can also be disrupted. International research has established the criminogenic impact of even a short period on remand in custody compared to being placed on remand at home (discussed in NSW LRC 2012), but this has not been identified in Australia.

The current study confirmed international research that has identified that OOHC children who are incarcerated are an especially vulnerable cohort within an already disadvantaged population. As discussed in Chapter Four, international research has shown reported that children in care are negatively affected by the custodial experience (see for example: HoC 1998; 2009a; Goldson and Cole 2005; Summerfield 2011a; 2011b; Jacobsen et al., 201; HM Inspectorate of Probation 2012; APPG 2012a; 2012b; 2012c; Edmundson and Cole 2012; HoC 2013; Coles and Carmouche 2015). The NSW Ombudsman has also noted that incarcerated children in OOHC deserve 'special attention' (1996:133). The current study confirmed that some aspects of life within detention centres had a particularly significant impact upon children in OOHC. This was illustrated in the case of a 14 year-old non-Indigenous boy with a developmental disability, a speech disorder and mental health impairment who was assaulted by another detainee 'due to his inability to relate to others' while on remand. 'Bob' could not understand that he was in custody and was incapable of instructing as to a plea. Although he spent three weeks on remand, there was no information on his file regarding what role, if any, was played by his caseworker while Bob was in custody. The file also contained no details concerning the nature of the assault, its consequences or whether Bob had received victims' compensation or counselling.

The cohort was also less likely to maintain links with family while in custody. The lack of family support was expressed in a letter written to the Court by a 16 year-old Aboriginal boy who spent 88 days in custody and was subsequently acquitted of all but one of a half dozen charges. 'I've nearly done four months in Jail I don't like it in here' he wrote. 'I haven't seen my family ever. It's the longest I've gone without seeing them and all of all

I miss my little bro'. Having run away from his abusive father and thereby breaching a bail condition to reside at home, 'TJ' carefully explained to the Judge that he shouldn't be required to return to his father's house '...because we do fight a lot so its better for me to stay were (sic) I am because ill (sic) just end up leaving my dad's house'.

The likelihood that the care cohort will be brought into the CJS at an earlier point than those with no care experience and will have an accelerated path to incarceration, is immensely troubling. With research suggesting that the criminogenic impact of custody is the 'most significant factor in increasing the odds of recidivism' (Murphy 2010:69) time spent on remand is a matter of concern generally and 'from the individual's perspective, an occasion of injustice' (NSW LRC 2012:72).

### *Referrals to diversionary programs*

Children in OOHC were sometimes referred by the judiciary to diversionary programs. These options are commendable in that they seek to avoid the risk of stigmatisation through court proceedings and, by strengthening the focus on rehabilitating young offenders and encouraging participation by their families, reduce the risks of recidivism. Theoretically, matters are resolved simply, quickly and cheaply, thus freeing up court resources for more serious criminal matters (Wundersitz 1997; NSW LRC 2005). They can also be an effective option: Youth Justice Conferences (YJCs) for example, have had some success in reducing the number of children appearing before the Court (Trimboli 2000; Luke and Lind 2002; Vignaendra and Fitzgerald 2006). Victims of crime too are generally satisfied with the process and outcomes and believe that it is fair to offenders (Allard et al., 2010).

Based on the observations in the current study however, diversionary sentencing options seldom addressed the underlying issues behind children's offending. This was illustrated in the case of the 16 year-old boy in OOHC who became abusive toward police while drunk, mentioned previously in this chapter. The boy was required to write an essay on why he shouldn't swear in public as part of his YJC outcome plan. The YJC made no inquiry into why his carers had determined a suburban hotel to be an appropriate placement for him. In another case a 16 year-old boy in care was required to prepare for his Departmental case review meeting a powerpoint presentation on a reptile of his choice. This not only indicated a lack of understanding on the purpose of a case review,

but was striking in the apparent lack of attention paid to the welfare factors that had given rise to the boy's offending. No comment was made on the carers' behavioural management plan, which said that the police would be used to manage the child's behaviour; and no concern was expressed at the boy's ongoing difficulties in accessing psychological services brought about by constant staff changes.

The lengthy delays identified in reports produced for the Court - particularly when YJCs were ordered - was also a concern. The old adage that justice delayed is justice denied was borne out by the considerable time that elapsed between a report being ordered by the Court and its eventual production. While the Act does not specify time limits for completing an outcome plan, it stipulates that a conference should be held within 28 days after the referral for the conference is received by the conference administrator (*Young Offenders Act* s43). The *Young Offenders Regulation* (2004) allows 6 months for the completion of outcome plans, although the Director-General has discretion to allow additional time in exceptional circumstances. Lengthy delays were observed in over a quarter of matters, brought about by the court not allowing sufficient time for a report to be produced, a child's non-compliance, staff shortages and unavailability because of staff training or recruitment issues. Delays could be considerable: in one case, a series of adjournments was requested by the convenor due to the high rate of referrals in the area, the resulting processing backlog and the need to train new convenors in what was described as 'an intensive and time-consuming activity'. The conference was held almost four months after referral and the outcome plan was approved and the matter dismissed with a caution another seven months later. The time between offence and final disposition was 14 months. This is a significant period of time in a child's life, particularly when the child was, as in this case, less than 15 years of age. There must surely be some question as to the effectiveness of any purported deterrent or rehabilitative effect the child was expected to receive in such circumstances.

Australian research has also queried whether diversionary sentencing options reduce offending by vulnerable groups such as Indigenous children (Allard 2010) and young women (Cunneen and White 1995; Wundersitz 1997; Alder 2003; Field 2003). Diversionary programs may also have a net-widening effect that brings minor offenders who would previously have escaped official attention into the CJS and thus increases the level of State control over their lives. As the AIC has identified, a process of 'mesh-

thinning' operates within the CJS to reduce children's opportunities to exit the system that further disadvantages children in care (Richards et al., 2013:xi). Another concern regarding diversionary options lies in the way that the message to young offenders that society finds their behaviour unacceptable is conveyed (Vignaendra and Hazlitt 2005). While condemnation of the behaviour being punished includes an element of shaming, if this is imposed by people the offender does not respect then it will fail to induce shame. This is typified by Braithwaite's work on restorative justice, which distinguishes between positive shaming and stigmatising forms of shaming. Essentially, 'the only shaming that induces shame is disapproval of the act by those who we respect very highly. Just respecting them a bit is not enough. So shaming by police, judges and mass publics who read newspapers is mostly beside the point' (Braithwaite and Drahos 2002:273). This is evident in the response of Indigenous people, who as a result of individual personal experience and an inter-generational history of adverse welfare intervention, 'have learnt how to shift the moral burden instead to those who police, try, and imprison them and to re-interpret their experiences of the criminal justice system to subvert those experiences and hence make them tolerable' (Atkinson 1993). For many, involvement with the CJS is not a mark of shame but a badge of honour and incarceration in a juvenile detention centre or adult prison simply a rite of manhood (Mundine, in Bourke, *ABC* 9 January 2013; see too Beresford and Omaji 1996; Oglivie and Van Zyl 2001).

Shaming is particularly relevant for children in OOHC, for as the Court has acknowledged, shaming may be ineffective for those who lack adequate family or similar support (Mulroney 2008:6). Consistent with Matza (1964), who found that children drifting into delinquency had no respect for juvenile justice authorities because they saw them as incompetent, it was observed in the current study that children in OOHC were often afraid and deeply resentful of Departmental workers. For example, in one matter a child agreed to participate in the Youth Drug and Alcohol Court (YDAC) only after the magistrate assured him that the program was run, not by the Department, but by the Court. This is consistent with earlier Australian research that suggested that negative childhood experiences lead many people who have experienced the welfare system to regard authority with scepticism and distrust (Wrennall 1986; Alder 1998; Alder and Hunter 1999; Maunders et al., 1999; CLAN 2008).

### *The sentencing process*

The sentencing process was also observed to have a disproportionate impact on children in OOHC. The *Children (Care and Protection) Act* 1998 (NSW) provides that when deciding how to sentence a child, the fact that the offender is in need of care is *not* to be taken into account (my emphasis). According to the NSW Law Reform Commission, this ‘is designed to protect children in need of care against discrimination in sentencing’ (NSW LRC 2005:208) and to avoid ‘some magistrates attempt[ing] care/welfare outcomes via the criminal justice system’ through the imposition of onerous conditions, such as curfews and non-association orders on grants of bail, bonds and probation (NSW Law Society, submission cited in NSW LRC 2005:209). The Director of Public Prosecutions, New South Wales Young Lawyers and the NSW Bar Association have argued that it is important to maintain the separation of the jurisdictions in order to ensure ‘there is as little confusion as possible on the part of young people before the Court as to what the Court is attempting to achieve’ (NSW LRC 2005:209). Yet it is arguable that the majority of children before the Court would have absolutely no idea what the Court’s ambitions for them were. Indeed, it was observed in the current study that children had very little awareness of the Court’s role or aims and very little understanding of what was taking place in the courtroom.

While it has been recognized that ‘apparently equitable treatment at the point of sentencing may simply mask earlier systemic biases’ for Indigenous children (ALRC/HREOC 1997:19:105) the logical extension of this argument has not been extended to children in OOHC. In 1992 the NSW Supreme Court case laid down a set of principles that established ‘the relevance of the Aboriginality of an offender is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender’ (*R v Fernando* 1992 76 A Crim R 58). The Court has also recognised that ‘only the most myopic in this community would deny that much of the contact of Aboriginal people with the criminal law can be traced to their dispossession and the breakdown of their culture...From the court’s perspective, to ‘recognise that background in an appropriate case for the purpose of sentence is neither discriminatory nor paternalistic’ (*R v Welsh* (unrep, 14/11/97, NSWSC at 10, cited in Norrish 2009:274). In 2013 the High Court held that the impact of Indigenous disadvantage does not diminish over time (*Bugmy v The Queen* [2013] HCA 37) while also standing firmly by formal equality principles such that Aboriginal people are not sentenced differently.



While it has been acknowledged that a link exists ‘between care and youth offending (such that wards of the state are over-represented among offender groups)’ (Vignaendra and Hazlitt 2005:2), the limited literature on Court sentencing processes has not examined the impact of those processes on children in OOHC. The exclusion of care considerations in the criminal jurisdiction is contrary to the recognition in both caselaw and statute that some defendants might quite properly be regarded as having special needs, such as youth, Aboriginality, mental illness, intellectual disability or cognitive impairment, physical disability or other health problem, experiences of domestic violence or sexual abuse, custody of dependent children, drug addiction, homelessness, unemployment, a lack of education, that the sentencer should consider (Norrish 2009). The NSW Law Reform Commission has also recommended that ‘special vulnerability’ be recognised when sentencing offenders who possess particular characteristics. For example, offences relating to their disability mean that those with a mental or cognitive impairment are disproportionately affected by legislation that makes bail far less likely for repeat offenders (NSW LRC 2012). The short-term mobility of many Indigenous defendants can mean that the inability to provide a stable, fixed address disproportionately disadvantages them while the risk of absconding is likely to be regarded as more extreme for defendants without family connections (NSW LRC 2012). The Commission suggested that the ‘special vulnerability’ should also include illness, age and frailty, being from a cultural or religious minority or from a non-English-speaking background, or being gay, lesbian, bisexual, transgender or inter-sex status. OOHC status however, was not included in the recommendations.

Indeed, the view that ‘care issues ought not to be a factor in sentencing’ (NSW LRC 2005:209) has operated to disadvantage children in OOHC who are before the criminal jurisdiction. It was observed in the current study that children were disadvantaged by the sentencing process when character was being assessed and behavioural difficulties that were a consequence of experiences in care were often not put to the court. The NSW Community Services Commission had also previously remarked upon this factor (NSW CSC 1996). Children in care in this study also typically could not claim those factors that operate to reduce or mitigate a sentence. For example, they were rarely members of a sporting or community organization, possessed a strong employment history or impressive educational achievements, or had the stability and security of belonging to a ‘good home’. The cohort was further disadvantaged by ostensibly non-discriminatory

sentencing considerations, such as the aggravation of an offence pursuant to s21A *Crimes (Sentencing Procedure) Act* 1999. For example, police stated that a 12 year-old girl who had the intellectual capacity of an eight year-old had committed 'aggravated offences', because the alleged offence was committed in the presence of a child under 18 years of age [and] was committed in the residential home'. These aggravating factors were meant to be leveled against adult offenders, but were instead used as justification for refusing police bail to a developmentally delayed, mentally ill 12 year-old child. In another case police charged two 14 year-old girls in OOHC with aggravated break and enter and commit serious indictable offence in company after they attempted to break into a house across the road from their group home in broad daylight. Under NSW law, the alleged offence was aggravated because they had not committed the offence on their own – the fact of a 14 year-old co-offender made the matter sufficiently serious as to warrant a refusal of bail.

Procedures intended to facilitate rehabilitation also unintentionally impacted on the care cohort. For example, the Children Court's practice of introducing appropriate adult guidance to a child through the supervisory components of a bond or probation, had a 'limited rehabilitative utility' for vulnerable groups characterised by instability - such as those in care - who may view this as little more than the 'introduction of yet another adult caretaker into their lives' (Vignaendra and Hazlitt 2005:87). It was also observed that a more severe sentence was sometimes resorted to, almost out of frustration that the child had failed to benefit from the more lenient option or last chance offered them by the Court. This finding is consistent with NSW research which has found that magistrates sometimes abandoned a particular sentencing option if, in their view, a child's criminal history indicated they were immune 'to either the rehabilitative or deterrent value of such an option' (Vignaendra and Hazlitt 2005:74). This is particularly troubling for children in OOHC, for whom the risk of re-offending is high (Weatherburn et al., 2007), who are likely to engage in protracted and long-term offending (Oglivie 2000; Parliament of Victoria 2009; Day et al., 2011) and whose negative attitude towards authority (CLAN 2008) and chaotic lives arguably present poor prospects of rehabilitation.

The inability of the Children's Court to consider the impact of care status could also have a negative impact when factors around the inadequate care provided to children lead to offending. In the US for instance, extralegal factors - such as financial incentives for

carers led to more severe placements in training schools and a decision-making process more quarantined from judicial scrutiny – had the effect of leading to harsher sentencing outcomes for children in care (Belknap 1984). A study of sentencing decisions in England and Wales found children in care were particularly disadvantaged in borderline or ‘cusp’ cases – those deemed to lie on the brink between a custodial and a community sentence. Magistrates were concerned that authorities’ prosecution of minor matters against children in their care led to cases being brought to court which ‘did not always constitute criminal behaviour and could have been resolved informally’ (Solanki and Utting 2009:48). There appeared to be no consistency in the outcomes: children in care were ‘more likely to be given multiple chances before custody was imposed because of their legal care status’ on one hand, while the lack of appropriate accommodation ‘increased the likelihood of, or resulted in, custody’ (Solanki and Utting 2009:49).

### The impact of trauma and disadvantage

Care-criminalisation has recently been conceptualised as a trauma-related outcome. It has been argued that children become involved in the CJS through the display of challenging behaviour that constitutes criminal offences; are exposed to offending during attempts to fund substance use (itself an attempt to self-medicate trauma) as well as to offending peers and family; and this exposure is then exacerbated by placement in residential units and custodial environments. The limited supports in the post-care period consolidate the trauma and increase the risk of offending (Mendes et al. 2014). This theory builds on previous theories that have argued that the correlation between care and offending is primarily due to the accumulation and interaction of pre-existing risk factors common to the OOHC population (Schofield et al., 2012). Certainly, as Table 5.4 reveals, the OOHC cohort in the current study experienced high rates of all forms of trauma compared to the non-care group, particularly in relation to abuse and neglect, mental illness and cognitive impairment, poor educational attainment and bereavement. When coupled with the care-specific trauma of placement instability, separation from siblings and abuse in care, the precursors for offending behaviour seem clear.

However, the findings from this study take things a step further. The observations confirmed that one should not assume the care system always operates as a protective factor. As has been shown in a recent inquiry into the Victorian child welfare system, simply removing children from their families, however untenable these might be, and

placing them in the OOHC system does not of itself lead to an improvement in children's wellbeing (Cummins 2012). This is illustrated by the fact that almost a quarter (24%) of the children in the OOHC cohort in the current study had at least one documented episode of abuse in care.<sup>74</sup> The view that the OOHC system is a safeguard against the effects of parental abuse and neglect because it can provide a safe environment has been challenged by a series of NSW inquiries and reports that have confirmed abuse or maltreatment whilst in care is not uncommon (NSW CSC 1995; 1996a; 1997; 1998a; 1998b; 2001a; 2001b; Wood 1997; Wood 2008; NSW Ombudsman 2011). Similarly damning assessments have been made in inquiries across many other Australian jurisdictions (Australian Senate 1985; 2001; 2004; 2005; 2009; 2012; HREOC 1989; Forde 1999; Gordon et al 2002; Layton 2003; O'Grady 2004; Vardon 2004; Commonwealth Government 2002; 2005; Anderson et al, 2007; Mullighan 2008; Carmody 2013; McClellan 2014). The ramifications of abuse in care can be catastrophic and highlight the inappropriateness of a criminal justice system response to difficult behaviour exhibited by children who may have been subject to abusive or inappropriate care arrangements. As the *Royal Commission into the NSW Police Service (Paedophile Inquiry)* (Wood 1997) found, the assessment and placement of children in care 'has been less than perfect' (Wood 1997:1046) even though, 'of all the children at risk, [they] are the most vulnerable [as] they have often been brutalized, they lack trust in authority and they have no-one to speak for them'. Accordingly, it was 'critical that care is taken to ensure that such a child is not placed into the hands of someone who will take advantage of them or abuse them' (Wood 1997:1045).

Some children in the current study experienced multiple abusive episodes in care. For example, a young boy was placed with his brothers in kinship care with his grandmother. Some years later his brothers were removed, ostensibly because of their aggressive behaviour but although there were reports that 'Bert' had been physically abused and threatened with a knife, he remained in his grandmother's care until he was ten. He subsequently disclosed that his uncle had sexually abused him for years. After his grandmother took out an AVO against him, Bert was placed in a refuge with older

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<sup>74</sup> This is likely to be an underestimation. For example, a 17 year-old boy's extreme reluctance to speak about his 'difficult period' in foster care led a DJJ officer to suspect he had been abused. The file did not disclose further details or give any indication this suspicion was ever followed up.

children, where he was sexually, physically and psychologically abused. Placed in a group home, he was victimised by a co-resident. He subsequently disclosed that other children had sexually abused him on multiple occasions. As with most of the cases examined in this current study, Bert's file was silent as to whether he had received counseling, whether criminal charges had been laid against the various perpetrators or whether victims' compensation was ever lodged. Placement in more formal types of care did not necessarily prevent subsequent victimisation.

