Care-criminalisation: The involvement of children in out-of-home care in the New South Wales criminal justice system

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Abstract
This article discusses the involvement in the New South Wales criminal justice system of a cohort of children in out-of-home care. The paper reports the findings of a four-year research project that investigated the relationship between the child welfare and justice systems as experienced by a cohort of children in the New South Wales Children’s Court criminal jurisdiction. Analysis of 160 case files identified that children in out-of-home care appeared before the Children’s Court on criminal charges at disproportionate rates compared to children who were not in out-of-home care. The out-of-home care cohort had a different and negative experience of the justice system, entering it at a significantly younger age and being more likely to experience custodial remand, than children who had not been in out-of-home care. While both cohorts shared many of the risk factors common to young offenders appearing before the Children’s Court, the out-of-home care cohort experienced significant additional disadvantage within the care environment (‘care-criminalisation’), such that living arrangements designed to protect them from harm instead created the environment for offending. The paper concludes by arguing that a paucity of research exists regarding the drivers and dynamics of care-criminalisation and that more research is needed to explore the criminogenic impacts of a childhood spent in out-of-home care.

Keywords
Care-criminalisation, Children’s Court, criminal justice system, foster care, kinship care, out-of-home care, residential care

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Introduction

Children in out-of-home care

In Australia, the State may provide alternative accommodation, temporary care, or financial or other welfare support to a child who is unable to live with their family for a period of time due to abuse, neglect, ‘illness, drug and alcohol abuse, domestic violence or poverty’ (NSW Family & Community Services, 2014). Through an order of the New South Wales (NSW) Children’s Court, the State may also remove children from their parents’ custody and place them in alternate living arrangements (commonly known as ‘out-of-home care’ (OOHC)), for periods ranging from a few weeks through to the time until adulthood at age 18 is reached (Children and Children (Care and Protection) Act 1998 (NSW)). The State contracts out the provision of OOHC to non-government service providers – both charitable and for-profit – who oversee a range of care models including kinship care (placement with relatives), foster care (paid carers in family-like situations), and residential units or group homes, which are staffed by paid workers and accommodate up to six children at any one time.

The Australian OOHC population is growing at a rapid rate, having risen by just over 17% in the past four years. This increase is likely the result of a combination of children entering care while others are remaining in care for longer periods of time (CFCA, 2016). As of 30 June 2016, some 46,448 children were in care nationwide. Almost 17,000 of these children identified as either Aboriginal or Torres Strait Islander. Indigenous children are over-represented in care nationwide: at 9.8 times the rate of non-Indigenous children (CFCA, 2016). The OOHC population is a very young cohort, with over half of all children in care under nine years of age. Despite their youth, the vast majority of children have lived in care for more than 12 months. Most children live with relatives (47.3%), in foster care (40.4%), or other type of home-based care arrangements. Approximately 5.5% of children live in residential care placements (CFCA, 2016).

Involvement in the criminal justice system

A correlation between an experience of OOHC and involvement in the CJS has been identified in Australian research. In NSW for example, children in OOHC have been found to be disproportionately represented in the criminal jurisdiction of the NSW Children’s Court, with estimates ranging from 19% (Wong, Bailey, & Kenny, 2009) to 34% (Fernandez, Bolitho, & Hansen, 2014). They are also disproportionately represented on community orders such as good behaviour bonds and community service orders (CSOs) (Kenny et al., 2006, 2008) and in the State’s juvenile detention centres (Cashmore & Paxman, 1996; Indig et al., 2011). The overlap between the OOHC and justice systems has also been shown to extend into early adulthood: a national survey of 15- to 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 five per 1000 children (0.5%) in the general population (McDowall, 2009). Other studies have confirmed that careleavers are likely to experience regular and negative contact with police (Mendes, Baidawi, & Snow, 2014; Raman, Inder, & Forbes, 2005).