For some children, the abuse they experienced in care quickly affected their behaviour and ultimately led to their involvement in the CJS. This is illustrated by 13 year-old 'Jai': a particularly troubling case given that the serious repeat abuse occurred despite extensive monitoring from both the Court and the NSW Ombudsman, whose involvement had come about because Jai's siblings had recently been abused in care.

### **JAI**

*Jai had been sexually and physically abused in at least two separate care settings. The circumstances were so serious that his file was transferred out of the supervising Departmental office and he was restored to his parents after the second incident.*

*'Jai' was returned to care because his parents were unable to cope with his behaviour. He soon had more than half a dozen care-related malicious damage matters on his record. While on remand, some cherished possessions given to him by his family were stolen from his care home.*

*Having undergone 'highly traumatic experiences [that] caused him to mistrust those attempting to care for him', Jai was deeply suspicious of the Department. Despite being victimised by larger, older detainees he wanted to stay in custody and repeatedly refused a referral to the Youth Drug and Alcohol Court until the Magistrate explained it was not a Departmental program.*

Like Bert, Jai's file was remarkably silent as to the consequences of his abuse, with no details of whether counseling, victim's compensation or criminal proceedings had flowed from the incidents. It also revealed a disturbing attitude from caseworkers to Jai's subsequent offending. It was argued that Jai should not be permitted to act as a victim of past abuse but rather, that he should be required to 'take responsibility for [his] aggressive behaviour and criminal activity'.

Despite the inquiries outlined above, the extent of abuse in OOHC in Australia is impossible to determine. In NSW in 2009 over a quarter of the child population had been notified to the welfare department, with as many as 33% 'known to Community Services' at some point by the age of 18 years (Zhou 2010). Two decades after the issue was identified (Cashmore et al., 1994) details on the number of children abused in OOHC are not routinely published. Until the McClelland Royal Commission (2014), little academic attention has focused on the issue. For example, a recent English study into maltreatment in foster care (Biehal and Parry 2010:16) found that only one Australian study had addressed the subject. The study of the mental health of almost 350 young people in foster care in NSW (Tarren-Sweeney 2008) found that abuse allegations had been made in respect of just under a third of the cohort and that the allegations had been confirmed in over two-thirds of matters. The lack of attention to this issue is a striking omission in light of the myriad of Government and statutory agency that have repeatedly called for such research to be undertaken, the successive Australian government apologies for past child welfare practices, and, as this study has identified, the implications of such abuse given children's subsequent involvement in the justice system.

The practical and psychological impact on children of certain traumatic incidents does not appear well-understood. Few studies have examined the impact of the high rate of loss and the consequences of bereavement on children in the criminal justice system. Notable exceptions are the UK's study of the prevalence of loss and abuse in the lives of young offenders (Boswell 1996), a study of persistent young offenders (49% of whom had OOHC experience) (Liddle and Solanki 2002) and factfiles produced by the Prison Reform Trust (PRT 2012) which found that one in eight children in detention had experienced the death of a parent or sibling. No comparable NSW study appears to have been undertaken. Yet the consequences for children in OOHC can be profound. For example, some children in the current study had personally witnessed the death of a

person close to them, such as the young girl who saw the bike accident that killed her mentor while on a school excursion or the 11 year-old who found his father after he had committed suicide. In some instances, a child experienced more than one death in quick succession, such as the 15 year-old Aboriginal boy whose uncle died of cancer and father committed suicide within a few months of each other and the 14 year-old girl who experienced the death of four close and significant relatives in just one year. Some children had to live through the self-harm and suicide attempts of other family members and in several cases a child themselves had attempted suicide following the death of a parent. An unknown number of children had also witnessed the infliction of serious injury on a parent or sibling, whether self-harm or suicide or as a result of domestic violence or assault perpetrated by another person. In some cases examination of the file revealed that the child had not known for some time whether the victim had survived and in some cases, refused to accept the death. For example, one child in OOHC was convinced that her brother had not died in a bike accident, but had in fact, been murdered after being restored to their parent's care. Her brother's death was mentioned in passing in only one report and omitted from subsequent information provided to the Court. There was no discussion of the impact the death had had on the child. This was concerning given that the authorities were currently considering restoring her to her parents.

In some instances, the death of a family member was the catalyst that led to children's placement in OOHC, a process that was not always handled well by the authorities and which sometimes involved not just the swift separation of the child and surviving parent, but dislocation from the child's siblings, home and familiar neighbourhood. For a child already in OOHC, the death of a family member could result in an abrupt change in the type of care they received when a stable kinship placement ended following the death of a grandparent-carer. Others broke down in the face of children's challenging behaviour after the death of a parent with whom the child may have had a tumultuous but nonetheless significant relationship, as illustrated in the following vignette:

***CLAIRE***

*Claire lived with her grandmother. Her mother died from a heroin overdose and after her father died in the same way Claire ran away and was missing for several weeks. Charged with using offensive language on a train, resist arrest and assault police, she was initially bail refused*

*by police because of the seriousness of the charges. She spent several days in juvenile detention after her caseworker failed to attend court. DJJ ultimately recommended that Claire receive grief and anger management counselling to address the issues behind her offending.*

A death triggered significant changes in many children's behaviour, including the onset of criminal activity. For example, a 13 year-old girl began exhibiting anti-social and intimidating behaviour following her father's sudden death from a heart attack and a 14 year-old girl was involved in a violent school brawl just a few months after a youth was shot dead in her home. In another case, two brothers 'profoundly affected' by their mother's death, began offending almost immediately, quickly accumulating a series of bail breaches and custodial remand episodes incurred as they 'sought refuge with old peer associations in the suburbs [they] grew up in when...living with [their] mother'. In another case, a 13 year-old Aboriginal boy taken into care after he became homeless and associated with negative peers, was involved in an unprovoked and 'concerning' attack on a DJJ officer at 15 years of age. While the motivation for the assault was attributed to the child wanting to remain in custody because he was afraid to return to his care placement, the police facts noted that he had justified the assault by claiming that his co-offender should have been allowed 'to go to his funeral'. His concern for another child's loss suggests that for this boy, the impact of his own mother's death had continued to have far-reaching and serious ramifications that had not been addressed by the care system. For example, although his file noted the 'significant hardship and sadness' he had endured and warned that he was 'closed emotionally' and unable to deal with his mother's loss, it was unclear whether he ever received the grief counseling that had been recommended.

Notwithstanding the many reports attached to the Court files, the impact of trauma was generally not well presented. Matters were often alluded to only in passing and there was very little information regarding the support or assistance that a child had received to address their grief and confusion. This is concerning given the obvious psychological impact such events could have on children and the likely connection with their offending behaviour. For example, although the loss of a parent or sibling to imprisonment could include substantial interruptions in children's care through displacement from home, placement in insecure or unsafe accommodation, social isolation, unresolved grief and



fear over the arrest and removal process and an increased likelihood that children will become offenders and end up in custody themselves (Flynn 2013:213),<sup>75</sup> little is known about what happens to these children. Consistent with findings from a study set in the Melbourne Children's Court (Sheehan and Borowski 2013) there was no distinctive response from either the child welfare or the CJS that acknowledged, let alone addressed, the long-term nature of the problems experienced by this group. Despite the approximately 38,000 Australian children with a parent in custody (Quilty 2005), the Children's Court files examined in the current study contained little detail regarding the extent or nature of familial involvement with the justice system. There is a scarcity of NSW-specific data and the group remains largely invisible to policy-makers (NSW Parliament 1997; 2000b; 2001c; 2001d).

### Failure to provide programs or support

It was also observed that an experience of trauma incidents did not necessarily equate to receipt of health or social services. For example, despite the high rate of mental and cognitive impairment identified in the sample (35% and 10% respectively), only 13% of the children had ever had their matters dismissed pursuant to the *Mental Health (Forensic Provisions) Act 1990*. One limitation of the section is it only binds the defendant: third parties such as government agencies cannot be compelled to provide particular facilities or services (Howard and Westmore 2010). This factor, combined with the apparent requirement that children continue to front the Court for behaviour described above, was observed to severely restrict the effectiveness of the s32 and s33 dismissal provisions and meant that children with serious mental and cognitive impairment continued to appear before the CJS.

This is problematic, for a history of OOHC has been strongly associated with the development of mental health conditions, particularly in young offenders (Kenny 2014a:30), although it has not been established whether such conditions pre-date the care experience or arise as a consequence of it. The prevalence of behavioural disorders, especially amongst vulnerable children, has been criticised for too easily labelling as

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<sup>75</sup> Although the extent to which this occurs and the pathways by which it happens is subject to dispute. Flynn (2013) suggested that children of prisoners may be arrested for 'protective reasons' but failed to explain what she meant by the term.

mental illness, the end behaviours that result ‘from highly unsatisfactory early life experiences, in which children have been the victims of the behaviours for which they are later charged’ (Kenny 2014b:22). Such behaviours may well represent a ‘reasonable response to a problematic environment’ (Kenny 2014a:31) such as an abusive family or care home, but are often responded to with inappropriate treatment that may actually escalate problematic behaviours. This was observed in the current study, as illustrated in the case of a 12 year-old girl with a developmental delay and a history of multiple placements, who had been sexually abused in care. She self-harmed by swallowing glass after being threatened by her former assailants; and followed it with further self-harm attempts that saw her repeatedly hospitalised. Remanded in custody for her own well-being, she was physically assaulted by another detainee and subsequently attempted suicide. Inappropriate and over-medication was a concern for some psychologists and health workers, who warned that mandatory and frequent checks were required to monitor its effects. Several health workers complained that medication had been prescribed to control a child’s behaviour, or ‘to keep [a child] calm’ rather than ensuring that care workers were equipped with the ongoing support and training to understand children’s behavioural outbursts as more than just ‘manipulative, naughty or deliberately aggressive’. This was illustrated in the case of a 15 year-old boy in OOHC who was prescribed anti-psychotic medication in the absence of any diagnosis, leading a psychiatrist to raise concerns that the medication was being ‘used for mood/behavioural control and not the management of psychosis.’

Although drug and especially alcohol dependence was identified as a primary factor in the motivation for many offences, either because the child was intoxicated at the time or because they were seeking to obtain money in order to purchase alcohol or drugs, assistance was not always provided. A lack of rehabilitation programs was observed, particularly for children engaged in long-term, heavy or polydrug use or for those who also had a mental illness or cognitive impairment. Children’s capacity to fully appreciate the consequences of bail non-compliance was affected by their addiction and their failure to abstain from alcohol and/or drugs led to frequent bail breaches. Although it was beyond the scope of this study to investigate the extent to which drug or alcohol dependence impacted on sentencing options, it was also noted that children with drug or alcohol dependency were generally assessed by DJJ as unsuitable for options such as Community Service Orders. The lack of culturally relevant facilities and programs also undercut

attempts to engage Indigenous children, while the isolation and separation from family associated with Sydney-based programs increased the risk that children would fail to complete them. Compounding these difficulties, children's poor record of compliance and criteria that excluded someone with a relative already in the program resulted in some children being unable to access rehabilitation services. This was observed to have a detrimental effect on children's willingness to engage in rehabilitation – several files noted a definite negative change in attitude when the child was excluded from diversionary or non-custodial rehabilitation programs. Bail conditions designed to encourage the child into rehabilitation or to continue with treatment programs could thus inadvertently lead to a breach of bail.

It was further observed that the high levels of abuse reported in the current study did not always equate with investigative action being undertaken by the child welfare Department. For example, an 11 year-old regarded as being at a high risk of harm was not allocated a caseworker to investigate serious abuse claims; and the Department failed to support a 16 year-old girl who had taken out an AVO against her father, despite ongoing reports she was in a high-risk situation. Departmental involvement in another case stopped because a 15 year-old's father posed an 'unacceptable risk' to staff. In another case two brothers were returned to their father's care although there was evidence that their mother had almost died at his hands; and in two separate cases a child was bailed back to what had been assessed as 'a safe placement' despite recent parental suicide attempts.

### **Lack of Departmental support at Court**

The lack of Departmental support at Court was particularly striking in this study. While it is not possible to conclusively determine the significance placed by the Court on the presence of a support person during criminal proceedings, the OOHC cohort was likely to have been disadvantaged by the lack of Departmental and agency assistance. This can be extremely troubling: as a legal advocate told a recent NSW Parliamentary Inquiry, 'I cried last Friday at the bar table, because there were ten DoCS kids that were there and just had nowhere to go and there one little kid was like, barely waist height...hugging me all the time because I was the only person that was there to help. Like there was no-one there for him...' (Ross, NSW Parliament 2009:189).

It was apparent that the Court viewed the family or other support structure as important to the child's case overall. Court files included notes about family ties and support that were recorded by hand by the Magistrate on each court date. Several of the files specifically noted the close or supportive family bond with approval, one viewing a child 'as a good candidate for change and rehabilitation given...the strong family support' and another commenting that an offence, 'which appears an aberration in an otherwise normal and healthy young life' seemingly has 'brought the family closer'. The Court's views may also be inferred by the Magistrate's notations when family or other support was *not* evident. A number of files included adverse comments when it appeared that a child was at risk of being remanded in custody because no support person was present at court, although the inability of a family member to attend court was not always regarded as suggesting a lack of interest or support for the child, especially when court proceedings could be held hundreds of miles away from the family home. According to a senior NSW Children's Magistrate, the need to appreciate the parent's perspective and 'whether they are a help or a hindrance to the young person' could lead the Court to issue a notice to compel a parent to attend Court. This might reveal 'that the young person has managed to conceal their offending from their parents [or] that the young person is burdened rather than supported by their parent or parents. It will often be necessary to address family dynamics in order for the process of rehabilitation to take place' (Mulroney 2008:6).

It could be anticipated that children in OOHC would be guaranteed Departmental assistance when appearing before the Court on criminal charges, especially as 39% of the cohort was under the Parental Responsibility of the Minister until 18 years of age. Yet this was not always the case. Certainly the OOHC cohort had significantly more agency reports on file than was the case for those not in care (39% : 16%): this was not unexpected given that children in OOHC are exposed to many more agencies, particularly the child welfare and mental health systems, than other children. Again, it was not surprising that the vast majority of the reports on the OOHC cohort's files (71%) were provided by the child welfare Department. However, these reports were often provided only *after* the Court had requested the agency provide the information, rather than in anticipation of the child's needs. Many of the reports also seemed to be of limited utility, for they often contained no more than a simple confirmation that a child was in OOHC and under the Parental Responsibility of the Minister and minimal other information. As discussed previously and as seen in Table 5.1, only 41% of the OOHC cohort was supported in

Court by a relative or agency representative compared to 58% of the non-care group, and the Department attended Court in just 22% of matters. Moreover, for almost half of the children in care (42%), the Department provided no information to the Court at all and did not attend any proceedings. As was noted in the *Noetic Strategic Review of the New South Wales Juvenile Justice System* (Murphy 2010) - which recommended that a Departmental representative should attend court on each occasion to support a child in OOHC - the lack of Departmental assistance was concerning. Interestingly, the Department also failed to provide a written report in respect of any of the non-care group, notwithstanding that a quarter had been victims of abuse and or neglect and several had extensive child protection histories.

The problem was highlighted by the 5% of cases where there was no allocated caseworker on file despite some children being in care for years. As the following vignette reveals, the lack of Departmental input could not be taken as an indication that the child did not require assistance:

### ***BILLY***

*Billy was an 11 year-old Aboriginal boy who appeared before the Court for a series of offences relating to domestic disputes with various family members, public nuisance and breach of bail matters.*

*Having left school functionally illiterate following an extensive history of truancy, suspensions and attendance at specialist behavioural schools, Billy had been diagnosed with ADHD and significant substance abuse issues. He had experienced severe physical abuse at the hands of his intellectually disabled mother's partner and had self-harmed and attempted suicide on several occasions. His uncontrollable behaviour had resulted in repeated periods of homelessness as successive carers refused to have him reside with them. He had been assessed as possibly having a 'mental condition'. DJJ warned that court interventions risked the institutionalisation of a child in need of a safe environment and repeatedly urged the Court to 'order' accountable, intervention and support to 'make DOCS take responsibility for this young man and ensure he is afforded the*

*opportunity to develop in an environment where his wellbeing is the priority'.*

*Although Billy was found to be at 'a high risk of harm', the Department refused to allocate his file due to competing agency priorities. Consequently, there was no caseworker or plan for the child. Following a Court order DOCS attended the proceedings, ostensibly as a support agency, but argued instead that Billy should remain in custody as no alternate placement could be found for him. During proceedings Billy's file was allocated and the Minister assumed Parental Responsibility.*

*Doli incapax hearings were held some 18 months after Billy's first alleged offence. He received a caution for one offence but all other charges were dismissed after he was found to lack criminal capacity. By that stage, Billy had spent 13 separate occasions – some 65 days in total – in custody. One of those days was his 11th birthday.*

It was further observed that even when a worker was allocated to represent a child in OOHC, there was no guarantee that suitable assistance would be provided. For example, in 11% of matters DJJ or the police complained they been unable to contact the Department to obtain essential information for the Court. As the vignette below illustrates, another set of problems was experienced if a caseworker accompanying the child to Court did not know them well:

### **JADE**

*Jade was a 15 year-old Aboriginal girl who had lived in kinship care since early infancy and was under Ministerial responsibility until age 18. She was charged with robbery in company after committing an offence with another child in Departmental care.*

*Jade's file indicates that her Departmental caseworker had seen her 'on occasion briefly'. DJJ noted that there had been 'little involvement from the NSW DOCS' and stated that Jade's placement 'may be unallocated in the near future' because of the lack of caseworker and*

*lack of oversight by the Children's Guardian. Jade was not supported in court, where she received a 12 month Good Behaviour Bond.*

Both Australian and international research has established that the criminalisation processes for children in OOHC may be accelerated if a child does not have an allocated caseworker assigned to them. This is evident at the very first contact with authority: police ignorance of care status of the children they arrest can propel children deep into the justice system (Conger and Ross 2001) and can be exacerbated if there is no caseworker available to facilitate police or court bail (Ross et 2002). The disadvantage continues into the Court system. As the Queensland *Child Protection Commission of Inquiry* (Carmody 2013) was told, if caseworkers are absent when a child needs an address for bail and they are not able to provide information about the assistance, such as therapeutic supports, that a child may have upon release from custody, a child may be placed in an unsupportive placement while at the same time being expected to comply with intensive and onerous conditions attached to court sanctions such as bail (South West Brisbane Community Legal Centre, submission, *Carmody Inquiry* 2013). At precisely the time when a stable well-supported placement is required, children in OOHC will be left to essentially fend for themselves. If an agency representative fails to attend court, the Magistrate will also lack knowledge about the child's emotional or therapeutic needs and may not be provided with the background that could explain the circumstances around the offending (South West Brisbane Community Legal Centre submission, *Carmody Inquiry* 2013).

In the UK, attendance by an adult who very rarely knew the child well has reportedly made bail and sentencing decisions more difficult and increased the likelihood of custodial remand (HMI Inspectorate of Probation 2011; HM Inspectorate of Prisons 2012). In the USA, the OOHC cohort has been found to experience judicial 'foster-care bias' when they appear before criminal court such that they are disproportionately likely to be remanded or sentenced to detention than their delinquent, non-care peers (Conger and Ross 2001). Importantly, when caseworkers did attend court on behalf of a child in care, the detention rate has been shown to drop significantly: 48% of children in OOHC were released compared to 30% of matters where a caseworker did not appear (Ross et al., 2002). If caseworkers came to court for serious matters but not for minor absconding or minor level offending, then the foster-care bias was eliminated (Conger and Ross 2001).

## CONCLUSION

This chapter presented the findings of a review of 180 NSW Children's Court criminal matters conducted over an 18-month period during 2008-2010. A number of vignettes were used to illustrate common themes identified in the files and to describe the key findings of the current study. The identification that almost half of the sample comprised children in OOHC was a significant finding and one that enabled consideration of the differences between children who had been in care and those who had not. Detailed analysis of various key events in the criminal justice system revealed that the OOHC cohort had a different experience of the justice system compared to other children. There was a statistically significant difference between the OOHC and non-care cohorts across several key measures, namely the age that children in care first came into contact with the criminal justice system; the average age they incurred their first charge; and their age at the time they allegedly committed their current offence. This also applied to males in OOHC on these measures, although not to females. There was also a statistically significant difference between the two groups and their Indigenous status.

As was demonstrated throughout this chapter, children in OOHC were disproportionately impacted at key stages as they progressed through the criminal justice system. Consistent with recent findings published by the Australian Institute of Criminology (Richards et al., 2013) the OOHC cohort in the current study was adversely affected by onerous or arbitrary bail conditions and often excluded from bail accommodation services on the assumption that child protection agencies should be assisting them. They were more likely to be remanded for bail breaches (again, this was statistically significant), perhaps due to the higher levels of scrutiny to which they were subject, particularly in residential care facilities which are more likely to identify and report breaches to police. The OOHC cohort in the current study also spent longer in custody than their non-care peers.

As the offences committed by children in care were broadly consistent with those committed by the non-care group, this could not account for the cohort's exclusion from pre-Court diversionary options nor from less restrictive sentencing practices, nor did it support the view that there was a greater likelihood that the OOHC cohort would re-offend compared to other children (Weatherburn et al., 2007). The current findings were consistent with Canadian research that has identified that children in care – especially those under 14 years of age – are likely to be breached for non-compliance with bail



conditions rather than more substantive charges (Turpel-Lafond 2009). The findings were also consistent with UK research (Glover and Hibbert 2009) that reported that children in OOHC were not engaged in ‘wilful act[s] of non-compliance’ but were subject to the authorities’ unrealistic expectations that they are ‘able either to understand or comply with the long-term and sometimes complex instructions of their community order without a high degree of support’ (Glover and Hibbert 2009:14).<sup>76</sup> The role of police and judicial decisions thus assumed a particular significance in shaping the pathways through the CJS and the outcomes for vulnerable children.

A key observation in the current study was that many children in OOHC came into contact with the CJS, were arrested and charged and subsequently remanded in custody, for offences that arose out of and were unique to the care environment. These children became involved with the justice system earlier and were immersed more deeply and more quickly than the non-care group, often for offences that would not have led to police involvement if they had occurred at home. Factors specific to the care experience such as accumulated trauma, placement instability, separation from siblings, police interactions and the removal process itself increased children’s pathways through the justice system. While the nexus between OOHC and offending behaviour highlighted the importance of a coordinated response from both welfare and justice agencies, there was a failure to work effectively together in children’s best interests. This further contributed to their poor long-term outcomes. The failure of the child welfare Department to allocate children’s cases, provide reports or attend court in support, as well as the lack of interaction with other agencies and at times, active lobbying for children to remain in custody ‘for their own protection’, further disadvantaged children in OOHC who were involved with the CJS.

While devastating for the individual children involved, the disadvantage faced by young people in OOHC is not unique to the current study, as the analysis of the responses given in the NSW State Parliament and the practices of departmental bureaucrats contained in the following chapters, will demonstrate. As will be discussed, inadequate Government and agency initiatives have ensured the continued exodus of children from care into the criminal justice system.

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<sup>76</sup> Inexplicably, the report by the UK charity Barnardos omitted care status when summarising the disadvantage experienced by the research cohort, although this was evident in the table from which the analysis was drawn (Glover and Hibbert 2009:19).

## CHAPTER SIX: INSTITUTIONAL NEGLECT AND INDIFFERENCE

This chapter draws on an original analysis of the past 25 years of Parliamentary papers, Government reports and Commissions of Inquiry to explore why successive governments' professions of commitment to overcoming the criminalisation of children in care has not been implemented by the responsible Departments or the child welfare sector. Using the case study of the New South Wales ('NSW') interagency *Wards Project* of the mid 1990s, I demonstrate that notwithstanding Australia's international human rights obligations, care-criminalisation has been repeatedly downplayed and ignored. I argue that the lack of policy and programs relevant to the criminalisation of children in OOHC in NSW has been brought about by bureaucratic 'patch protection' ((NSW PD LC 3 May 1994:1694 (Hannaford) and the desire to avoid 'issues that might be critical of responsible officials and management' (Platt 1977:181). By examining current practice against Australia's obligations under international law and against the experience of England and Wales, where considerable government priority has recently been afforded to children in care, I argue that the NSW policy and program vacuum is an example of the continuation of the 'institutional neglect and indifference' towards children in out of home care (OOHC) identified by Royal Commissioner Justice Wood almost 20 years ago (Wood 1997:258).

### International human rights instruments

There are a number of international human rights instruments that seek to enshrine protection for children from arbitrary State interference and unjust treatment. Chief amongst these is the United Nations *Convention on the Rights of the Child* 1989 (the CROC'). Of particular relevance in the OOHC environment is Article 3, which states that the best interests of the child must be a primary consideration in all actions concerning a child whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Children also have the right to express their views and for these to be given due weight in accordance with their age and maturity (Article 12). States are obliged to take measures to ensure children are protected from violence, abuse and neglect (Article 19) and significantly, a child deprived of the protection of his or her family (whether temporarily or permanently) and whose best interests cannot be served in that environment, are entitled to special protection and

assistance (Article 20).

Children who are the subject of criminal proceedings, whether in OOHC or otherwise, are also afforded special protection under CROC. Articles 3, 19, 23, 34 and 36 set out children's rights to protection from harm, emotional wellbeing and treatment for health issues. Article 37 recognises that custody for children should only be used as a last resort and Article 39 confirms children's rights to measures that promote their physical and psychological health and reintegration from any form of abuse, neglect or exploitation. Article 40(2)(iii) recognises the right of any child who is accused of having infringed the penal law to have the matter fairly determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law. Such dispositions must be appropriate for a child's wellbeing and should include such things as counselling and care.

Similar protections are afforded under the *Standard Minimum Rules for the Administration of Juvenile Justice* 1985 (the 'Beijing Rules'). According to Rule 5, one of the main objectives of a justice system is the promotion of the wellbeing of the child. Rule 13.5 states that children on remand should receive care and protection, including psychological and medical care. This is reinforced by Rule 26.2, which notes the particular importance of such assistance for institutionalised drug addicts, violent and mentally ill young people. Children's rights (particularly in relation to mental health and emotional wellbeing) are further affirmed in the United Nations *Standard Minimum Rules for Non-Custodial Measures* (the 'Tokyo Rules'), which involve the treatment of young offenders through both the court process and community-based sentences and the *United Nations Rules for the Protection of Juveniles deprived of their Liberty*. The latter is especially clear regarding the requirements for institutions to meet the specialised individual needs of children, who should be placed in the type of care best suited to their particular needs and which can ensure the protection of their physical, mental and moral integrity and wellbeing (Rule 28). Other international human rights instruments of varying relevance include: the *International Covenant on Civil and Political Rights* (the 'ICCPR'); *Convention for the Elimination of All Forms of Racial Discrimination* (CERD); *Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment* (CAT); the *Convention on the Rights of Prisoners*; and the *Convention on the Rights of People with Disabilities*.

Australia ratified the CROC in 1990, however it is not a direct part of domestic law. Certainly, many of the international human rights principles relevant to children have been reflected in Australian law: practices around the sentencing of child offenders, for example, are premised on a commitment to diverting children away from formal judicial proceedings. Domestic instruments reflect international expectations that the principles that underpin the sentencing of children will involve children's best interests; allow for their participation in decisions; facilitate rehabilitation; not involve cruel, inhumane or degrading punishment; feature a range of options; be proportionate and permit review. Detention should be a matter of last resort and should be imposed for the shortest period of time. It must also be free from arbitrariness (Cunneen et.al 2015) while at the same time, the community must be protected from harm.

The Federal government has recently mirrored a number of international human rights standards relevant to children in OOHC as part of its national policy agenda. While child protection and OOHC are not strictly a Federal responsibility, the issuing of the series of National Apologies<sup>77</sup> in relation to historic abuse of children indicated a sizeable policy shift and signaled a greater willingness to become involved in essentially State and territory-based matters. For example, reflecting Articles 2 and 19 of the CROC, the Department of Families, Housing, Community Services and Indigenous Affairs' *National Framework for Protecting Australia's Children* (2009–2020) focused on providing timely and universal support to all families (rather than being restricted to those deemed 'at risk') to prevent abuse and neglect and reduce the over-representation of Aboriginal children in the protection system. Similarly, the *National Standards for Out of Home Care* (FaHCSIA 2011; 2012), which were endorsed by the Council of Australian Governments in April 2009 to 'deliver consistency and drive improvements in the quality of care' provided to children in OOHC, are underpinned by child rights principles and aim to ensure that Australia's children and young people are safe and protected from harm (as per Article 19 of the CROC) (Child Rights Taskforce 2011).

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<sup>77</sup> As previously discussed in this thesis, the trilogy of apologies made by the Federal Government on behalf of the nation comprised the *Apology to Australia's Indigenous Peoples* (CPD 13 February 2008); the *Apology to the Forgotten Australians* (CPD 16 November 2009); and *Apology to the Victims of Forced Adoption Practices* (CPD 21 March 2013).

There is no guarantee however, that incorporation in domestic law will actually protect children or ensure them a better life. For example, all Australian state and territory child protection legislation follows the CROC in that the child's best interests are to be a paramount consideration. Yet children's outcomes 'indicate that legislative protection alone has not been adequate in ensuring the fulfilment of this right' (Child Rights Taskforce 2011:6).<sup>78</sup> Similarly, care and protection legislation in each state and territory enshrines the principle that children should have the opportunity to participate in decisions made about them and have the right to adequate information and assistance to express their views, yet there has not been any evaluation of the extent to which children do actually participate as provided for under these provisions. As discussed in Chapter Five, this can be a particular problem for children in OOHC who are involved with the criminal justice system.

Indeed, as the National Children's Commissioner testified to the Australian Parliament, 'children and young people in out-of-home care are especially vulnerable to having their rights violated' (Australian Senate 2015:23). In 2012 the UN Committee on the Rights of the Child noted concerns about Australia's record in respect of children in OOHC. The Committee was concerned about the increase in the number of children being placed in care, as well as the lack of data detailing the criteria for and decisions leading to placements. The Committee was particularly concerned at evidence of a lack of care options; inappropriate placements, inadequate screening, assessment, training and support of carers; the lack of Indigenous carers; and placement of Indigenous children outside their communities. The quality of OOHC was also of serious concern: the Committee noted the poor outcomes of children in OOHC when compared to the general population, and commented adversely on the abuse and neglect of children in care and the inadequate preparation and support for those leaving care (Australian Senate 2015:24).

Australia's commitment to international human rights principles has been questioned on several occasions. While the High Court has determined that international human rights

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<sup>78</sup> Every five years, the UN Committee on the Rights of the Child reports on the status of a country's adherence to the principles enshrined in CROC. As well as the Government's official report on its progress, the Committee examines a report from the Australian Child Rights Taskforce, comprising the views of service providers, experts and children and young people.

instruments are relevant to the interpretation of domestic law and the development of common law and held that there is an expectation that their provisions will be taken into account (pursuant to *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273), successive Governments have attempted to limit this ruling through the introduction of domestic legislation that seeks to permit officials to ignore such instruments without adverse legal consequences (Cunneen et.al. 2015). The Australian Human Rights Commission is able to investigate violations of international instruments only in certain limited circumstances (Cunneen et.al. 2015) and complaints to the UN Human Rights Committee, which has power under the Optional Protocol to the ICCPR and a number of other treaties, to consider individual complaints lodged by people in Australia against action by the Australian government, are infrequently made.<sup>79</sup> The barriers to making a complaint are considerable: the complainant must establish that he or she has been a personal victim of the violation, rather than being affronted or aggrieved by the alleged violation. The complainant must also have exhausted all available domestic remedies before making a complaint. Both the financial costs and the time involved in pursuing a determination are prohibitive: the Human Rights Committee averages four years for its decisions. Moreover, a determination is not binding. The Committee's view has only a moral imperative. Arguably, the country must only weather any political embarrassment from being adversely featured in the Committee's annual report to the General Assembly of the UN. The lack of enforceable consequences for a member State explains why, while Australia has been found to have breached its obligations under a treaty by failing to act on the treaty body's views, the government of the day has rarely acted to address a proven breach. This has direct relevance to children in out of home care: for example, as illustrated by the continued detention of two NSW prisoners who were children in OOHC at the time they abducted, raped and murdered a young woman,<sup>80</sup> Australia is the only

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<sup>79</sup> At least 14 successful complaints have been made in relation to Australia, covering matters as varied as unlawful discrimination; arbitrary detention, poor treatment of individuals while in gaol or detention, interference with family life, denial of freedom of expression and the right to a fair trial. For examples of complaints made to the UN, see the Australian Human Rights Committee website at <https://www.humanrights.gov.au>

<sup>80</sup> Blessington and Elliott were 14 and 16 years of age respectively when they killed their victim. Over the subsequent 28 years, the State has intervened to keep the men in custody on three separate occasions: passing retrospective legislation in 1997, 2001 and 2005. The Government has repeatedly denied the legitimacy of the United Nations determination, which found the sentence and the State's subsequent actions to be "cruel, inhuman and degrading" due to Blessington and Elliott's youth and the failure to consider their prospects for rehabilitation (Allard, *SMH* 29 January 2016). The refusal of the Government to accept the UN Committee's findings is illustrated by the comments by then-NSW Attorney-General Brad Hazzard, who stated that the government would grant "no special benefits via the UN" to the men and accused the Human Rights Committee of 'failing to acknowledge the human rights of Janine Balding and

country in the world (apart from some States in the United States, which has not ratified the CROC), that still imprisons children without a real possibility of parole.

### The Australian policy vacuum

Notwithstanding its relatively recent forays into child protection and OOHC policy, the Australian Government has largely ignored the issue of care-criminalisation.<sup>81</sup> For example, neither the national *Framework* nor the *Standards* discussed above make any mention of the overlap between the care and criminal justice systems. Nor, despite recommendations that State and Territory custodial data should be collated and provided for national analysis with the input of the Australian Bureau of Statistics (ABS) and the Australian Institute of Criminology (AIC), so as to inform national standards, policies and programs (HREOC 1997a; Australian Senate 2004), has this occurred. Moreover, while the federal Labor Government introduced the concept of social exclusion to the country in 2008 with the establishment of the *Social Inclusion* Unit (my emphasis) within the Department of Prime Minister and Cabinet to create ‘a better future for all Australians, particularly for those who start a step behind’ (<http://www.socialinclusion.gov.au/>), it failed to include OOHC as a strategic priority. This omission is particularly striking given, as will be discussed later in this chapter, the fact that addressing the issues affecting children in care was a key platform of the English model it appropriated. To date, the Australian unit has failed to conduct research into any aspect of OOHC.

NSW policy is likewise lacklustre in this regard. For example, the *Children and Young Persons (Care and Protection) Act* 1998 (NSW), the primary Act governing the care of young people in OOHC in NSW, is silent on children’s involvement with the criminal justice system (CJS). While there are a myriad of publically available Standards and Policies relating to the care system,<sup>82</sup> none of them specifically relate to common

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those of the community who are entitled to protection’. “I don’t see any sign that the Human Rights Committee weighed up the barbaric end to her life at the hands of these individuals” he said (cited in Allard, *SMH* 25 November 2014).

<sup>81</sup> One exception is the Federal Attorney Generals’ Department ‘Access to Justice Taskforce’, designed to improve life for young people transitioning from OOHC to custody. In 2014 the Taskforce held a two-day workshop for representatives from ten federal government bodies, non-government agencies and academics (Vanstone, 2014). There has not been a public announcement of the Taskforce or its work and to my knowledge, no further action has arisen to date.

<sup>82</sup> These include the *NSW Standards for Statutory Out-of-Home Care* developed by the NSW Children’s Guardian as optimum standards; the *Child Wellbeing and Child Protection NSW Interagency Guidelines* which inform and guide both government and non-government agencies involved in the delivery of child protection services in NSW; the *Charter of Rights for Children and Young People in Out-of-Home Care*;

criminalisation processes, such as the use of police and criminal charges. Nor do the *Guidelines* developed by the NSW Children's Guardian, the watchdog agency charged with monitoring the circumstances of children in care, address the issue. The invisibility of the issues affecting children in OOHC extend to the criminal justice organisations: neither the prison nor juvenile justice agencies have incorporated OOHC status into intake procedures at detention or entry onto programs. The Attorney General's Department has not conducted research or studies nor instituted crime prevention programs targeted at the OOHC population, although as will be discussed later in this chapter, this has been recommended in several government reports.

The NSW Police Service has also neglected the importance of OOHC. Its *CRIME (Custody, Rights, Investigation, Management and Evidence) Guide* (NSW Police 2014a) specifies only that name, age, gender and the time and place of the offence must be recorded. Care status (as well as Aboriginality) is not recorded. Despite the close interaction of police with children in care, as demonstrated in Chapter Five, there is no evidence that recommendation 30 of the NSW Commission for Children and Young People ('the CCYP') *Inquiry into Children and Young people with no one to turn to* (NSW CCYP 2002) has been implemented. That recommendation urged police to commission research to investigate effective models of policing to inform the development of police training at both intake and ongoing professional development levels, particularly in relation to vulnerable children (NSW CCYP 2002:138). Just three years after the NSW CCYP's report in fact, the NSW Police Association told a Parliamentary Committee examining the situation of juvenile offenders in NSW (NSW Parliament 2005) that its members were 'frustrated with the current "softly, softly" approach that is being used in relation to juvenile offenders and advocate for 'a tougher approach and system more in line with that of the adult prison structure' (Police Association of NSW 2005:11). More recently, it was revealed that just 14% of sworn police had completed specialist youth officers training (NSW Government 2010:28). This also indicates a lack of awareness of the overlap between the OOHC and CJ systems.