International research has also identified a correlation between OOHC and involvement in the CJS. For example, in Canada, a study of over 50,000 children aged 12–18
years (Turpel-Lafond, 2009) found that children in OOHC were eight times more likely to appear before a criminal court than children in the general population. One in six of the OOHC cohort had been in youth custody (whether police lock-up, remand or on sentence), compared to less than one in 50 of the general study population, and by age 18, 10% of children in OOHC had been sentenced to custody, compared to just half a per cent of the general study population. The study also found that children in OOHC became involved in the justice system at a younger age and remained in the system for longer than offenders who had not been in care. Another Canadian study found that ‘high rate chronic offenders’ (those who begin their criminal careers at an early age and account for a large number of court appearances and serious violent offences) were disproportionately likely to be in OOHC (Day et al., 2011). Within this recidivist cohort, those in OOHC came into contact with the CJS earlier than all other groups, had the largest number of court contacts and the longest criminal careers. In the United States, a succession of publications detailing the results of longitudinal studies that are tracking the post-care outcomes of young adults have reported high rates of criminal justice involvement on a range of measures, including detention (see e.g. Courtney et al., 2011). In the United Kingdom, the involvement of young people in OOHC in youth custody has been noted by a series of inspectorates and watchdog bodies such as The Youth Justice Board (Arnull et al., 2005), HM Inspectorate of Prisons (Summerfield, 2011a, 2011b) and HM Inspectorate of Probation (2011, 2012). Investigations and analysis published by independent charitable organisations (Hart, 2006; Howard League for Penal Reform, 2016; Jacobsen, Bhardwa, Gyateng, Hunter, & Hough, 2010; Liddle & Solanski, 2002; Prison Reform Trust (PRT), 2016), as well as by a succession of political committees and inquiries (House of Commons, 1998, 2013) have reported similar patterns amongst both children in care and young careleavers in terms of high levels of contact with police, high levels of arrest and increased likelihood of detention in youth justice facilities and adult prisons.

Research into the experiences of older careleavers suggests that for some, involvement with the justice system continues well into adulthood. Fernandez et al. (2016) found that some of the Indigenous Stolen Generations, British Child Migrants transported to Australia and the Forgotten Australians placed in care in the 20th century had experienced frequent arrests and repeated periods of incarceration throughout their lives. McInnes (2015) exploration of the effects of institutional trauma amongst males who had attended the Tamworth Boys Home in the 20th century also found high rates of subsequent involvement in the CJS. In New Zealand, Stanley’s (2017) analysis of those in residential care between the 1950s and 1990s identified similar experiences of OOHC and subsequent involvement with the justice system, including arrest and incarceration.

In Australia, childhood removal and/or family membership of the Indigenous Stolen Generations has been shown to be a significant factor in predicting the likelihood of contact with the justice system (Australian Bureau of Statistics, 2004; Hunter, 2001; Mukherjee, Carcach, McDonald, & Barnes, 1998; Weatherburn, Snowball, & Hunter, 2006, 2008; Wundersitz, 2010). Indigenous prisoners who were removed from their families as children are also significantly more likely than Indigenous prisoners who were not removed to have been jailed more than five times (Egger & Butler, 2000).

Looking at the OOHC prison pathway from a different perspective, NSW snapshot studies of prison populations have reported that up to 30% of respondents had lived
in OOHC before the age of 16 (Indig et al., 2010). In Scotland, where regular surveys of the prison population have been conducted since 1990 to inform business planning, it has been identified that 28% of prisoners had been in OOHC (Carnie & Broderick, 2011).

While the studies cited above differ in their methodological approaches and the cohorts they have examined, they commonly posit several factors to explain the OOHC cohort’s involvement in the CJS. One view is that children enter care already having had increased exposure to the risk factors for delinquency. For example, a child in OOHC may have experienced maltreatment before coming into care (Malvaso & Delfabbro, 2015). This, in fact, may have been the catalyst for placement in the OOHC system. Poor role modelling such as parental antisocial behaviour and engagement in criminal activity, disrupted education, homelessness and lack of connection to community and society generally are other examples of factors associated with involvement in the CJS. Although these factors might equally be viewed as indicators of a child’s need for assistance and intervention, rather than through the lens of risk management and a child’s personal culpability, they are often presented as ‘significant risks’ (Schofield et al., 2012) and advanced as explanations for the OOHC’s involvement in the justice system.

Some scholars have argued that negative pre-care experiences are then exacerbated at key transition points, such as moving into or exiting the care system, which may then initiate or aggravate offending. While the existence of multiple risk factors across the family, community and individual levels is said to place any young person at an increased risk of offending, the accumulation and interaction of these risk factors are considered more significant for children in OOHC (Schofield et al., 2012).