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and the *Service Provision Guidelines for Out-of-Home Care*. Developed by the Department, the latter cover entry into care, assessment, referral, and case management and closure for children in care in NSW.



The care-criminalisation policy vacuum has serious implications for practice. The Department's historical and 'terrible negligence in data collection' has previously been criticized for making it difficult to know what policy changes have meant for service delivery (Mason 1993:119) and it has proven particularly problematic for 'those wards at risk with contact with the juvenile justice system' for whom information is 'inconsistent in terms of what's collected, how it's categorised, and how it is shared and reported' (NSW CSC 1996a:47). This has not been well-understood by NSW authorities. For example, NSW Justice Health recently reported that 41% of the juvenile justice population had a parent 'who had been in prison at some time during the formative years of that child in custody' (cited in PoC 2011:42). Although governments have seized upon 'the disturbingly high incidence of family abuse and 'hereditary detention' - where parents of young offenders had a history of jail terms and criminal activity' (Minister Beamer, Media Release 1 December 2003), the link between parental imprisonment and the placement in OOHHC of a child, has not been paid attention to. In the mid-1990s for example, the Parliamentary Inquiry into *Children of Imprisoned Parents* (NSW Parliament 1997) reported with incredulity that that 'there are no available data regarding how many children are State wards because their primary carer is in prison' (NSW Parliament 1997:57). Although subsequent government reports have confirmed that parental imprisonment is a common factor among the children entering OOHHC (NSW Parliament 2000b; 2001c) and the 'intergenerational entrenchment of involvement with the CJS among many Indigenous people has been recognised as one of the risk factors for offending by Aboriginal people' (PoC 2011:42), the Department still does not collect data or investigate the consequences of parental imprisonment on children in its care. Moreover, as the National Children and Youth Law Centre has commented in its submission to the UN on Child Rights, 'there is currently no consistent approach to funding and no assurance that all children of prisoners have access to support programs' (Child Rights Taskforce 2011:16).

The failure to collect information on care status has also had ramifications for prisons policy. Accurate and wide-sweeping demographic data is important in order to determine the recidivism rates for detainees and essential to identify effective programs and to build community support for them. Programs and policies are less effective and efficient if custodial authorities do not understand the significance of a care background. As the Human Rights and Equal Opportunity Commission recommended, data collection should

include information regarding those who had been in the care and protection system in order to inform program development and policy, to alert authorities to their over-representation and to understand their particular needs in custody (HREOC 1997a). Yet although the prison department had identified in the early 1980s that over 70% of the gaol population aged under 21 and almost half of the older prisoners had been through boys homes as children (Anderson 1989), they failed to capitalise on this finding. This represented a significant missed opportunity to break the ‘recyclable population of disadvantaged people’ (Anderson 1989:48) that churn through the State’s prisons.<sup>83</sup>

### The situation in England and Wales

The situation is markedly different in the United Kingdom (UK). Considerable government priority has been afforded to children in OOHC. For example, information on the care status of children arrested by police is published annually in that jurisdiction and has revealed that as many as 50% of those arrested have been in care or have a history of significant child protection and social services involvement (NACRO 2003). The collation of children’s care status by police has allowed comparisons to be drawn between the care cohort and the general young offender population, leading to the identification of looked-after children as a disadvantaged group that offends - and reoffends - at considerably disproportionate rates. For example, it was identified that children in care aged ten and above (who had been in care for at least 12 months) were charged by police at a rate of almost 11% – over three times that of the general child population (DfES 2007). The Blair Labour Government declared that it would reduce this offending rate disparity by 30% over three years (DoH 2001) and poured millions of dollars into a concerted agency push to achieve that aim.

In contrast to the Australian experience, the UK Government has taken a decidedly proactive role in respect of the overlap between the OOHC and offending populations. For example, the five year *Quality Protects* program (DoH 2000), a whole-of-government response to the damning revelations of the *People Like Us* (Utting 1997) report that had identified systemic and long-standing disadvantage and abuse of children in care, sought

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<sup>83</sup> As discussed in Chapter Four, research by the Departments of Juvenile Justice (Cain 1993; 1995) and Corrective Services (Dewdney and Swarris 1971; Miner 1987; Denton 1995; Hastings 1998; Pollard and Baker 2000) has also demonstrated the over-representation of the OOHC cohort amongst prison populations.

to improve agency efficiency and accountability and included funding incentives in a bid to engender local authority compliance with the national program. In 2000 the Youth Justice Board was established and charged with collecting data on looked after children involved with the CJS while the *Children (Leaving Care) Act 2000* (introduced in October 2001) required local authorities to assess the needs, including the legal and immigration matters, of all children in care.

Judicial scrutiny also focused attention on the needs of looked after children in custody (*R v Secretary of State* (2002) EWHC 2497 per Mr Justice Munby). In 2004 the Department for Education and Skills ('the DfES') confirmed the responsibilities of local authority toward incarcerated children, including those in local authority care,<sup>84</sup> publishing a circular to this effect and funding the *Looked after Inside* project to facilitate the care planning needs of looked after children in custody (Hart 2006). A national focus was also brought to bear on the issue with the *Children Act 2004*. The Act established the post of Children's Commissioner for England:<sup>85</sup> a position which, after an apparently sluggish start,<sup>86</sup> directed its attention to children in care. So too, the UK Social Exclusion Unit - after its own initial failure to prioritise the 'victims of "social exclusion"...' [who] suffer from just the kind of failures of co-ordination of policies and communication between agencies that the Social Exclusion Unit was set up to tackle' (HoC 1998:Rec 5) - helped expose their over-representation in the CJS, reporting that nearly a third of adult prisoners had been in care as children (SEU 2002a). In 2006, additional measures were proposed. These included a national protocol between residential staff, local police and Youth Offending Teams to manage anti-social or offending behaviour in care (DEfS 2006c:81). In 2009 the UK Crown Prosecutor Service published guidance on residential care homes, establishing that a decision to prosecute a child in care can only be made by an appropriately trained specialist youth officer and senior Crown prosecutor. The guidance acknowledges that children in care have special needs which may place them at

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<sup>84</sup> A year later however, Justice Munby ruled that these local plans for looked after children were "little more than worthless" (*R v Caerphilly County Borough Council*, 11 April 2005).

<sup>85</sup> The Office of the Children's Commissioner (OCC) is an aspect of the National Preventative Mechanism – a United Nations protocol for monitoring cruel, inhuman or degrading treatment in settings where people are deprived of their liberty.

<sup>86</sup> In 2010 the Government commissioned Dr John Dunford to undertake an independent review of the Office. His report included a commitment to having an independent Children's Commissioner with a clearer focus on promoting and protecting children's rights.

greater risk of offending and coming into contact with police compared to children not in residential care<sup>87</sup> (NACRO 2012:25).

NACRO, the UK's largest crime reduction charity, sought to further reduce the inequities in the CJS by publishing a guide to the issues that decision-makers should consider when prosecuting and sentencing children in care. The agency argued it is essential that informal, restorative and pre-court diversion, bail, remand and sentencing options are available to those in care in the same way that they are utilised by other children involved in the CJS. Additionally, it advised, practitioners need to be responsive to the special needs of the care cohort and to be sensitive to potential negative court reactions to information relating to care history (NACRO 2012:26). Of particular importance in this regard is the Court's understanding that any failures or inadequacies in the care system need to be properly considered in pre-sentence reports, and that recorded care histories and incidents are not afforded inappropriate prominence when assessing a child's likelihood of complying with a court order (NACRO 2012:26).

In March 2010 regulations and guidance to improve the care planning, placement and case review of looked after children and support for care leavers were published and became a statutory obligation for local authorities in 2011. In recognition that entering custody marks a significant change in the child's circumstances, it likewise became a statutory obligation for local authorities to arrange a review during a child's time in custody (Summerfield 2011a). The importance of care status in managing the prison population was also acknowledged. As a result, OOHC background is now routinely collected on intake to the justice system as part of ASSET, the standard assessment tool used by youth offending teams to collate information on all children who come into contact with the justice system. ASSET regarded as being of critical importance – allowing identification the factors that contribute to offending and which must to be addressed if reoffending is to be prevented. The assessments feed into interventions and sentences to assist meeting an individual's needs and offending profile (Jacobsen et al., 2010). While of variable reliability, the collection of care status has highlighted the particular circumstances and vulnerability of children in care in detention. As well as

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<sup>87</sup> In determining whether to proceed against a child in care, the Crown Prosecutor Service must review the behaviour management policies of the children's home, and consider how they have been applied and why police were called rather than the matter being dealt with in another fashion (NACRO 2012:25).

enabling the development of care-specific risk assessments, this information has identified the need for girl-specific programs, particularly around violence committed by girls from residential institutions, and revealed the disproportionate numbers and acute vulnerability of very young children in care being accommodated in juvenile detention centres (Hart 2006; Arnall et al., 2007; HoC 2009a; Glover and Hibbert 2009; Arnall and Eagle 2009; Jacobsen et al., 2010; HM Inspectorate of Probation 2012; HoC 2013).

A Government commitment to addressing the issues facing children in OOHC was also crucial to ensuring that care was placed on the national agenda. Elected to government in 2010 after 18 years in the political wilderness, the conservative Cameron Coalition affirmed its commitment to children in care (HoC 2011). Stating that ‘it is essential that corporate parents do everything possible to avoid unnecessary criminalisation of young people in the care system’ the Government was clear: it expected the revised *National Minimum Standards* for children’s homes and fostering services and the revised *Care Planning Guidance* to assist local authorities on how to reduce criminalisation. The *Guidance* requires local authorities to establish strategies to provide children in care with ‘all possible support’ to become responsible citizens. While acknowledging that some improvements had been made in the care system in recent years, the Government understood that the outcomes and experiences of children in OOHC remained poor (HoC 2011). Consistent with traditional conservative thinking, the Government attributed this relatively limited impact to the fact that the initiatives had tended to be centrally led and controlled, arguing that the previous Labour government had ensured that children in care had remained a relatively low priority. In a symbolic gesture intended to demonstrate that the Coalition regarded children in care as one of its highest priorities, responsibility for this group was assumed by the office of the Prime Minister.

The English experience has not operated to protect children in OOHC from abuse and service inadequacies. For example, the *Independent Inquiry into Child Sexual Exploitation in Rotherham 1997 – 2013* (Jay 2014) reported that perpetrators of sexual exploitation targeted local residential units and that services had failed to protect children in care. In July 2015, an *Independent Inquiry into Child Sexual Abuse* was established to investigate ‘whether public bodies and other non-state institutions have taken seriously their duty of care to protect children from sexual abuse in England and Wales’ (<https://www.csa-inquiry.independent.gov.uk/>). In relation to care-criminalisation, data

inconsistencies, competing priorities and agency politics have all conspired to minimise the effectiveness of many of the initiatives intended to reduce the criminalisation of children in OOHC. For example, national statistics on children in care in England and Wales exclude ‘young offenders in youth justice provision’ (Ward, cited in Stein and Munro 2008:266).<sup>88</sup> This significantly understates the numbers of children in the OOHC system. Agency take-up of some initiatives too has not been as comprehensive as initially expected. For example, although the Comprehensive Spending Reviews (CSRs) established clear public clear targets which, for the first time, indicated how public service improvements would be achieved against key governmental priorities and outcomes and specifically set about reducing the disparity between the offending rates of children in OOHC and the general youth population (Public Service Agreement (PSA) for 2001–4 (target 7c), local authorities were slow to embrace it. ‘Somewhat surprisingly’, less than ten local authorities moved to quickly adopt the target, although 60 agencies had agreed to more general PSA arrangements (NACRO 2003). There has also been criticism that local authorities have failed to embrace the government’s stated commitment to incarcerated children in OOHC, including those in local authority care, with local plans for looked after children regarded as ‘little more than worthless’ (*R v Caerphilly County Borough Council*, 11 April 2005). There has also been criticism that some prosecutors have remained either unaware or uncaring of the Crown Prosecutors Guidance (NACRO 2012:25), thus restricting its impact on children in OOHC.

Finally, the quality of the police-youth justice data collection has been criticised because of its variability, while discrepancies in the quality of systems utilised by various local area commands have been identified. For example, while the Home Office reported favourably on a data system that was able to identify patterns of offending by children in local authority care, including the nature, frequency and location of incidents, which could form the basis of thematic analysis – allowing for example, identification of the links between school exclusion status, care and offending - the system was believed to be the only one of its type in the country. Although the database was important in that it enabled police ‘to discuss potential responses with their partners to issues such as the

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<sup>88</sup> The national statistics also exclude ‘several thousand children...who are not officially in care, but are placed by education (now children’s services) departments in boarding schools for children with special educational needs or by health authorities in mental or physical health provision’ (Ward in Stein and Munro 2008:266).

over-reporting of offending, which...led to changes in practice and the establishment of local protocols' (Home Office 2004:5) and so was 'a valuable tool in informing discussion of, and practical responses to, youth offending' (Home Office 2004:4), no recommendations were made that it should be adopted as a universal approach.

Nonetheless, in England and Wales, Government acceptance that offending by children in OOHC required a national, whole-of government approach has allowed the recognition, and at least some inroads, into many of the systemic issues that contribute to the problem of criminalisation. For example, a decade after the identification of the disparity between the offending rates of children in OOHC compared to the general population, the disparity had been reduced - although never to the extent promised by successive political leaders. Today, children in OOHC are twice as likely to be cautioned or convicted than their non-care peers (HoC 2013:9).<sup>89</sup>

### **INSTITUTIONAL INDIFFERENCE AND NEGLECT**

In my view, the failure of NSW agencies to include OOHC status in policy and program development is an indication of the 'institutional neglect and indifference' (Wood 1997:258) to children in OOHC identified by Royal Commissioner Justice Wood almost 20 years ago. My discussions with senior Corrections staff for example, elicited a range of reasons why care status could not be incorporated into the existing questionnaire asked of all inmates entering prisons. It was variously argued that the inclusion of yet another question at intake would place an onerous burden on both staff and prisoners; would not yield useful information; would be overly expensive; and could not be justified given the limited numbers of prisoners to whom it would apply.

Similar resistance has been exhibited by data collection agencies. In 2006 the Australian Institute of Criminology, which had been 'the data custodian for juveniles in detention for a number of years', argued that it no longer had responsibility for the area, advising that a new national minimum data set (NMDS) on juvenile justice in Australia had been developed by the Australian Institute of Health and Welfare (AIHW) 'in conjunction with all jurisdictions.' Yet the AIHW does not regard children in juvenile justice facilities as

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<sup>89</sup> As discussed in Chapter Three, it seems this figure will be investigated by Lord Laming as part of the UK Prison Reform Trust's independent review into the links between OOHC and custody (see [www.prisonreformtrust.org.uk/carereview](http://www.prisonreformtrust.org.uk/carereview)).

being in OOHC (AIHW 2008a; 2008b; 2011a; 2011b; 2012a-d; 2013a-e) despite being advised of the importance of the OOHC – juvenile justice nexus. The Juvenile Justice Data Sub-Committee of the Australasian Juvenile Justice Administrators (AJJA), while advising that its members ‘were aware of the over-representation of young people, with a history of care, who are now in the juvenile justice system and recognise that this is an important issue’, failed to incorporate care status into data collection processes. No concrete action has eventuated. Although a key aim of the *National Framework for Protecting Australia's Children 2009-2020* (‘the NFPAC’) was to establish comparable definitions and data across jurisdictions), there are no current national indicators against which its own measure – the tracking of ‘cross-sector clients’ across child protection, juvenile justice and homelessness services – can be reported (AIHW 2013:49).<sup>90</sup>

### Government recognition of care-criminalisation

#### Data collection

The lack of action cannot be attributed to these agencies’ ignorance of care-criminalisation. My research has identified that detailed data involving OOHC status and involvement with the CJS was once officially collected. Between 1899-1915 for example, the *Register of 7th Class Prisoners* (SRAI 2303), which referred to incarcerated juveniles convicted on predominantly delinquency charges, recorded detailed statistical information on ex-‘Vernon boys’, the former inmates of the floating hulks that indiscriminately housed orphans and criminal boys. Between 1971-1974 statistical reports published on juveniles appearing before the Children’s Courts (SRAI 14637) and those dealt with by police caution (SRAI 14638) included a wealth of information about young offenders, including whether the juvenile was in OOHC (or a ward of the State, as was the terminology of the day).<sup>91</sup> Until the early 1980s the Police provided ‘Home Reports’ that included care status to the Children’s Court (Blackmore 1985c) and the Court itself was able to access information on a child’s involvement with the welfare system from a central index of juvenile court records encompassing both criminal and welfare proceedings maintained by the Department’s Planning and Research Unit

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<sup>90</sup> In any event, the *Framework* measure misses the mark: its definition of cross-sector clients effectively net-widens the scope beyond the involvement of children in OOHC in the CJS, to encompass the involvement of *all* children known to child protection services (whether in care or not). As discussed throughout this thesis, this is a significantly different issue that has allowed the importance of care-criminalisation to be ignored.

<sup>91</sup> It is likely that this is only a surviving sample only of reports that continued for a much longer period.



(Blackmore 1985b). Ten years ago, the *Wards Project* (NSW Government 1997) noted that care status was routinely collected by NSW Police and recommended focusing on prevention work with the Police Service to encourage a greater use of cautions and conferences for the OOHC cohort

### *Government reports*

#### *Indigenous-specific analysis*

Moreover, the criminogenic impact of Australia's child removal practices and subsequent institutionalisation of children has been known for decades. Most of the discussion around care-criminalisation has focused on the impact on Indigenous communities. In 1977 the Department of Aboriginal Affairs (Sommerlad 1977) noted that approximately 95% of people in NSW and Victoria who sought assistance from the Aboriginal Legal Services on criminal matters had been in care. Dr Sommerlad attributed this over-representation to the children being separated from the support of the Aboriginal community, the corresponding lack of identity with Indigenous culture and simultaneous alienation from the white community. The Australian Law Reform Commission stated that the link between placement in OOHC and subsequent incarceration 'has often been asserted and seems undeniable' (ALRC 1982:6) and the Senate Standing Committee on Social Welfare (Australian Senate 1985) observed that welfare intervention was a highly disruptive factor that had set many young Indigenous people on the road to incarceration. 'It may be conjectured' the Standing Committee wrote, 'that the process of care, particularly wardship, has a momentum of its own that carries a child through a series of placements and through a series of officers, so that family and kin ties are weakened, personal identity is confused, and self-esteem is low, to the point where anti-social behaviour makes correctional care necessary' (Australian Senate 1985:18).