The post-care experience of many careleavers has also been cited as a reason for the OOHC-CJS pathway. The process of leaving OOHC has been identified as a time of heightened risk for engagement in criminal activity. Numerous studies have established that children ageing out of OOHC are generally expected to negotiate their way through the challenges of independence in early adulthood without adequate agency support, including financial assistance (Mendes et al., 2014). This places young careleavers at an increased risk of participation in ‘survival offending’ – behaviour brought about by homelessness or by their lacking the skills needed to survive in the adult world.

The conceptualisation of the pathway from OOHC to crime as a trauma-related outcome essentially combines these theories. Essentially, it is premised on the belief that children enter OOHC with a high level of pre-existing needs, which are expressed as challenging or difficult behaviour. The child’s behaviour may constitute a criminal offence, or he or she may seek to self-medicate through drug use: itself likely to led to criminal sanctions. The child is also likely to be exposed to offending peers and family. In recognition of the criminogenic environment of (typically) residential care homes, the theory posits that children are exposed to offending during their attempts to fund substance use and subject to peer contagion through their placement in residential units and custodial environments. Finally, the child receives limited support in the post-care period, further increasing the likelihood of engagement in criminal behaviour (Mendes et al., 2014).

In contrast, other studies have focused on the criminogenic nature of various models of care, such as residential care, citing factors such as inadequate physical facilities,
the isolation from culture and community (particularly Indigenous culture), and limitations placed on to children’s access to education. The impact of ‘system’s abuse’ (Cashmore, Dolby, & Brennan, 1994; Gil, 1982) has also been seen as significant. ‘System’s abuse’ refers to 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, p. 11). The punitive responses to children’s behavioural issues within the OOHC system are one example of system’s abuse that has been shown to facilitate children’s exposure to the CJS. Multiple placements, poor matching between carer and child and inappropriate housing of children with vastly different needs in the same facility have been shown to compound the problem.

The criminogenic nature of system’s abuse has been generally discussed in relation to residential care. Residential facilities have long been regarded as ‘universities of crime’ (Cain, 1993, p. 36), whereby 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 (Berridge et al., 2012; Ryan, Marshall, Herz, & Hernandez, 2008), 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, Ward, & Caulfield, 2008) and those for whom the combination of ‘less consistent care’ (Taylor, 2006 in Schofield et al. (2012, p. 28)) and peer pressure has exacerbated their offending (Ryan et al., 2008).

The identification in recent studies of the criminalisation of children that occurs in OOHC, particularly in residential care facilities, departs from previous explanations for children’s engagement in criminal offending. Rather than viewing the child’s behaviour as the catalyst for subsequent involvement in the justice system, these studies have highlighted a process of ‘care-criminalisation’ (McFarlane, 2016) that typically occurs in residential care facilities. Care-criminalisation describes the processes by which inadequately trained and poorly remunerated staff who fail to understand and are unable to resolve conflict rely on police to manage children’s behaviour. The failure of care homes to implement appropriate processes to manage children who are likely to have experienced significant trauma leads to an over-reliance on criminal sanctions, notably in response to children who abscond or go missing from care placements and those with cognitive impairment or mental health issues. This literature points to evidence that children in OOHC, particularly those in residential care, are commonly arrested for minor matters that ought not to have incurred a police response (Cruickshank, Barry, & Morrison, 2008; Darker et al., 2008; Fitzpatrick, 2009; Hayden, 2010; McFarlane, 2008, 2010, 2016; Moore, Gray, Roberts, Taylor, & Merrington, 2006; Ryan, Marshall, Herz, & Hernandez, 2008; Shaw, 2012, 2014, 2016; Taylor, 2003, 2006; Wong, Bailey, & Kenny, 2009; Wong, 2014). It has also established that the OOHC cohort progresses quickly and inexorably into the CJS when their peers do not, often for breach of bail conditions arising from over-scrutiny and policing of residential care homes, and a lack
of alternate diversionary options and accommodation placements (Richards & Renshaw, 2013; Victoria Legal Aid, 2017).

Finally, the intersectional impacts of Indigeneity can be understood as another explanation for the involvement of children in OOHC in the criminal justice system. In a process described as tantamount to genocide (Cunneen & Libesman, 2000; Tatz, 1999), the successive policies of official government, church and non-government interference in the lives of Indigenous communities culminated in the forced removal of Indigenous children and the disintegration of communities (HREOC, 1997). The government’s 2008 Apology to Australia’s Indigenous Peoples (Commonwealth Parliamentary Debates, 13 February 2008) recognised the immeasurable harm done to the ‘Stolen Generations’ and acknowledged the ongoing disparities in education, health, employment and incarceration rates between Indigenous and non-Indigenous Australians (Anthony, 2013; Baker, 2001).

**Methodology**

This paper describes the findings of a research project that investigated the relationship between the child welfare and criminal justice systems as experienced by a cohort of children in the NSW Children’s Court criminal jurisdiction. Specifically, the research set out to identify the rate of appearance of children in OOHC before the Court on criminal charges; whether this appearance rate was disproportionate; and, if so, what factors had led to that over-representation. Analysis was undertaken of a representative sample of the hard copy files of 160 children who had appeared before the criminal jurisdiction of the primary Children’s Court in NSW, located in the Western Sydney suburb of Parramatta, between 2008 and 2010.

Demographic information such as gender, age, Indigenous status, ethnicity and whether a child had ever been in OOHC was collected and analysed. Indigenous status was based on identification made in police and court records, adjusted to reflect the documented involvement of the Aboriginal Legal Service, referral to an Aboriginal-specific programme or course, and material contained in background reports and agency information. Identification of OOHC status was based on official child welfare documentation (such as copies of final care orders, case plans and leaving care plans); a letter provided to the Court by the child welfare department or a non-government care provider; or a note to this effect in police facts, lawyer’s submissions or judicial notes. Detailed analysis of various key trajectories through the CJS – encompassing bail, breach of bail, referral to diversionary programmes and sentencing decisions – was undertaken to identify whether the OOHC cohort had a different experience of the justice system compared to other children. Chi square tests were used to determine whether any such differences were statistically significant.

A number of characteristics that have been associated with juvenile offending were examined. These comprised static risk factors (Chen, Matruglio, Weatherburn, & Hua, 2005), traumatic incidents (Ardino, 2011, 2012; Weeks & Widom, 1998; Widom, 1991) and experiences of social disadvantage (Indig, Frewen, & Moore, 2016). The static risk factors (i.e. fixed characteristics that cannot change over time) included age at first contact with the justice system, the number of contacts with the justice system and offence type. Trauma was defined as bereavement due to the loss of a significant
person in the child’s life and/or witnessing or experiencing physical, sexual or emotional abuse or neglect.\(^1\) Specific attention was paid to ‘care-specific trauma’ that occurring within or peculiar to the OOHC environment. This was defined as an experience of abuse in OOHC, separation from siblings, placement instability and absconding from care. Absconding was defined to include going missing from or running away from a care placement. An experience of disadvantage included 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.\(^2\) Evidence of trauma and/or social disadvantage was noted only if the NSW child welfare department or another agency had identified it.

**Ethics**

Ethical approval was obtained from the University of New South Wales Human Research Ethics Committee and in-principle support was received from a number of government agencies, including the departments of Juvenile Justice and Community Services.

**Findings**

Almost half (49.5\%) of the 160 children in the sample who appeared on criminal charges before the NSW Children’s Court at Parramatta had spent time in OOHC. This finding is important, for the very small number of children in care in NSW means that 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).

Nearly half (44\%) of the OOHC cohort identified as Indigenous compared to 14\% of the non-care group (n = 35:n = 11, respectively). This was a statistically significant finding (\(\chi^2 = 13.525, df = 1, p < 0.01\)) and the percentage is higher than the proportion of Indigenous children in OOHC in NSW generally, of whom approximately one-third identify as Indigenous (Zhou, 2010). Interestingly, no significant age or gender differences amongst Indigenous children based on care status were identified.

The vast majority of children who appeared before the NSW Children’s Court had a prior criminal record. Those in OOHC however, were more likely to have a criminal record than children who had not been care (81\%:60\%). Significantly, just 6\% of the OOHC cohort had no prior criminal record, compared to 30\% of their non-care peers.

The author had assumed that a child’s first formal involvement with the justice system would, in the vast majority of cases, begin with a police caution, as is generally required under NSW legislation. However, the expected linear progression from police caution to charge was not observed. Instead of receiving the benefit of a police caution, many children were officially charged by police, even for relatively minor offences for which a caution could quite properly have been imposed. As shown in Table 1 for example, a quarter of the OOHC cohort (n = 20) had been charged on their first involvement with the justice system, rather than receiving a police caution. This compared to just 16\% (n = 13) of the non-care group.