Dr Roberta Sykes, a radical Aboriginal leader of the 1970s and 1980s, was scathing of the effect of the devastating impact government policies had had on Indigenous communities. 'Between the efforts of the legal justice system, courts, and welfare agencies' she wrote, 'there are numerous country towns where it is possible to find no Black males between the ages of 12 and 16 left in their communities. Under one guise or another, they were removed to institutions or other placements' (Sykes 1989:143). She warned that the experience of juvenile institutionalisation 'pre-conditions many children to accept, and often expect, periods of institutionalisation as adults. It can therefore create

long-term destabilising influences for a person for their whole life' (Sykes 1989:143). Other commentators noted that for Indigenous women in particular, 'the devastating effects of this institutionalisation and forced adoption of Aboriginal infants and children are still, and will continue to be, a major factor in Aboriginal over-imprisonment for both sexes for a long time to come' (Payne 1992:66).

The pathway from child welfare homes to subsequent institutionalisation in prison for Indigenous people was confirmed by the findings of the *Royal Commission into Aboriginal Deaths in Custody* (RICIDIC 1991). Of the 99 people whose deaths in State custody had been investigated by the Royal Commission, 43 had 'experienced childhood separation from their natural families through intervention by State authorities, missions or other institutions' (RCIADIC 1991:1.2.17). Former Labor Commonwealth Minister for Aboriginal Affairs, Robert Tickner, found the statistics compelling. Addressing a press conference in 1994, he noted the Commission's findings and declared 'If that doesn't tell the story, nothing else will' (Tickner, recorded in Katona and Mackinolty (1994), cited in Windschuttle 2009). So too, the Human Rights and Equal Opportunity Commission's *Bringing Them Home* report (HREOC 1997) viewed childhood removal as a significant cause of delinquency, 'both in distinctive horror and its capacity to breakdown resilience and render a victim perpetually vulnerable' (HREOC 1997:11-114). Citing the Australian Bureau of Statistics, HREOC noted that forcibly removed people were twice as likely to have been arrested more than once in the past five years and that one in five removed people had had this experience (HREOC 1997). In 2011 the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (PoC 2011) lamented the ongoing exodus from care to gaol. The Committee noted evidence 'linking young people who have lived in OOHC to future offending behaviour and detention' and observed that up to a third of children who have grown up in care are in the juvenile justice system (PoC 2011:3.134). The 'intergenerational entrenchment of involvement with the criminal justice system among many Indigenous people and communities' concluded the Parliamentary Committee, is a risk factor for offending (PoC 2011:42).

#### *Non-Indigenous specific analysis*

It should not be assumed however, that Australia's child welfare practices only affected Aboriginal children and communities. Care-criminalisation amongst the non-Indigenous community has also been identified in a plethora of Government reports. The engagement

in criminal activity amongst children removed under Australia's forced adoption practices for example, was acknowledged as early as 1961 when, as minutes from the first child welfare officers' meeting demonstrate, a delegate complained of the 'abnormally high' incidence of delinquency amongst adopted children, which he attributed to 'the result of bad matching' between child and their adoptive parents (draft *Report of the Officers' Conference on the Social Welfare Aspects of Adoption*, 8 June 1961, cited in Commonwealth Parliament 2012:168). So too, the relationship between the welfare and juvenile justice systems for young women was observed in the NSW Premier's Department *Girls at Risk* report (L'Orange 1986) and again by the NSW Parliament (1992). The Parliament observed that girls in OOHC were 40 times more likely to be incarcerated than other girls and often remained in detention 'by default' when bail conditions could not be met due to inappropriate accommodation or homelessness (NSW Parliament 1992:141). Research conducted in the early 1990s by the Department of Juvenile Justice researcher Michael Cain (Cain 1993; 1994; 1995; 1996) also drew attention to care-criminalisation. Cain highlighted the 'unusually high' representation of girls on remand and suggested that juvenile justice centres were being used 'as crisis accommodation for female offenders who are either homeless and/or in need of care and protection' (Cain 1993:34). He subsequently reported that almost half (42%) of a cohort of young women 'first appeared in court in relation to child welfare or care and protection matters' rather than for criminal offences, and noted that for many children, 'there exists a doubt that the decision to incarcerate, by way of bail refusal or committal, was based on the criminality of the offender involved...' (Cain 1995:18).

The involvement in the CJS of children in care generally was highlighted in a series of reports of the NSW Parliament's Standing Committee on Social Issues during the 1990s. The *Inquiry into Juvenile Justice in New South Wales* (NSW Parliament 1992) urged the child welfare and juvenile justice agencies 'to continue to monitor the numbers of state wards in the Juvenile Justice System with a view to developing strategies as to how best such children might be diverted from contact with that system' (NSW Parliament 1992:54). The *Inquiry into Youth Violence* (NSW Parliament 1995) noted that many offenders had a history of contact with the welfare system and the *Inquiry into Children of Imprisoned Parents* (NSW Parliament 1997) observed that children in OOHC 'present a serious risk of involvement in anti-social behaviour and entry into the juvenile justice system' (NSW Parliament 1997:57). Similar observations were made by the Standing

Committee on Law and Justice's *Inquiry into Crime Prevention Through Social Support* (NSW Parliament 2000b) and the Select Committee on the *Inquiry into the Increase in the Prison Population* (NSW Parliament 2001). The *Inquiry on Child Protection Services* (NSW Parliament 2002) heard highly critical evidence of children in care being fast-tracked to the CJS because of systems abuse issues, and the Select Committee on *Juvenile Offenders* (NSW Parliament 2005) cited witness testimony that this issue 'probably one of the most tragic things in our society' (NSW Parliament 2005:108). Three years later the highly anticipated *Noetic Review* of juvenile justice (Murphy et al., 2010) urged the government to adopt a 'sound policy platform' and address the risk factors of OOHC and its links to the juvenile justice system (Murphy et al., 2010:88).

Care-criminalisation has also been raised as a concern by inter-state and federal agencies. For example, the Federal Standing Committee on Social Welfare *Report on Homeless Youth* (Australian Senate 1982) noted the links between OOHC, homelessness and criminal activity. The Victorian Auditor General (VAGO 1996) warned that the 'high incidence of criminal behaviour and the likelihood of it continuing beyond discharge from wardship is of serious community concern and warrants research as to its causes and prevention strategies' (VAGO 1996:266). The Australian Law Reform Commission (ALRC 1997) warned that the care system was producing long term criminal offenders. The Ministerial Council on the Administration of Justice (MCATSIA 2003) recommended the legal issues and incarceration rates among previously separated children should be further investigated. A series of inquiries by the Federal Community Affairs References Committee (Australian Senate 2001; 2004; 2005; 2009) also noted evidence of care-criminalisation and ultimately led to the Commonwealth Government *Apology to the Forgotten Australians* (CPD 16 November 2009). The Committee reports pointed to the impact of children's homes that resulted in 'uncontrollable, often explosive anger leading to outbursts of violence' and prison stints (Australian Senate 2001:101) as well as engagement in 'antisocial and criminal behaviour' (Australian Senate 2004:166) for many adult survivors. The brutality of institutional life 'where abuse and assault, both physical and sexual, was a daily occurrence and where hardship, hard work and indifferent care was the norm' was particularly responsible for people's subsequent involvement in 'domestic violence...crime and violence (Australian Senate 2009:3). The Committee argued that recognition of the involvement of those in OOHC in the CJS would lead to 'an improved understanding of the factors influencing crime and social

disorder’ and recommended that research into the issue ‘be matched by appropriate resources, policies and administrative effort’ (Australian Senate 2005:16.43 Rec 16).

Running parallel to these Inquiries was the scrutiny emerging from independent watchdogs such as Royal Commissions and Special Commissions of Inquiry. As discussed in Chapter Three, early Inquiries undertaken by Allard (1920); Fincham (1923); McCulloch (1934a; 1934b); and Muir (1975), to name a few, identified Departmental practices that criminalised children in care and constituted forms of systems abuse. More recently, the *Burdekin Royal Commission Inquiry into Our Homeless Children* (HREOC 1989), the *Inquiry into Systems Abuse* undertaken by the Child Protection Council (Cashmore et al., 1994), the 1996 *Wood Royal Commission into Police Corruption (Pedophile Inquiry)*, the NSW Community Services Commission (NSW CSC 1996b; 1999a;b;c;d; 2000a; 2001a;b;d) and the *Special Commission into the NSW Child Protection System* (Wood 2008) all made adverse comments on the pathway from OOHC to the CJS.

### **Censoring care-criminalisation: The *Wards Project***

My original documentary analysis indicates that far from practice changing in light of the government reports listed above, care-criminalisation has been repeatedly downplayed and ignored by government agencies. This is demonstrated in the interagency practices relating to the NSW Government’s ‘*Wards Project*’ of the mid 1990s.

In February 1993 the NSW Coalition Government released a Green Paper prepared by the Juvenile Justice Advisory Council (NSW DJJ 1993). The *Future Directions for Juvenile Justice in New South Wales* report echoed the findings of State ward over-representation in detention made by the NSW Parliament’s *Inquiry into Juvenile Justice* made the previous year (NSW Parliament 1992). The Green Paper stated that the over representation of wards in the CJS had been long known and complained that the interagency co-operation needed to identify and assist the high-risk group had often been inadequate (NSW DJJ 1993). Examination of the NSW Parliamentary papers (the Hansard) and press articles of the day indicate that the issue was also being ventilated in the media. NSW Labor Community Services spokesperson Ron Dyer had seized on the poor relationships between the child welfare and juvenile justice agencies. Dyer argued that children were being detained due to a lack of suitable accommodation and accused

the government of inaction towards ‘disadvantaged and homeless youth’ (NSW PD LC, 2 March 1993:121-22 (Dyer). He revealed that Juvenile Justice had accused the Department of Community Services of failing to prevent the criminalisation of homeless children and those in care and claimed there was ‘clear evidence’ of a lack of Departmental care (Jurman, *SMH* 8 March 1993). He cited research by Kerry Carrington (Carrington 1993a) that children in OOHC comprised up to 75% of juvenile detainees although they made up less than half a percent of all Australian children and issued a press release alleging this was because of government neglect (Dyer, 20 September 1993). In the release, Dyer also claimed that Children’s Court magistrates were ‘being forced to jail State wards because [the Department] is refusing to assist them if they are granted bail’ and painted a picture of a Court in crisis - ‘loathe to refuse bail to young people on welfare grounds’ but faced with the unenviable choice of releasing vulnerable children ‘on to the streets or lock[ing] them up’. He said the Senior Children’s Magistrate Rod Blackmore was ‘so concerned about this situation that he has written to the Government in the strongest terms’ and claimed that the government had admitted in the Parliament that ‘State wards have been inappropriately jailed...because of a demarcation dispute...over who has responsibility for State wards when they are charged with an offence’. He called for ‘immediate action to ensure State wards are not jailed for welfare reasons, and that...Government provides them with safe accommodation’ (Dyer 20 September 1993).

The Attorney General and Minister for Justice, John Hannaford, acknowledged that children had been placed in detention for essentially welfare matters ‘*in the past*’, but pledged that things would change. ‘...As a result of the discussions that have transpired’ he said, ‘those issues are unlikely to arise again’ (NSW PD LC 16 September 1993: 3244-45 (Hannaford) – my emphasis). Acknowledging that things had not been done well in the past, he also pledged that the government would ‘ensure that appropriate protocols have been instituted to put beyond doubt the source of responsibility for caring for those people’ (NSW PD LC 16 September 1993:3244-45 (Hannaford). He also issued an unusual public warning to the bureaucracy. ‘All three Ministers<sup>92</sup> who had responsibility for the administration of the community services portfolio,’ Hannaford put on the Parliamentary record, shared concerns about Departmental ‘patch protection’ that was leading children in OOHC to become involved in the CJS (NSW PD LC 3 May 1994:1694

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<sup>92</sup> Hannaford was referring to his Coalition colleagues Ministers Virginia Chadwick and Jim Longley.

(Hannaford). The Attorney Generals' comments were intended to be a clear indication to the relevant bureaucracies that the Government would not tolerate inaction on care-criminalisation.

The Attorney Generals' Department agreed that the 'lack of clear guidelines delineating the responsibility of each department' had meant that 'children were not receiving appropriate service' (NSW AGD 1994:36). It set about developing new protocols to combat this by providing 'clear procedures and guidelines for working with young people who become the responsibility of both departments'. Under the *Protocols*, agencies would 'work co-operatively, with the child's interests always paramount in both case planning and service delivery' (NSW AGD 1994:29). Six months later, the Attorney General announced the *Protocols* had been completed and restated the expectation that agencies' would address care-criminalisation. 'The problems that have occurred previously, which were caused by young people falling between the chairs of responsibility of the Office of Juvenile Justice and the Department of Community Services will now be redressed' he stated. '[A]n agreement has now been reached to overcome that problem' (NSW PD LC 3 May 1994:1694 (Hannaford)).

The White Paper *Breaking the Crime Cycle: New Directions for Juvenile Justice in NSW* (NSW DJJ 1999) was released the same year. It reinforced the message that State wards were amongst the specific categories of offenders 'who should have access to a range of preventive and support services, bail options, pre-court interventions and court-ordered sanctions [and] specialised services and programs' (NSW DJJ 1994:4). This document remained a bi-partisan blueprint for reform of the juvenile justice system after the Labor Government assumed power in 1995. The White Paper also paved the way for the establishment of a 25 member Interdepartmental Committee on Juvenile Justice ('the ICJJ') to provide a co-ordinated response to the government's justice objectives, foster inter-agency co-operation, share information and resources, clarify areas of responsibility and prevent duplication of services. It was specifically tasked with identifying 'policy priorities and service deficits for young people within, or at risk of entering, the juvenile justice system' (NSW DoCS 1996b:83).

The ICJJ set up a sub-committee – the *State Wards in Juvenile Justice Subcommittee* ('the SWIJS') comprising senior agency representatives from eight Departments - with the

specific task of ‘reducing the number of young people, particularly state wards, who drift into the juvenile justice system and serious criminal activity’ (NSW DoCS 1996a:72). According to departmental annual reports, the SWIJS immediately set about identifying procedures to ‘help address the needs of wards in juvenile justice, reviewed existing interagency protocols... and identified mechanisms to establish new procedures relating to wards in the juvenile justice system’ (NSW DoCS 1996a:72). It also produced a damning report, which while apparently provided to the Minister, was never released.<sup>93</sup> The *State Wards in Juvenile Justice Report* found that statistics ‘were not detailed or specific enough to identify the exact number of wards who are in the juvenile justice system’ but nonetheless, confirmed they constituted ‘a significant over-representation’ (NSW Government 1997:6). The report pointed to a number of systemic inadequacies in the Department’s operations that contributed to an increased likelihood of children entering the CJS: these included a high numbers of placements; high turnover of supervising officers; limited amount of information on the children; lack of appropriate accommodation; lack of staff training in joint case management; and a lack of adolescent specialist staff. The SWIJS recommended that further research be undertaken into the over-representation issue and that an interagency working group be established to develop a ‘comprehensive and compatible data system on wards at risk and wards entering the juvenile justice system’ (NSW Government 1997:7).

By 1997 the SWIJS had ceased operation (NSW DOCS 1996a:74), leaving the ICJJ to provide ‘quarterly reports on trends, issues and progress’ of the implementation plan to various Government Ministers (NSW Government 1997:39). This was an exceedingly odd time to wrap up such a Committee. The independent watchdog, the NSW Community Services Commission, had released its own report into the ‘drift’ of children in care into the CJS (NSW CSC 1996b) and the NSW Ombudsman’s *Inquiry into Juvenile Detention Centres* had found that State wards constituted a group ‘deserving special attention’ (NSW Ombudsman 1996:133). The *Royal Commission into Police Corruption* (Wood 1997) had made scathing comments on the government’s ‘official neglect and lack of concern’ over the issue (Wood 1997:1142). NSW Premier Bob Carr responded to this

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<sup>93</sup> A copy of the WIJSR *Wards in Juvenile Justice* report has proved impossible to trace, despite the professional endeavours and resources of library staff at the NSW Attorney Generals’ Department, NSW Law Reform Commission, the NSW Parliamentary Library, the NSW State Library, NSW Juvenile Justice and Family and Community Services.



criticism by personally promising a series of initiatives: the independent Community Services Commission would review the circumstances of the 6000 children in OOHC to ensure that they were being properly cared for (NSW PD 16 April 1996:20-21, Carr) and a newly established Commission of Children and Young People ('the CCYP') would oversee their progress and financial and counseling assistance would be available to former wards. Carr also committed that the Department would achieve accreditation, overseen by an external monitoring agency, the NSW Children's Guardian. The new watchdogs were given monitoring and advocacy responsibility for children in OOHC, while the commitments were presented as specific actions to reduce State ward over-representation (NSW Government 1999a).

Few of these initiatives eventuated. The independent case audit was quickly relegated to a departmental file review (Horin, *SMH* 18 August 1997) and two years and almost \$2.5 million later, even this had been abandoned (*Northern Daily Leader* 20 July 2000). Today, 15 years after the Government promised the Department would be accredited, it has failed to achieve it.<sup>94</sup> The specific OOHC focus of the watchdog bodies was also watered down. Fifteen months after the Children's Guardian was appointed with a \$2.6 million budget, she had not been given the legal power to do her job (Horin, *SMH* 12 April 2002). Ultimately, the agency's advocacy role for children in care, described as the 'most crucial reform in the entire 1998 Act' by the legislation's principal architect, Sydney University Law Professor Patrick Parkinson, was never proclaimed. This was commonly regarded as a 'complete disgrace' (Parkinson, in evidence 19 August 2002, NSW Parliament 2002) and as confidential legal advice obtained by the then Opposition stated, it was also highly unusual. 'While it is not unusual for parts of legislation to remain unproclaimed, what is unusual in this instance is that the relevant sections relate to important accountability provisions...the powers of the Children's Guardian regarding Out of Home Care' (private papers 2002, sighted by the author). It was reported that it was commonly thought that pressure from the Department, which was unable to comply with the basic standards for OOHC, had led to the abandonment of the Guardian's advocacy role (Horin, *SMH* 12 April 2002).

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<sup>94</sup> As discussed in Chapter Two, the NSW Department of Family and Community Services has only achieved interim accreditation. In July 2015 the Children's Guardian issued a *Community Services Accreditation Order 2015* (NSW) that extended the Department's interim accreditation to 31 July 2016, by which time, it is hoped that full accreditation will be achieved.