There were several statistically significant differences between the cohorts regarding the age at which they first became involved with the justice system. For example, the
OOHC cohort was an average of nine months younger than the non-care group (13.4:14.2 years: p < 0.01). The OOHC cohort also comprised twice as many young children (those aged 13 years or younger) than the non-care group: 15% of the OOHC cohort, compared to just 6% of the non-care group. The OOHC cohort was also considerably younger on average – by almost 10 months – than other children in the sample when they incurred their first charge (13.9 years:14.7 years). Again, this difference was statistically significant (p < 0.01).

Analysis of the children’s court files revealed other differences between the OOHC and non-care cohorts. An initial impression was of strikingly high rates of loss, grief and social disadvantage experienced by many children who appeared before the NSW Children’s Court, whether they were in care or not. For example, 39% had experienced abuse or neglect. Abuse included witnessing domestic violence or 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 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 impairment or intellectual disability of some sort. Sixteen per cent of children had experienced the death of a significant person such as a parent, sibling, carer or mentor, and over 20% had familial involvement with the justice system. Half were known to use alcohol or other illegal drugs and approximately 35% had experienced insecure accommodation or homelessness.

For children not in OOHC, truancy and substance use were symptoms of, or appeared to give rise to the behaviour that led them into the criminal justice system. As shown in Table 2 however, the OOHC cohort consistently reported higher rates of trauma incidents than their non-care peers. For example, children in care had experienced higher rates of abuse and or neglect (53%:25%) and had experienced the death of a significant person at higher rates than children not in care (19%:12%). Their rates of 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 OOHC 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 the placement of children in the care system (Phillips & Bloom, 1998).

It was evident from the case file audit that many children in OOHC had not received the benefits potentially available in a protective welfare system. Consistent with
international research, the key transition points ‘such as moving from school to work, from family to care or from care to independent living’ (Schofield et al., 2012, p. 30) were observed to initiate or aggravate offending. Those children 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 were not restricted to adolescents leaving care: children experienced problematic care throughout their time in OOHC. In this regard, analysis of the files revealed that 24% of the OOHC cohort had been abused in care and 43% had absconded from care.

Many of the OOHC cohorts had experienced high rates of placement instability. For example, children spent 7.3 years in the welfare system on average, and almost a third (n = 22) 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 (Barber, Delfabbro, & Cooper, 2001; Hartnett, Falconier, Leathers, & Testa, 1999; Pardeck, 1983, 1985; Sinclair, Wilson, Taylor, Pithouse, & Sellick, 2004; Smith, Rudolph, & Swords, 2002; Ward & Skuse, 2001; Webster, Barth, & Needell, 2000; Wulczyn, Kogan, & Harden, 2003), the current study found that 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 for every year they were in the child welfare system. This finding was concerning, for placement instability increases the risk of delinquency.

<table>
<thead>
<tr>
<th>Characteristics</th>
<th>% of total cohort (n = 160)</th>
<th>% of OOHC cohort (n = 79)</th>
<th>% not in OOHC cohort (n = 81)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abuse and neglect</td>
<td>39</td>
<td>53</td>
<td>25</td>
</tr>
<tr>
<td>Death of significant other</td>
<td>16</td>
<td>19</td>
<td>12</td>
</tr>
<tr>
<td>Mental health impairment</td>
<td>35</td>
<td>48</td>
<td>22</td>
</tr>
<tr>
<td>Intellectual and cognitive impairment</td>
<td>10</td>
<td>16</td>
<td>4</td>
</tr>
<tr>
<td>Suicide and self-harm</td>
<td>11</td>
<td>18</td>
<td>5</td>
</tr>
<tr>
<td>Case dismissed (s32 Mental Health (Forensic Provisions) Act 1990 (NSW))</td>
<td>13</td>
<td>20</td>
<td>6</td>
</tr>
<tr>
<td>Alcohol and other drug use</td>
<td>50</td>
<td>51</td>
<td>49</td>
</tr>
<tr>
<td>Homelessness (ever)</td>
<td>35</td>
<td>48</td>
<td>22</td>
</tr>
<tr>
<td>Homeless at time of current offence</td>
<td>11</td>
<td>14</td>
<td>9</td>
</tr>
<tr>
<td>Family involvement in the CJS</td>
<td>21</td>
<td>29</td>
<td>12</td>
</tr>
<tr>
<td>Not in education</td>
<td>73</td>
<td>77</td>
<td>69</td>
</tr>
<tr>
<td>Attended a behavioural school</td>
<td>33</td>
<td>38</td>
<td>28</td>
</tr>
<tr>
<td>Truancy</td>
<td>44</td>
<td>41</td>
<td>47</td>
</tr>
<tr>
<td>Suspension</td>
<td>22</td>
<td>38</td>
<td>6</td>
</tr>
<tr>
<td>Expulsion</td>
<td>13</td>
<td>27</td>
<td>0</td>
</tr>
</tbody>
</table>

CJS: Criminal Justice System.

Table 2. Trauma events and social disadvantage.
(Ferguson, 1966; Jonson-Reid & Barth, 2000a, 2000b; Kraus, 1981; NSW CSC, 1996; Widom, 1991), at least for males (Ryan & Testa, 2005), and has been associated with incarceration for a violent or serious offence during adolescence (Jonson-Reid & 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. While in 47% of cases siblings had also been removed from their family, few of the cohorts had been placed together. Just 4% of children were living with their siblings in their current placement.

Young children in OOHC appeared particularly at risk of poor outcomes in a range of areas. For example, those aged 13 years and under (n = 12) experienced a multitude of trauma incidents, both prior and subsequent to entering care. Taken into care at approximately 6 ½ years of age, they remained in OOHC for an average of 6.75 years. This group experienced an average of eight placements – more than one a year – during that time. A third of the children had been abused in care and a quarter had attempted suicide. Over 90% of this 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 justice system, they were likely to be remanded in custody: consistent with the OOHC cohort as a whole, 75% of the under-13s had spent time on remand.

While caution should be exercised given the small size of this cohort, the prevalence of 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 conclusion is supported by the lack of agency involvement in the lives of these vulnerable children: although 58% of the children had been placed in OOHC until age 18, in over a third of the files there was no evidence of assistance being provided by the child welfare department or a non-government organisation. 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 departmental inaction by other agencies, such as police, juvenile justice or a legal service. Only half of the under-13 cohort was accompanied at court by a caseworker, and an agency background report or letter in support had been provided to the Court in just five cases (42%).

The impact of care-specific trauma was also seen in the high incidence of care-related offending. A key observation was that many children in OOHC came into contact with the justice system, 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 at some point in their criminal histories.

Children’s offences were identified across the range of placement types. For example, at the time of the occurrence 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 with relatives. It was not possible within the parameters of the current study to determine conclusively whether the type of placement contributed to a difference in outcome for the individual child involved. What was
apparent, however, was that offences in residential care were more visible and consistent with previous studies (Richards & Renshaw, 2013), bail conditions for those children living in residential care facilities were more heavily policed – leading to more action on breaches – than was the case for those in kinship or foster care. More analysis than was conducted in the current study would be required to provide useful consideration of any differences in police or judicial responses to offences committed across care types.

Of more significance was the finding that of the 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 related to 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.

Children in OOHC were more likely to be placed on remand than the non-care cohort (75%:62%, respectively). This was a statistically 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 were remanded for their current alleged offence compared to 60% of the non-care group of the same age. Children in OOHC also spent longer on remand than their non-care peers: a mean of 33.9 days on remand, which is almost three times longer than the mean of 12.2 days for their non-care peers. This was a statistically significant difference \((p < 0.05)\).³

Information on the sentences imposed by the NSW Children’s Court was available in the files of 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. The most common sentence imposed by the Court, seen in 42% of finalised matters, was a Good Behaviour Bond – to which agency supervision and a range of conditions are often attached. A control order or sentence of imprisonment – the most serious penalty available to the Court – was imposed in just 14% of matters. In 12% of cases, matters were dismissed at hearing, invoked no penalty or were withdrawn by the prosecution. A caution was a common sentence: 18% of matters in the sample received this disposition, and in 34% of these cases the caution was imposed following a youth justice conference. This rate is generally consistent with the outcomes reported for the Children’s Court (NSW Bureau of Crime Statistics and Research (BOCSAR), 2014).