The role of the Commission for Children and Young People in addressing the issues impacting on children in OOHC in the CJS was also diluted via a range of legislative amendments. The CCYP's focus was net-widened to encompass *all* vulnerable children. It saw its focus not as considering 'the child or young person in relation to a particular part of the service system intended to support them – care and protection, juvenile justice or some other official program' but took 'a wider perspective' to give 'a broader picture of children and young people in the setting of family, peer and community relationships – strong or weak, supportive or damaging – that shape their lives' (NSW CCYP 2002:10). Deliberate or otherwise, this view led to an abandonment of the agency's original mandate to protect State wards.

Questions were also raised regarding the sincerity of the Government's commitment to addressing the over-representation issue at the time. 'Frosty relations' between the Government and the NSW Community Services Commission head, Roger West, had been running high for some time (Horin, *SMH* 18 August 1997) and in 1998 it was announced that West would not be reappointed. Seen as a 'prominent critic of the Government' whose 'stinging reports and statement' had drawn 'attention to deficiencies in disability and child protection programs' (Bernoth and Murphy, *SMH* 18 December 1998), it was West's series of reports into the over-representation of State wards in detention, and his work with the SWIJS, that had brought the issue to the public's attention. His failure to be reappointed was regarded by many, as an extremely unsubtle form of payback.

Bureaucratic game-playing of the sort identified by Attorney General Hannaford some years earlier had also undermined work to reduce the over-representation. According to Jenny Barga, former Chair of the Juvenile Crime Prevention Advisory Committee, the ICJJ, which had been entrusted to resolve care-criminalisation, was a toothless tiger. It had been deliberately sabotaged by its own members, who sent a series of junior officers with limited understanding and insufficient authority to make decisions to Committee meetings. The result was a 'general feeling that the [Committee] was a waste of time' [and] led 'to a worrying level of cynicism about the value of the White Paper' (Barga 1997:5).

It was against this backdrop of interagency politicking that the new head of the NSW CSC, Robert Fitzgerald, a former national President of the Australian Council of Social

Service, released the *Just Solutions – wards and juvenile justice* report (NSW CSC 1999a). *Just Solutions* identified the need for improvements in policy, program and case management by the child welfare and juvenile justice Departments and generated considerable media scrutiny. Juvenile Justice Minister Carmel Tebbutt re-pledged her government's commitment to children in care who 'may end up as a high-risk group within the juvenile justice system' (NSW PD LC 2 June 1999:784 (Tebbutt) and announced that the 'Wards Project', a 'major initiative', would reduce the number of wards in juvenile justice (NSW DJJ 1999:13). Coming full circle from the Government's Green Paper (NSW DJJ 1993) just five years previously, the issue of ward over-representation was then referred back to the Juvenile Justice Advisory Council of NSW for review (NSW DJJ 1999:34).

Behind the scenes, the newly constituted *Wards Project* systemically net-widened the scope, changed the terminology and subverted the original Government commitment. Rather than address the systems inadequacies that the SWIJS and NSW CSC reports had identified as contributing to the over-representation of State wards in detention, it interrogated their methodology, questioned their conclusions and commissioned new research which indicated that State wards made up 'no more than 4% of the juvenile justice system' (NSW Government 1999b:11). The *Wards Project* argued that although even this figure was an over-representation, it was not as high as had been said; did not apply to all wards or even a majority; and meant there was 'still a low number of wards in the juvenile justice system' (NSW Government 1999b:9). The argument however, was a fallacy. The data cited to support the assertion significantly understated the problem, for the Department's own surveys had identified that wards made up at least 33% of the girls at Yasmar and 42% of the boys at Reiby detention centre (NSW Government 1999b:11).

The *Wards Project* Final Report (NSW Government 1999b) also challenged the very premise on which it had been established, namely, to reduce the numbers of State wards in custody, by questioning '*the inadequacies of focusing purely on Wards as the only target group*' (NSW DoCS 1999:3 – my italics). It argued that the real focus should be on children generally at risk of entering the juvenile justice system and cemented the net-widening with a name change: in 2001 the initiative was renamed the *DoCS-DJJ Justice Project*. This net-widening also enabled Minister Tebbutt (now in charge of the child welfare department) to side-step allegations of departmental inactivity regarding children

in OOHC in the CJS. She argued that ‘there was always some debate about the level of overrepresentation’ (NSW PD LC 21 September 2004:11112 (Tebbutt)) and implied that previous allegations of ward involvement in the justice system had over-stated the extent of the problem by including children ‘in the juvenile justice system who had some contact with the Department of Community Services’. This was ‘obviously a much larger number than the number of young people in the juvenile justice system who are in the care of the Minister and therefore in out-of-home care and under the responsibility of the Department of Community Services’ she said (NSW PD LC 21 September 2004:11112 (Tebbutt)). In reality, as demonstrated above, her own department had advocated the widening of the research scope.

Minister Tebbutt was able to make such a claim because no one had access to the information about joint departmental clients. Beyond the historic secrecy surrounding these children, the lack of a finalised *Memorandum of Understanding* about data sharing between Community Services and Juvenile Justice had prevented monitoring and reporting of the issue. Indicating that the MOU was ‘very close to being finalised,’<sup>95</sup> Tebbutt’s answer established that, just as Minister Hannaford had believed with the *Protocols* discussed earlier, a Minister was seemingly content to repeat departmental assurances that a bureaucratic ‘arrangement’ would solve the longstanding problem of children being inappropriately placed in juvenile gaols. Assurances were given that as soon as the MOU was complete, a data matching exercise would be able to be conducted and agencies would embark on ‘improving policy, service planning and delivery to joint client and promote[s] a collaborative approach to joint case planning and service delivery’ (NSW PD LC 10 November 2005:19434 (Della Bosca)).

The *Wards Project* was said to have ‘been overtaken by a range of other developments in out of home care and support for children and young people who can no longer live with their families’ (NSW PD LC 21 September 2004:11112 (Tebbutt)). Yet although \$600 million in new funding had been flagged for OOHC as part of a comprehensive program to improve the life chances of children and young people who come into care, it remained

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<sup>95</sup> In her written answer (released a month later) the Minister gave a little more information: agencies were ‘co-supervising a Senior Project Officer to finalise the MOU regarding service provision to children and young people under the parental responsibility of the Minister who are clients of juvenile justice’. The MOU – now downgraded to a mere ‘draft’ - was again said to be ‘expected to be finalised shortly.’

unclear how the over-representation and criminalisation of children was being addressed. Comments made by the Labor Minister for Juvenile Justice, Diane Beamer for example, reveal that although a JusticeHealth report had identified that children in OOHC were still over-represented in detention, they were also apparently invisible to Government. Minister Beamer noted that the report presented a 'sad and disturbing picture of young people in detention, a picture we all need to take very seriously' (NSW PD LA 3 December 2003:5771 (Beamer)). The JusticeHealth *NSW Young People in Custody Health Survey* (YpiCHS) to which Minister Beamer referred, detailed children's disengagement from school, history of parental incarceration, prevalence of drug and alcohol-related offending and histories of maltreatment. According to the Minister, the report was 'a great tool...to pinpoint and refine our current single-agency and multi-agency programs to reduce the number of kids in detention.' She noted its importance in terms of interagency responsibility: the statistics 'also give weight to the importance of the multiagency approach in preventing juvenile crime'. '...We no longer say "That is the responsibility of DoCS" or "That is a police matter"; rather, we now work with DoCS, Education and NSW Police to give an alternative to drugs, to give kids a safe home, to get them into school' the Minister said. 'The Government is using a multiagency approach, and it is working' (NSW PD LA. 3 December 2003:5771 (Beamer)).

Ironically, one statistic was conspicuously absent from the Minister's recital: the YpiCHS report revealed that over one quarter of those surveyed had been in OOHC. As such, they were the direct responsibility of the Government. Yet as the Government's spokesperson, Minister Beamer avoided public comment on the significance of those statistics. Moreover, agency practices and policy did not adapt in response to this information, just as they had not reacted to the previous revelation that people removed from their families as children were significantly more likely than their non-removed Aboriginal peers to present with significantly worse mental health, child sexual assault and suicide rates (Egger and Butler 2000). The inadequacy of the Minister's answer is evident when considered alongside the evidence being provided by her expert advisory group, the Juvenile Justice Advisory Council, which advised the Parliament's *Inquiry into Juvenile Offenders* (NSW Parliament 2005) that, 'not enough attention is being paid to the needs of former State wards who are now part of the juvenile justice system, particularly the intensive counselling needs that many of those young people require'. Care-criminalisation was still operating in NSW. As Professor Cunneen observed, 'behavioural

problems that might be associated with traumatised young people who were formerly State wards, in a sense can be brushed under the carpet, they can be pushed aside and can be treated as management and behavioural problems to be foisted onto Corrective Services rather than being dealt with intelligently and sympathetically within the department (Cunneen in evidence 09 March 2005, in NSW Parliament 2005).

### The failure of interagency collaboration

Over a century ago, Sir Charles MacKellar remarked in respect of England and NSW, that although, '[i]t is clear then what the intention of Parliament was in regard to juvenile delinquents and dependent children...there is the tendency...to take the alternative course which the law permits – that of *not* boarding out or *not* releasing on probation or license; or, if the latter course *is* adopted, not properly supervising the conditions of release' (MacKellar 1913:156 – original emphasis). As discussed above, the NSW *Wards Project* of the 1990s was a 20<sup>th</sup> century example of the bureaucratic tendency to 'take the alternative course'. It demonstrated how the best intentions and specific Government directions can nonetheless, amount to nothing when undermined by bureaucratic 'patch protection' (NSW PD LC 3 May 1994:1694 (Hannaford) and politics. As is discussed in the following section, another example of MacKellar's argument is evident in the departmental failure to address care-criminalisation through effective inter-agency co-ordination.

The belief in interagency collaboration has shaped the overarching philosophy of child protection in the State. The *Children and Young People (Care and Protection) Act* 1998 ('the Act') establishes that an all-of-government approach to child protection in NSW is necessary to protect children, for while the child welfare Department has the responsibility for child protection, other Departments may have the resources or the answers. Accordingly, statutory responsibilities were placed on key agencies - such as health, education, child protection, police, the welfare sector and juvenile justice – to ensure they work together to address the many needs of their shared clients. As discussed previously, an independent oversight body – the NSW Children's Guardian – was tasked with overseeing this inter-agency approach through the accreditation of care agencies, review of caseplans and advocacy and performance monitoring.

The call for interagency collaboration has also been a primary rallying cry internationally. For example, the identification of children in care and in custody as ‘two sides of the same coin’ (Bilchik and Nash 2008; Nash and Bilchik 2008) led to moves for closer collaboration between the justice and welfare systems. This was premised on the belief that early welfare intervention in a child’s life can reduce the likelihood of subsequent delinquency (Loeber and Farrington 1998:425 cited in Petro 2006b:8) and reduce the number of ‘cross-over kids’ (Siegal and Lord 2004; Herz et al., 2012). International experience suggests however, that inter-agency relationships may not deliver all that they promise. In the United States a series of studies has revealed that the failure of policymakers and practitioners to comprehend the background and pathways of those in their care is a significant obstacle to improving the outcomes of these crossover youth (Herz et al., 2012). For example, a survey of 1500 juvenile justice and court administrators across 42 states found that only 10% of respondents had a specific program or policy for children involved in both the welfare and justice systems (CWLA 2002). A follow-up nationwide telephone survey undertaken some three years later found that gaps in practice remained. Lack of funding coupled with restrictions on how states could spend the money, poor interagency dynamics, lack of clarity around agency roles, service delivery gaps, differing philosophies between child welfare and justice agencies and poor communication and information-sharing all impacted on the care that children received (Petro 2006b:8).<sup>96</sup> Significantly, these barriers withstood legislative demands that agencies work together to provide crossover youth with collaborative, effective services. For example, over half the respondents had laws in place that mandated such cooperation; another 13 had written policies and/or Memorandums of Understanding or Executive Orders that similarly required agencies to work together (Petro 2006b).

In the UK, poor relationships between branches of the child welfare and justice sectors have led to increased criminalisation of children in care. There is a ‘sharp divide’ amongst professionals on why this occurs: frontline care home staff argue that they often have no option but to rely on the police in response to children’s behaviour, but police, leaving-care workers and youth offending services’ staff believe police are being unnecessarily

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<sup>96</sup> Moreover, the majority of respondents excluded young people under the jurisdiction of both the child welfare and justice agencies *at the same time* (my emphasis) – discounting those who had prior child welfare experience and those who might be referred to welfare services on discharge from the juvenile system (Petro 2006b:5).

involved in minor care home incidents (Shaw 2010; Hayden 2010). The differences of opinion between those that provide direct residential care for children and other workers, particularly those in the CJS, can lead to difficult relationships between professionals. For example, while police representatives indicated that they felt they were being over-used by staff to manage the behaviour of children in residential care units, ‘those of us coming from the residential sector felt quite defensive’ (Gentleman 2009:2).

The inability or unwillingness of agencies to work together has been shown to plunge children deep into the CJS. The situation is exacerbated by an ‘apparent paradox’ (NSW CSC 1996b) that has also been noted internationally, whereby programs intended to reduce care-criminalisation ‘somehow are either ineffective or worse, actually increase the likelihood of CJS involvement across both the adolescent and adult life stages’, particularly for Australian Aboriginal children (Corrado et al., 2011). For example, a US study that sought to test the impact of placement in OOHC on criminal behaviour among maltreated children by differentiating between those who received child welfare services and those to whom services were not provided, found that the risk of incarceration for maltreated girls actually *rose* alongside the level of services received (Jonson-Reid and Barth 2000:346 – my emphasis). The NSW Parliament (NSW Parliament 1999d) found that human service agencies were unable to ensure adequate supportive and safe environments and criminal justice agencies could not respond sensitively and appropriately. Systemic failures at all levels of service provision thus directed children into the justice system. Similar findings were made by the NSW Sentencing Council, which reported that agencies ‘mandated to provide assistance’ failed to ensure effective options in response to those coming in contact with the CJS (NSW Sentencing Council 2006) and the NSW Law Reform Commission (NSW LRC 2010) which reported that notwithstanding government pledges to improve agency collaboration and assistance to those in need of care, service dysfunction and inadequate responses pushed those with cognitive impairments into the CJS.

The fact that so-called ‘Governmentalised’ youth may be chronic offenders despite being subject to repeat interventions and services across their lifetimes raises another concern: not only that ‘our current armoury of social services is not as effective as we are entitled to expect’, but that ‘troublesome’ youth are simply being transferred from agency to agency with little in the way of any very obvious benefit being derived’ (Ogilvie



2000:12). It also indicates that the services are ‘not as effective as we could reasonably expect – not so much of a *good* thing for a ‘lucky’ few, as too many getting too little of the *right* thing’ (Ogilvie 2000:11 – original emphasis).

As discussed in Chapter Five, my examination of children in OOHC before the NSW Children’s Court criminal jurisdiction confirmed that the NSW landscape is characterised by extremely poor inter-agency relationships. Tensions between government agencies over who is responsible for children who have committed offences remains a significant concern. Agencies have been reluctant or unable to work together, especially in the transfer of children’s information or files. Often there has been no lead agency willing to assume the main role and ensure that others fall into line behind commonly accepted and agreed to practices, and there has been little consistency of practice and standards applied across agencies. Inadequate or non-existent monitoring of the non-government sector, a lack of public scrutiny or accountability of non-government agencies who are not held to be same level of public reporting of findings and performance and which operate to a different standard or financial and time constraints than the State agency, also impacts on children’s welfare. Ironically, the plethora of agencies theoretically involved in every aspect of the life of a child in OOHC has meant that in many cases there has been a dilution of responsibility, with no one person or agency having accountability for the child’s overall well-being. When statutory agencies fail to live up to their role and meet their obligations - for example, by failing to coordinate accommodation or transport once children are incarcerated (Wong et al., 2009) – children are at risk of being remanded in custody and of remaining there indefinitely. My findings suggest that the agencies may well be ‘simply ‘passing the buck’ with the knowledge that if ‘things don’t eventually work themselves out’ the buck will always finally stop at the point of incarceration’ (Ogilvie 2000:12).

### Failure to provide services

Attempts to overcome care-criminalisation are also dependent on the OOHC system redirecting the path from maltreatment to juvenile delinquency by ‘changing the environment and securing rehabilitative services.’ As such, success depends on a range of

factors, including whether services were provided by the system (Jonson-Reid, 2003).<sup>97</sup> As discussed above, Australian studies have noted that ‘governmentalised’ youth subject to intensive agency interventions, may nonetheless be chronic or persistent offenders (Ogilvie 2000). Numerous Australian reports have identified that the absence of appropriate support services for children in OOHC, particularly for those with severe emotional, behavioural and psychological problems, directly contributes to children’s progression into juvenile justice, as well as into homelessness, poverty and drug dependency (Burdekin 1989; Van Krieken 1991; NSW CSC 1999). As the Department’s own submission to a 1984 Senate *Inquiry into institutional care* clearly stated, unless appropriate forms of care are given, children’s pre-existing problems will only become worse (Australian Senate 1984:61). Yet while urgent recommendations for specialised services and support have been made in countless reports (see for example: Vardon 1983; NCOSS 1987; Usher 1992; Cashmore et al., 1994; NSW CSC 1996; 1999; 2000) subsequent inquiries have revealed that they been inconsistently implemented or not acted upon, even when they have been mandated by law. This was confirmed in a NSW Ombudsman report which found that although almost half of an OOHC cohort had been in contact with the police and/or Juvenile Justice since coming into care, this was not acknowledged or addressed in the children’s mandatory leaving-care plans (NSW Ombudsman 2004a).

### Lack of data and research

A lack of statistical data has also impeded analysis of the significance of the OOHC cohort amongst offending populations. This parallels the Indigenous experience. According to Dr Don Weatherburn (2014) who has headed the NSW Bureau of Crime Statistics and Research (BOCSAR) for over a quarter of a century, when the *Royal Commission into Aboriginal Deaths in Custody* (RICIDIC 1991) began its hearings, there were ‘no national data archives on the rates of Indigenous and non-Indigenous involvement in various types of crime, or on rates of arrest, bail refusal, diversion from prison or recidivism. In short’ Dr Weatherburn stated, ‘there were virtually no data that could be used to test competing hypotheses about the causes of over-representation’. In his view, ‘matters could not have

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<sup>97</sup> The literature on this issue is however, extremely limited: an early US study which reported associations between outcomes and the kind of services provided to a child in care (Fanshel and Shinn 1978) was unable to produce ‘substantial and consistent findings...[making] it impossible to draw even tentative conclusions’ (McDonald 1993:127).

been worse from the standpoint of a disinterested and objective enquiry into the causes of Aboriginal over-representation in prison' (Weatherburn 2014:23).

Ironically, Dr Weatherburn's own agency (prior to his stewardship) had itself had been accused of abrogating its responsibility in respect of Indigenous data collection. Since 1969 the statistical and research agency had been responsible for identifying factors that affected the distribution and frequency of crime and the effectiveness, efficiency or equity of the NSW CJS. However, BOCSAR had been criticised by Dr Sykes, for when faced with the system's inability to generate statistics on Indigenous criminal clients, BOCSAR had failed 'to *insist* on the collection of source data for the collation and generation of valuable analysis and guides to flaws in the system' (Sykes 1989:133 – original emphasis). Dr Sykes was also critical of BOCSAR for designing a court reporting system that failed to include any information relating to race, and which therefore could 'not identify any of the areas of severity, over-or-under-representation, or discrimination of Aboriginal people within the process' (Sykes 1989:133).

While Indigenous status is now collected and reported on at various stages of the CJS, the nexus between the tremendous rate of Indigenous over-representation in the child protection and OOHC systems and subsequent incarceration rates has rarely been commented upon. Yet the 'the impact of 'colonisation, dispossession and the separation of children from their families' has played 'an enormous role' in Aboriginal over-representation in custody (Baker 2001:1). As the official apologies by both State and Commonwealth Governments have conceded, child removal often occurred for spurious reasons (see for example, CPD 13 February 2008; CPD 16 November 2009; and CPD 21 March 2013). Moreover, many Aboriginal families had previously been affected by the seizure and placement of their wages into a government-administered 'trust fund' (Australian Senate 2006; see too Kidd 2006). While the NSW government has apologised for the subsequent 'loss' of trust monies<sup>98</sup> (NSW PD LA 11 March 2004:11) (Carr), my research indicates that the significance of the trust monies scandal has not been fully appreciated in the context of Australia's child removal policies. Rather than merely losing their wages, some Aboriginal families subsequently lost their children. I postulate that

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<sup>98</sup> The NSW Government's apology for the loss or misappropriation by government agencies of wages belonging to approximately 11,500 Aborigines, and worth over 70 million dollars, was followed by the establishment of a Trust Fund Reparations Scheme in 2005.

with their parents unable to show they possessed lawful means of support, children were removed by the authorities as a consequence of the poverty imposed through the government confiscation of Aboriginal wages.

While few academics have explored the issue of whether OOHC is linked to offending, care status - defined as direct childhood removal from the natural family *and/or* secondary family membership of the Stolen Generations (my emphasis)<sup>99</sup> – has been shown to be a significant factor in predicting the likelihood of contact with the CJS (Wundersitz 2010). For example, Mukherjee et al., (1998) found that removal from the family as a child was strongly associated with likelihood of arrest for both Indigenous males and females, with removed adults significantly more likely to be arrested compared with those Indigenous people who had not been removed, while Hunter's (2001) analysis of NATSIS data, including Indigenous respondents aged 13 years and over, found that removal had a smaller but nonetheless significant effect in predicting overall likelihood of arrest in the preceding five years (although it played no role on an individual's probability of being arrested for a specific offence, in this case, assault). In 2002 the Australian Bureau of Statistics (ABS) noted that respondents aged 15 and over who had been removed from their natural family were 1.3 times as likely to be charged by police than those who had never been removed (ABS 2004). Weatherburn, Snowball and Hunter (2006) also found that being a member or a family member of the 'Stolen Generations' increased the likelihood of being charged by police. A subsequent study by the same authors, focusing on Indigenous arrest frequency, found that being a member of the Stolen Generations increased the risk of arrest but, along with a number of other predictive factors, did not have a significant effect on the number of arrests an individual experienced (Weatherburn et al., 2008). More recently, Dr Weatherburn (2014) has speculated that the 'deliberate removal of Indigenous children from their natural families...may have contributed to the rise in Indigenous arrests.' This view is premised on the fact that 'children removed from their families during the 1950s and 1960s would have been reaching their crime-prone years during the 1970s and 1980s'. However, he cautioned that the evidence for this is currently weak: 'there are no time series or panel studies showing that changes

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<sup>99</sup> I argue that the definition of 'Stolen Generations' used in the NATSISS is inherently problematic. While, as has been argued above, the impact of forced removal on successive generations has now begun to be recognised, there is a real need for accurate data on the effect of direct removal practices. The failure to make such a distinction netwidens the group of affected people, running the risk that the impact of forced child removal can be falsely attributed to Indigenous disadvantage generally.

in...offending over time are strongly linked to changes in the rate at which...children were removed from their natural families...the data required to do this simply does not exist' (Weatherburn 2014:151).

The limited research into child removal and involvement in the CJS has been largely restricted to examining the impact on the Indigenous community. The impact of removal policies and of the OOHC experience on the broader NSW community has rarely been undertaken. The limited studies that do exist have ignored care-criminalisation. This is seen in the *A Thousand Prisoners* study (Vinson 1974) undertaken by BOCSAR in the early 1970s. The agency found that 41% of prisoners had lived in an orphanage or some form of children's home. However, this 'substantial number' was seen not as evidence of care-criminalisation, but as the result of the prisoners' status as products of a broken home. BOCSAR's Foundation Director Tony Vinson - a qualified social worker and later head of the NSW Corrective Services Commission and Dean at the University of NSW – did not explore the OOHC connection. Rather, he stated that research into broken families was so well established there was no need to examine the matter further. The significance of Vinson's study had however, been understood by at least one commentator at the time. Rinaldi Fiore, lecturer in law at the Australian National University and later the creator of the specialist Australian Criminal Reports,<sup>100</sup> noted Vinson's findings that over a third of NSW's long-serving prisoners had spent time in a children's home. Reflecting that the gaol population was growing younger and more difficult to manage, Fiore highlighted the increasing violence in Australian prisons and stated that '[i]nstitutions are notorious producers of socially deprived children who turn to crime' (Fiore 1977:51).

## CONCLUSION

Through an original analysis of over 25 years of Parliamentary papers, independent inquiries and Government reports, set against a backdrop of international human rights obligations, this chapter has shown that Government attempts to address the criminalisation of children in OOHC has not been successful. The *Wards Project* of the mid 1990s was examined in detail to demonstrate how agency 'patch protection' (NSW PD LC 3 May 1994:1694 (Hannaford) and bureaucratic game-playing, alongside

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<sup>100</sup> The *Australian Criminal Reports* is a record of selected criminal cases from the High Court, Federal Court and State and Territory Supreme Courts since 1979.

Government inconstancy and failure to learn from previous Inquiries, allowed care-criminalisation to be downplayed and ignored. The failure of agencies to work together as mandated by the *Children and Young (Care and Protection) Act* 1998 to ensure the provision of services to children, and the unwillingness to be ‘critical of responsible officials and management’ (Platt 1977:181) has allowed the involvement of children in OOHC in the CJS to continue today. Set aside the recent developments in England and Wales, I have argued that the NSW policy and program vacuum is an example of the continuation of the ‘institutional neglect and indifference’ towards children in OOHC identified by Royal Commissioner Justice Wood almost 20 years ago (Wood 1997:258).

## CHAPTER SEVEN: CONCLUSION

This thesis has examined whether, as Foucault (1977) alleged, the child welfare home is a major contributor to the creation of criminals. It explored the intersection between the child welfare and criminal justice systems to identify the rates of appearance of children in out of home care (OOHC) before the New South Wales ('NSW') Children's Court on criminal charges, whether this appearance rate is disproportionate and what factors might be responsible for the over-representation. Through original analysis of the 180 files of children who appeared before the criminal jurisdiction of the NSW Children's Court (Parramatta) between July 2009 and December 2010, I have identified that children in OOHC are over-represented in the criminal justice system (CJS) compared to their non-care peers. Further analysis revealed that the OOHC cohort had a different experience of the justice system compared to other children. As discussed in Chapter Five, there was a statistically significant difference between the two cohorts across several key measures: for example, there was a statistically significant difference between the Indigenous status of children in OOHC and those not in care. Children in OOHC first came into contact with the criminal justice system earlier and incurred their first charge at a younger age than children who had not been in care. Males in OOHC were particularly affected. Children in OOHC in this study were also more likely to be remanded for bail breaches and spent longer in custody than their non-care peers.

There are complex and interconnected reasons for care-criminalisation. Through an exploration of the processes and policies of the NSW child welfare system, this thesis has shown it is inexorably linked to the manufacturing of delinquency and children's involvement in the CJS. Analysis of the files of the children who appeared before the Children's Court revealed that in many cases, children in OOHC were adversely affected by agency practices. Systemic institutional factors - such as limited high quality placements, a lack of support from health, education and justice services - negatively affected outcomes. Carers and workers were often inadequately trained and poorly supported or managed and files were frequently unallocated, with no-one assigned responsibility for responding to a child's needs. In some situations it seemed too easy for individuals to evade responsibility for their client's overall well-being. Workers' lack of awareness of the role of other agencies also meant that too often, children were left to 'drift' from care to the CJS (NSW CSC 1996b).

My research has demonstrated that the criminalising effect continued once children were brought to the attention of police and the courts. Police are the ‘gatekeepers’ to the CJS (PoC 2011) and as such, they wield significant power over a child’s fate. Consistent with Scottish research that has found that police discretion regarding whether to charge children with an offence, refer them to diversionary programs, or move to a formal court hearing led to certain categories of children, the so-called ‘usual suspects’, being ‘propelled into a repeat cycle of referral’ into the justice system while other equally serious offenders avoid the attention of formal agencies altogether (McAra and McVie 2010), I found that poor police relations particularly impacted upon the OOHC cohort.

The State’s historical reliance on police to enforce government policies implanted a mistrust of authority. Police were active agents of social control, working alongside ‘the welfare’ and deployed to enact government policies such as the removal of Indigenous children from their communities and their forced assimilation into religious and State-run orphanages. These facilities were controlled by the same agencies that oversaw the institutionalisation of other vulnerable children and there too, police were relied upon to control their behaviour - undertaking surveillance of state wards, returning absconders and rounding up truants and girls ‘exposed to moral danger’ for confinement in laying-in homes and institutions. State reliance on police to remove children from their families reinforced in the mind of the public that the children must have done something wrong, while even the language used by the NSW Children’s Court condemned children who had never committed an offence to be treated as criminal, with charges of neglect and abandonment persisting up until the mid-1970s.

Today, the removal process itself often shapes the poor relationship between police and children in OOHC. The experience of coming into care has been described as a traumatic and terrifying experience that represents the collapse of the child’s entire world (Harper 1985) and ensures ‘a traumatic beginning to the loss of everything familiar and entry into an institution full of strangers’ (CLAN 2008:5). The process instilled a deep distrust of authority in the minds of some children and their families, leading them to regard involvement with the child welfare system as ‘a very negative experience’ and the Department to be seen ‘not as a source of support and security, but as an uncaring bureaucracy, to be feared rather than trusted’ (Sanders (2002:2). For example, well over three-quarters of respondents to a survey of people formerly in care said that they found



it hard to trust people, angered easily, had taken life-threatening risks and felt abandoned, lonely, deprived, guilty, angry, ashamed and forgotten. Almost half of the cohort admitted they ‘hated or had no respect’ for authority (CLAN 2008:13). These emotions are all potent precursors to behaviour likely to bring people into conflict with police or other authority figures. Such sentiments are also likely to ensure that people who come to police attention are met with a hostile response that can lead to conflict and ultimately result in arrest and further involvement with the CJS. Inter-generational child removal policies (HREOC 1997a) also affected relations with other authority figures. The files analysed in the current study indicated that some families were also markedly hostile in their interactions with authority, either assisting their children to abscond from care or hiding them and lying about their whereabouts. This was consistent with research that has reported that Aboriginal youth in both Australia and Canada regard juvenile justice staff with suspicion because of their parents’ experiences of institutional care and incarceration (Cashmore and Paxman 1996; Johnston 1997).

Analysis of the Children’s Court files revealed that absconding from placements, having a negative attitude towards authority or a history of minor delinquency also resulted in a child in care being characterised as a “serious offender” and led to fewer referrals to diversionary options such as youth justice conferencing, and a rapid escalation to formal court proceedings. The imposition of welfare-focused bail and probation conditions, such as a requirement to reside at a certain placement or not associate with one’s friends, were easily breached and drove some children deep into the justice system. Placement instability, increased propensity for behavioural difficulties and the inevitable negative impact on a child’s education and involvement in sporting or community activities, further disadvantaged children in care at sentence. The absence of parental advocacy both at the police station and the court, as well as agencies’ failure to meet their legislative and regulatory obligations by assisting children before the court, exposed some children in OOHC to harsh judicial penalties and the increased risk of incarceration.

People who have been through the child welfare system have provided some useful insights into the impact of child removal policies on their lives and those of their families. In *The Forgotten Children: Fairbridge Farm School and Its Betrayal of Australia’s Child Migrants* (Hill 2007) David Hill (the former chairman and managing director of the ABC, former chairman of the Australian Football Association and a British child migrant

transported to NSW) noted that many of the ‘poorly educated, socially and emotionally incomplete, lost, alienated (and) poor’ 17 year olds who left Fairbridge suffered mental illness, spent time in prison or committed suicide (Hill 2007:291). A survey of almost 400 people who had experienced OOHC in 20<sup>th</sup> century Australia found that over 35% of respondents had been in trouble with the law for something other than a parking infringement and almost a fifth had been in gaol (CLAN 2008:10).<sup>101</sup> As the *Inside: Life in Children’s Homes and Institutions* exhibition at the National Museum of Australia<sup>102</sup> emphasised, the intergenerational impact of OOHC can run deep. As one exhibit stated ‘[w]ith my story, it’s the fifth generation in State care. My dad, my grandparents and my great-grandparents, all in State care’ (Sibraa, in the National Museum, 2011). This was consistent with the survey of former children in care, which found that over 14% of respondents had a history of parental OOHC (CLAN 2008:6).<sup>103</sup> The intergenerational impacts flowed both ways: almost 5% of respondents indicated that their children were in OOHC and just over 6% reported that their grandchildren had been taken into care (CLAN 2008). Indicating that ‘issues stemming from a parent’s time in care as a child can affect their children and in turn their grandchildren,’ the survey revealed that almost 9% of respondents’ children and just over 1% of their grandchildren, had also been in gaol (CLAN 2008:15).

Although it has been claimed that agencies ‘do not have to be convinced of the importance of preventing cycles of intergenerational offending by State wards’ (NSW Parliament 2000b), there has been very little investigation of this issue. As discussed in Chapter Four, the experience of adult careleavers is generally invisible in the academic literature and departmental practice. This is a surprising omission (Murray, submission, Australian Senate 2005) for their inclusion would overcome many of the methodological difficulties encountered when undertaking research with adolescents. It is also arguable that adults would have a greater understanding than children presently in care today, whose voices are invariably mediated through social workers and facilitators. The exclusion of those

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<sup>101</sup> Twenty-six percent of the men and almost 14% of the women had been in gaol.

<sup>102</sup> The exhibition was part of the Commonwealth Government response to the Australian Senate Inquiries into the *Forgotten Australians* (2004; 2009): an undertaking given as part of the 2009 Apology (CPD 16 November 2009). In addition to being shown at the National Museum of Australia, the exhibition toured several States and Territories. It was not seen in NSW.

<sup>103</sup> As the response ‘don’t know reflects a relatively common experience of careleavers, many of whom have little knowledge of their own history’ (CLAN 2008:2) it is likely that this is an under-representation of parental care status.

who have been through the care system is short-sighted, for, as careleavers have asked, if we do not examine these issues and tackle the difficult research questions, how ‘can we bring about the changes in the system which will prevent children in ‘care’ from entering the same damaging cycle?’ (Sheedy et al., in *SMH* 19 July 2000).

The issues identified in this thesis are not, in reality, different to those facing policy-makers and reformers of previous generations. As shown throughout this thesis, the history of child welfare in NSW has been characterised by constant reforms and reorganisation. For example, in just ten years, during which time the children in the research sample entered both OOHC and CJS, there were eight attempts at reform and restructure presided over by four Ministers and Directors General (Chesterfield-Evans, *SMH* 15 July 2000). The Public Service Association (‘the PSA’), the primary union representing child welfare workers, has complained that ‘there is no Department under the sun that has been more restructured and the victim of untalented carpentry than the unfortunate DOCS’ (PSA, 26 June 2000). Between 1990 and 2010, over 30 critical reports into the child welfare Department’s operations were undertaken. It could be expected that in view of so many inquiries, the organisation and administration of the Department ‘would be almost perfect’ (McCulloch 1934b:20). Yet the observations of Royal Commissioner McCulloch made almost a century ago still hold true. This thesis has shown that rather than learning from past mistakes, ‘many recommendations...have been anticipated and submitted for consideration on more than one occasion, over a number of years, and have not yet been adopted’ (McCulloch 1934b:20). While each restructure was met with a flurry of media interest and corresponding bureaucratic activity, this incessant action and reinvention was characterised by Royal Commissioner James Wood as ‘the endless development of plans, and changes in structure, which appear sensible on paper but in the end achieve nothing’ (Wood 1997:839). Some commentators have suggested that other factors may be at play: Commissioner Wood for example, noted with concern ‘that there should be fear engendered in people who are trying to improve the system, or concern as to the existence of a coterie of inner managers whose interest in the past has been to suppress all criticism and innovation’ (Wood 1997:901). So too, the PSA union called on the Minister to ‘solidly intervene’ to prevent the ‘retention of senior bureaucrats collecting incredibly high salaries year after year, people who are particularly talented at mismanagement. It is galling’ the PSA complained ‘to see such people reappointed in restructure after restructure’ (PSA Media Release 26 June 2000).

My research established that the child welfare system is still affected by the attitudinal views that regarded children in OOHC as inherently criminal: this has been evident since the days of transportation, when the new colony struggled to respond to the perceived threat posed by its own children. As discussed in Chapter Three, while ostensibly ‘saving’ children from lives of poverty and vice, the State and religious agencies sought to exert their moral influence to break the supposedly contaminating influence of corrupt and immoral working class families and raise their children to be law-abiding responsible adults. Whether orphaned, abandoned or simply a highly visible presence on the streets of Sydney, children were regarded as problems to be monitored and controlled. A range of tools were employed to control the behaviour of these ‘difficult’ children in care. Education for example, was seen as one means by which recalcitrant and potentially problematic children could be fitted to an appropriate station in life, while proving a doubly useful mechanism by guaranteeing a steady supply of much-needed domestic servants for the colony’s elite. Limiting or denying access to family and refusing letters and visits also isolated children, making it easier to replace family-life with a strict institutional discipline borrowed from military and religious orders. Children’s homes commonly drew staff from the ranks of former military personnel and custodial officers. Notwithstanding the raft of legislative, regulatory and other measures designed to offer some degree of protection, throughout the 20<sup>th</sup> century, children in care were commonly subjected to harsh regimes that included corporal punishment, a ‘silent system’ that forbade normal interaction, solitary confinement and forced marches known to have caused the death of some children.