A larger percentage of the OOHC cohort received a Good Behaviour Bond compared to the non-care group (46%:39%). The OOHC cohort was also more likely to receive a caution (18%:8%). These sentence dispositions suggest that a larger proportion of the OOHC cohort’s offences were less serious than those committed by their non-care peers. It was also observed that the OOHC cohort did not receive a single CSO, compared to the 6% of the non-care group. This can be attributed to the frequency with which Juvenile Justice officers 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 the unstable nature of his accommodation, and a 17-year-old Indigenous girl was deemed unsuitable because of her childcare responsibilities to her young son.
Discussion

This paper makes an important contribution to the understanding of the experiences of and pathways through the CJS for a cohort of children in OOHC in NSW, Australia. The finding that almost half of the sample who appeared before the Parramatta Children’s Court comprised children in OOHC was significant and highlighted the need to consider the differences between children who had been in care and those who had not. Consistent with previous research that has found that although just 2% of the NSW population is Indigenous, Aboriginal and Torres Strait Islander children are over nine times as likely to be placed in OOHC compared to non-Indigenous children (AIHW, 2015), the significant over-representation of Indigenous children in the current study was a matter of serious concern. The literature is generally lacking in its analysis of the overlap and intersectionality of Indigeneity and OOHC generally, and further examination of the interplay between these factors, and the additional layer posed by questions of gender, is needed.

Detailed analysis of various key events in the cohorts’ progression through the CJS revealed that the broader OOHC cohort had a different experience of the system from that of other children. For example, there was a statistically significant difference between the OOHC and non-care cohorts across several key measures, such as the younger age at which children in OOHC came into contact with the CJS and incurred their first charge. While the discrepancy between the two cohorts itself was not unexpected, given research that has identified that Indigenous children (Weatherburn, Snowball & Hunter, 2008) as well as children with multiple vulnerabilities, such as cognitive impairment or an intellectual disability (Baldry, Clarence, Dowse, & Trollor, 2013) are exposed to the CJS at a younger age than other children, the relative youth of the OOHC cohort at first involvement with the CJS was more pronounced than anticipated. This was also a finding somewhat at odds with the doctrine of doli incapax. This doctrine provides that a child under 10 years of age in NSW is deemed ‘incapable of crime’ (Children (Criminal Proceedings Act) 1987 s5), and that the prosecution must establish beyond reasonable doubt that a child aged between 10 and 14 years of age understood their actions were wrong in a criminal sense, rather than being merely naughty. It is also a significant finding insofar as the age of first contact with police is a key indicator of ongoing contact with the CJS (Baldry et al., 2013; Chen et al., 2005; Sentencing Advisory Council (Victoria), 2016; Vignaendra & Fitzgerald, 2006) and of an increased likelihood of reoffending, particularly for children who have been in OOHC (Indig et al., 2016). Given the observation of the Special Commission of Inquiry into Child Protection in NSW that 10- to 12-year-olds spend more time in detention than other children (Wood, 2008), the age discrepancies between the cohorts warrant further investigation, notwithstanding the small sample size involved.

The OOHC cohort was also disproportionately impacted at key stages of their involvement with the CJS. The correlation between care and offending has been read as primarily due to the accumulation and interaction of pre-existing risk factors common to the OOHC population (Schofield et al., 2012). Certainly, children in care in the current study experienced greater 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. A key observation, however,
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. This is consistent with Australian research that has found that many charges laid against the OOHC cohort comprise matters almost exclusively arising from the care environment (Carrington, 1993; McFarlane, 2010; NSW CSC, 1999; Richards & Renshaw, 2013; Victoria Legal Aid, 2017). It is also in line with international findings (Fitzpatrick, 2009; Fitzpatrick & Williams, 2016; HM Inspectorate of Probation, 2012; National Association for the Care and Resettlement of Offenders (NACRO), 2003; PRT, 2016; Taylor, 2003, 2006).

Factors specific to the care experience, such as accumulated trauma, placement instability, separation from siblings and significant others, police interactions and the removal process itself, shaped children’s trajectory through the justice system. Criminalising practices operating within the OOHC system escalated children’s exposure to the CJS for offences that would not have led to police involvement if these offences had occurred at home. The two factors – being in OOHC and offending – then exacerbated each other. Agencies failed to allocate caseworkers to children, to provide reports or to attend court in support. They also failed to work consistently with other bodies and, at times, actively lobbied for children to remain in custody ‘for their own protection’. These elements further disadvantaged the OOHC cohort.