My original analysis of contemporary and historical departmental documents revealed, as discussed in Chapter Six, that the Department and child welfare agencies have tended to blame their failure to provide essential services for children in OOHC, on the children themselves. For example, a review of substitute care services in NSW found that children were being denied stable placements and essential services because of lazy stereotyping by caseworkers. Staff ‘too readily identified’ matters as being difficult and labelled children as ‘more complex, ‘multi-problem’ [and] ‘hard-to-place’ (Usher 1992:66). The NSW Community Services Commission’s inquiry into the Ormond and Minali residential care homes similarly reported that high-needs children were commonly described by Departmental staff as the ‘most difficult children’ to care for and denied services as a result (NSW CSC 1999c:4). So too the interagency *Wards Project*, initiated to investigate

allegations that children in OOHC were over-represented in the CJS, found that Departmental staff claimed that adolescents were more difficult to deal with than in the past – not because they were actually more problematic, but because staff preferred to work with younger children (NSW Government 1999b). Resources too were predominantly directed toward the very young, with the result that older children missed out on essential services. It was the delays in the delivery of interventions - rather than any particular societal problems – that fuelled perceptions that children were more difficult. The *Wards Project* questioned whether children's needs had really changed over the years and suggested that the Department was 'just intervening at a later time and reacting to behaviours from a control perspective'. This process put the systems needs ahead of the individual and, the *Project* warned, represented 'a form of systems abuse' (NSW Government 1999b:3).

Notwithstanding the rhetoric of international human rights instruments that seek to place the child's best interests at the forefront of policy and practice, this has not assisted children in OOHC. Government has tended to blame the child for being 'difficult' and thus responsible for their own subsequent criminalisation and incarceration. For example, child welfare ministers Goward, Burney, Tebbutt, Lo Po', Dyer and Longley - as well as their respective Directors General - have all claimed that children in their care were more difficult than at previous times, even as they pledged commitment to address the systems abuse factors that were propelling children in their care to the CJS. One of the most blatant examples however, was that of former NSW Labor Premier Bob Carr, who once described a homeless child in the care of the child welfare department as 'almost uncontrollable' and 'probably one of the 20 most difficult young people in the state' (NSW PD LA 18 September 2002 (Carr)). With this simple statement the State's most powerful political figure promoted in the public mind the view that a 13 year-old boy was in the same league as the most dangerous offenders in the community – as dire a threat as that posed by murderers and rapists, thieves and arsonists. The public would have been justified in believing the child had soaked up countless hours of police and court time and cost taxpayers' millions as he waged his own one-man juvenile crime-wave across the State. Yet the boy had never been charged with a criminal offence. He had come to the Premier's attention after the NSW Parliament had been told that he had been forced to sleep on the floor of his local police station because the Department could not provide him with alternative accommodation. His only crime was to have inconvenienced the Department

and embarrassed Carr by focusing media attention on the government's broken election promise to protect children in care. The local newspaper for the area expressed the sentiments of many when it reminded the Premier that as the boy was a state ward, he was therefore the state's responsibility. 'These are facts that Mr. Carr, as Premier of this state, cannot avoid no matter how 'difficult' the boy may be' the editorial stated, dismissing Carr's 'unsavoury' attack on 'the person rather than the problem' (*The Manly Daily* 19 September 2002:4).

That the Premier's first response was to defend the welfare system - rather than to take it to task for having failed the boy – continued the State's long tradition of regarding children in its care as offenders. Girls incarcerated in the Hay School for Girls during the 1960s and early 1970s, for example, were portrayed by authorities as 'the ten most difficult girls in the State' (*ABC's Radio National, Hindsight*. 25 October 2007.) This was a patent untruth, but it was seen as legitimising the extreme violence inflicted by some officers on the girls, many of whom had been taken into care for their own protection (McClellan 2014). Reports of the abuse were ignored: denials made possible by a system that seemed not to care what happened to the children it was meant to protect.

The terminology might have changed,<sup>104</sup> but the view that children in OOHC are difficult or troublemakers, has endured. This is seen in the labelling of children today as 'difficult' or 'challenging'. While ubiquitous, it is still only 'a term used within the professional community that describes the effect of behaviour on carers but says little about the behaviour itself' (NSW CG 2012:12). As former the NSW Unity Party Parliamentarian Dr Peter Wong AM has argued, 'claims that children today are worse than in the past does a tremendous disservice to those children who have fallen foul of the law at a young age. More importantly, it does a disservice to the wider community, which is constantly being given false and misleading information in order to exonerate itself of any blame or responsibility' (NSW PD LC 9 December 2004:13676 (Wong)).

The authorities' stigmatising attitudes toward children in care can have long-lasting consequences. As adults who had been in State care told the South Australian *Commission*

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<sup>104</sup> For example, whereas a few decades ago children in OOHC were being termed 'mentally defective' or 'retarded' (Forde Commission of Inquiry 2000:69; CLAN 2001: 11) today they are labeled with conduct or oppositional defiance disorders for exhibiting similar behaviour.

*of Inquiry into Children in state care* (Mullighan 2008), ‘as children they had no respect for institutions such as courts, police, welfare, education and health, and did not trust most of the people working in them. As self-described ‘welfare children’ they felt stigmatised and of lesser value and importance than other children’ (Mullighan 2008:8). Similar sentiments were expressed in the nationwide survey of careleavers discussed previously: almost half of the respondents said they ‘hated or had no respect’ for authority (CLAN 2008:13). Children in care who are involved in the CJS today repeat the negative attitudes so often expressed to them by staff, seeking not to blame others for their offending but stating they are ‘simply “bad” and had been born so and therefore there was nothing that anyone could have done to prevent their offending’ (Berelowitz and Hibbert 2011:61). The general community also appear to believe the worst: according to a survey conducted by the children in care advocacy group *Who cares? Scotland*, almost a third of British adults believe that children are placed in care ‘because they have done something wrong’ rather than because their home life is unsatisfactory or unsafe (*BBC* 28 January 2010).

As discussed throughout this thesis, attempts to prevent the criminalisation of children in OOHC have not always been delivered. This was seen in Labor Community Services Minister Lo’ Po’s repudiation of the NSW Parliament’s Standing Committee on Law and Justice (‘the Committee’). Chaired by former Community Services Minister Dyer, the Committee had heard evidence that children in care were vastly over-represented in juvenile detention centres. Noting that ‘the importance of preventing cycles of intergenerational offending by state wards’ had been highlighted by the State’s Community Services Commission a few years prior, the Committee had presented a damning assessment of the Department’s failure to protect vulnerable children in its care. It recommended the eradication of agency silos, development of targeted programs and the commissioning of independent research to identify the number of State wards in the system (NSW Parliament 2000b). Confronted with the evidence that ‘State wards are 15 times more likely to be in juvenile detention centres’, Minister Lo’ Po misdirected the issue by ‘stepping up her campaign to take children from abusive parents in the wake of [the] report’ (*Daily Telegraph* 16 August 2000). She shifted the spotlight from her Department’s failure to protect children in its care from being criminalised, by focusing on the abuse that many of the children had suffered at the hands of their parents:

*'If I were to reach into the files of the Juvenile Justice Department and randomly select cases, most would tell a similar, sorry story – Fostered, fostered, restored to birth parents, bashed, fostered, returned to parents, sexually assaulted by de facto, fostered, fostered, caught shoplifting, restored to parents, ran away, drug abuse, break, enter and steal, drug dealing, arrested, charged, convicted.'*

(Minister Lo' Po, *Newcastle Herald* 21 August 2000:9).

The Minister thus used the Committee's findings of bureaucratic failure to usher in a self-proclaimed drastic new policy shift – the removal of children from their birth families and the permanent placement and eventual adoption of children in care by a 'forever' family.

A decade later, former Coalition Community Services Minister Prue Goward deflected similar criticism that her Department was criminalising children in its care. She initially accepted the premise<sup>105</sup> that 'the very system that's supposed to protect these damaged children is tragically failing many of them, serving as an incubator for a lifetime of crime, violence and prison' (Jones, *ABC Lateline* 30 May 2012a) and acknowledged 'that it ends up in criminality - I mean, that's generations old, that link' (Goward, in *ABC Lateline* 30 May 2012b). However, Minister Goward did not express concern at the numbers of children involved in crime, nor seek more information on the issue. Rather, in a series of misdirections, she turned the emphasis away from the Department, arguing that the children's criminalisation was understandable in light of their prior abuse and neglect and attributable to their 'difficult' behaviour. Like Minister Lo Po' before her, she turned criticism of her Department into an argument that permanency planning – now termed 'open adoption', or 'long-term guardianship' in the case of Aboriginal children – was necessary if vulnerable children were to be provided 'with the basic need of a safe home for life' (O'Farrell, 21 November 2013). Echoing its Labor predecessor, the Coalition Government declared that it was 'not prepared to accept a life of multiple placements in foster care as the best outcome for children whose birth parents are unable or unwilling to care for them' and championed 'the stability and permanency provided by open

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<sup>105</sup> The *ABC Lateline* program featured my preliminary findings from this thesis, reporting that children in OOHC were being criminalised by Departmental processes and systems abuse and ending up in juvenile detention centres and adult gaols as a consequence (McFarlane in *ABC* 30 May 2012a).



adoption...[as] a central component of this reform' (O'Farrell, 21 November 2013).

As her predecessor had done, the Minister also turned the spotlight from what 'the people who've studied it are telling us - [that] the state and its non-government partners are literally creating criminals, criminalising children' (Goward, in *ABC Lateline* 30 May 2012b), by blaming the parents, who 'are the beginning of this problem.' The State does not 'remove children until they are at risk of significant harm, until they've been bashed, neglected, not loved, not looked at, not fed, exposed to shocking violence, sexually abused' she said. 'That's what causes us to remove children and that leaves, inevitably, some long-term damage...' With her next comment, the Minister disclaimed all responsibility for the criminalisation of the children for whom she had responsibility: for given their histories, 'it's not surprising that these kids in adolescence have to really struggle to lead normal lives' (Goward, in *ABC Lateline* 30 May 2012b).

Minister Goward also ignored the criticisms made of Departmental and agency practice by focusing on the difficulties faced by foster carers - who had not been criticised in the program at all. 'I think where perhaps the story perhaps is perhaps a little over-simplified is to blame foster carers for the conversion of a lost generation of foster children, for the turning of them into a criminal group' she said. 'Clearly, foster care lets down a lot of children and a lot of children end up...much more likely to go into the juvenile justice system...But there are many reasons for that and I think foster carers do such an amazing job with increasingly complicated young people that it's a little unfair to suggest that that's what's driving it because there are many factors' (*ABC Lateline* 30 May 2012b). Here too, the Minister followed her predecessors' examples in blaming children in care for their poor outcomes. 'The sort of children that we're having in foster care are more complex' she said. 'Every foster carer I know says the children are different; they're different to what they were 20 years ago and they are more challenging for foster carers - good, loving foster carers - to do something with' (*ABC Lateline* 30 May 2012b). Her message was clear: children may be moving from OOHC to custody, but the Minister was not to blame, her Department was not to blame. Foster carers were the salt of the earth, unsung heroes and as her successor, Coalition Minister Upton put it, foster carers are 'saints' (Upton *Media Release* 20 May 2014). The inference was inescapable: the children themselves were at fault because they were, after all, so difficult to care for.

Combined with the historical invisibility of the OOHC population in NSW academic literature (as explored in Chapter Four) and the bureaucratic ‘patch protection’ (NSW PD LC 3 May 1994:1694) complained of by Attorney General Hannaford (discussed in Chapter Six), the Department’s role in perpetuating care-criminalisation has rarely been examined. Government policy, bureaucratic practice and the national research agenda have largely ignored the issue and the day-to-day business of child welfare, crime prevention and criminal justice agencies has continued to downplay the significance of the statistics. As the NSW Child Protection Council remarked in its report on systems abuse, ‘if you don’t have the statistics, you can’t know how big the problem is, and it is one less worry when there are lots of other areas to worry about’ (Cashmore et al., 1994:64). Certainly, the old adage that ‘ignorance is bliss’ may explain the otherwise baffling exclusion of children in OOHC from government data collection and policies, for the Department has failed to comply with the recommendation that has appeared in every major review of the State’s child welfare system over the past thirty years - to improve its records and information systems. It also renders Royal Commissioner McCulloch’s observation that senior personnel had not read previous Inquiry reports (McCulloch 1934b:10), a likely factor.

As this thesis has demonstrated, it is simplistic to assume that the welfare system is always benevolent and focused on providing nurture, protection and support (Herz et al., 2012). Nor can it be guaranteed that the level of care provided (or the type of placement) is always based on a child’s needs (Jonson-Reid and Barth 2003). Outcomes for children in out of home care (OOHC) are generally regarded as unsatisfactory. As has been recognised in the UK, whether measuring health, education, employment, stability, well-being, social inclusion, financial and emotional security or involvement in the criminal justice system (CJS), those who have been in OOHC perform badly when compared to their non-care peers of roughly comparable backgrounds and problems (HoC 1998; 2009a; 2009b; 2011; 2013; DfES 2002; 2005a; 2006a; 2006b; 2006c; 2007; Schofield et al 2012).

In NSW, the OOHC system has been said to ‘add to the deprivation’ of children (Tregeagle 2000:3). Notwithstanding Australia’s adoption of international human rights instruments, most notably the ratification of the UN *Convention on the Rights of the Child* over thirty years ago, welfare agencies can still be criticised for inadequate service

delivery, failure to engage and a lack of effective inter-agency coordination that results in children being propelled from agency to agency without receiving an adequate, and mandated, level of care. A lack of accurate and aggregated data on which policies and planning can be based, poor information gathering and sharing, and a failure to capitalise on developments and best practice to inform social work, has restricted the theoretical protective capacity of the care intervention. The failure to ensure appropriate and effective staff training, the inability to either initiate or maintain police engagement to reduce criminalisation and the transfer of children out of care early and without adequate supports, has further eroded the supposedly protective capacity of the system. While successive NSW and Australian Governments have long been aware of the over-representation of children in care in the CJS, the assessment conducted in this thesis of official State and Federal government responses over the past 200 years reveals that care-criminalisation remains a neglected area. This thesis has established that the avalanche of memorandums of understanding, guidelines, compacts, heads of agreement, committees, regulations, legislation, independent inquiries and reports established over the past twenty years in NSW alone, have failed to improve the situation of children in care who are involved with the CJS.

Measures designed to protect children have not overcome the system's inadequacies nor even begun to address the often questionable motivation and practices of the various players in the child welfare and justice systems. As respected US academic Mark Courtney has alleged in relation to his country, the ignorance about OOHC, 'cannot be attributed to the level of economic and social development, de-centralisation of responsibility for child welfare services and privacy concerns alone'. As he acknowledged, 'there is at least sometimes a veiled attempt by child welfare and other social welfare bureaucracies to avoid being held accountable for the outcomes experienced by those they serve' (in Stein and Munro 2008:287). This thesis has argued that a focus on the 'difficult' behaviour of children hides system inadequacies that can lead to children in OOHC becoming involved in the CJS. Although, as discussed in Chapter Two, 'systems abuse' has been identified in the international literature since the early 1980s (Gil 1982) and warranted a NSW Child Protection Council inquiry in the 1990s (Cashmore, Dolby and Brennan 1994), it was very evident in the care provided to children today. I have argued that the lack of policy and programs relevant to the criminalisation of children in OOHC in NSW has been brought about by bureaucratic

‘patch protection’ (NSW PD LC 3 May 1994:1694 (Hannaford) and the desire to avoid ‘issues that might be critical of responsible officials and management’ (Platt 1977:181).

The UK House of Commons has stated that ‘many of the things we wish would happen in the care system would follow naturally if the system and those who work within it were minded, and enabled, to act more like parents. Bureaucracy, misdirected aversion to risk, lack of autonomy and restricted resources limit the capacity of corporate parents to normalise children’s experience of growing up in care’ (HoC 2009a:15). In comparison, the inability or disinclination of the Australian government to hold its State counterparts to account for the failure to adhere to internationally mandated human rights standards, is matched by the NSW government’s failure to hold the bureaucracy and its non-government sector partners accountable for poor decisions, inadequate oversight and accountability and the inefficient use of resources (explored in Chapter Six) that erode the effective operations of the OOHC system. These failures have, in my opinion, allowed the problem of care-criminalisation (although individually devastating for the children concerned) to be presented as seemingly insurmountable. As a result, despite repeated professions of political goodwill and the commitment of countless millions of dollars expended across child welfare, juvenile justice and corrective services, the resulting unevaluated and poorly targeted programs have failed to recognise or cater for the OOHC population or to address care-criminalisation.

Over fifteen years ago Commissioner Wood declared that ‘no community with any real concern for the safety and well-being of its children can tolerate a system under which there is an inevitable, or even substantial, drift of State wards to juvenile justice, with its increased risk of progression to adult imprisonment’ (Wood 1997:1046). Twenty years ago, research showing that young women and girls had been fast-tracked from NSW child welfare homes to juvenile detention centres (Carrington 1993a) made national headlines. Yet as this thesis has illustrated, the fiction perpetuated by government and welfare agencies that those appearing on criminal matters have no connection with and no pathway from the child welfare system has guaranteed their continued over-representation in NSW detention centres and adult prisons. My analysis has revealed that the criminalisation of people in OOHC has not been considered of sufficient significance for the NSW government to prioritise or tackle with any degree of consistency. Instead, my assessment of internal policy documents and Children’s Court files has indicated that

the experience of those in OOHC has been used to net-widen services, programs and research, effectively silencing the care population amidst the clamour and noise of competing interests. This is made possible by the uncoordinated nature of government policy, a characteristic that seems to transcend political allegiances and beliefs.<sup>106</sup> Accordingly, I argue that ‘the state is at least to some degree implicated in the instigation of youth offending’ (Bessant and Hil 1998:153) and have concluded that there is little indication that the State’s ‘institutional neglect for and indifference to State wards’ (Wood 1997:258) has been overcome.

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<sup>106</sup> For example, only a year separated the publication of the NSW Parliamentary Select Committee *Inquiry on Juvenile Offenders* (NSW Parliament 2005) and the Government’s release of *NSW State Plan: A New Direction for NSW* (NSW Government 2006). Yet there is no mention of the issues posed by children in OOHC in the State Plan’s commitment to reduce the risk factors associated with juvenile involvement in crime (NSW Government 2006:31), although the Select Committee had identified that this group posed a high risk of offending and made up to 30% of the juvenile detainee population despite comprising only 0.135% of the population (Allerton 2003 in NSW Parliament 2005).

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