The OOHC cohort was also disadvantaged by the processes of the NSW Children’s Court. Consistent with findings published by the Australian Institute of Criminology (Richards & Renshaw, 2013), children in OOHC in the current study were adversely affected by onerous or arbitrary bail conditions. They were often excluded from bail accommodation services on the assumption that child protection agencies would assist them. They were also more likely to be remanded for bail breaches (again, this was statistically significant), such as the failure to be at a residential service at a specified time, or because they had run away from a care placement. It has been suggested that the greater likelihood of arrest for breach of bail is perhaps due to the higher levels of scrutiny to children in OOHC were subject, particularly in residential care facilities which are more likely to identify and report breaches to police (Richards & Renshaw, 2013). This finding was consistent with Canadian research that has identified that children in care – especially those under 14 years of age – are likely to be arrested for relatively minor or technical non-compliance of their bail conditions, rather than because they had committed additional criminal offences while in the community (Turpel-Lafond, 2009). It is also confirmed by English research 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 & Hibbert, 2009, p. 14).

Generally speaking, children in OOHC were charged with the same range of offences as children in the non-care group. That is, offences against good order (such as breaches of bail conditions), infliction of damage to property and relatively minor assaults. Their offences were not more serious. The minor nature of the offences committed by the OOHC cohort is indicated by the fact that only one of the children convicted of a care-related offence received a custodial sentence. It was therefore puzzling that many
children in the OOHC cohort were excluded from pre-court diversionary options and less restrictive sentencing practices. This finding is inconsistent with previous Australian research that has pointed to the widespread use of diversion programmes to support the assertion that only the more serious and complex cases are brought to court (Borowski, 2013). Rather, the role of police and judicial discretion, specifically in relation to bail, assumed a particular significance in shaping children’s pathways through the justice system and the outcomes for vulnerable children.

While the nexus between OOHC and offending behaviour highlighted the importance of a coordinated response from both welfare and justice agencies, the failure of these bodies to work effectively together in children’s best interests contributed to the likelihood of poor long-term outcomes. While previous Australian research has found that judicial officers are aware of the cross-over between the child protection and specifically, the OOHC experiences of children appearing before the Children’s Court (Borowski, 2013), in the current study there was little evidence of this awareness having translated into alternatives to strict sanctions and innovative bail conditions or sentencing options.

The response of both the child welfare and the criminal justice systems to children’s trauma and disadvantage was inadequate and ineffective. In 15% of matters, care-related offences were dismissed pursuant to the Mental Health (Forensic Provisions) Act 1990 (NSW) (‘the Act’). While the frequency with which the Act was invoked indicates a recognition that the mental health system may be a more appropriate response to children’s behaviour than the criminal justice system, the way in which their cases were disposed of made little difference to the children involved. For example, two girls, aged 12 and 16, spent in excess of three weeks in custody before their matters were dismissed. Between them, they had accrued 16 such dismissals in the previous six months alone. Both of the children had attempted suicide in custody. These cases raise serious concerns about agencies’ repeated use of the CJS as a response to children’s ongoing behavioural challenges, rather than addressing their mental health needs.

International research has indicated that the OOHC cohort is an especially vulnerable group within the already disadvantaged juvenile detainee population (Glover & Hibbert, 2009; Hart, 2006; HoC, 2013; Jacobsen et al., 2010; PRT, 2016; Summerfield, 2011a, 2011b). The finding that the OOHC cohort in this study spent almost three times longer on remand than their non-care peers is significant, and confirms the discrepancy identified by the Special Commission into Child Protection Services in NSW, that children involved with the child welfare department spent longer in custody than children who had no previous child welfare involvement (Wood, 2008). With research suggesting that the criminogenic impact of custody is the ‘most significant factor in increasing the odds of recidivism’ (Murphy, McGinness, Balmaks, McDermott, & Corriea, 2010, p. 69), the likelihood that the OOHC 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.

**Conclusion**

There is a need for a more sophisticated analysis of the OOHC population than is indicated by the cursory demographic information that is routinely published. An in-depth understanding of the children in OOHC in Australia is lacking, largely due to the
lack of disaggregated data that are collected and made publically available. To illustrate, statistics relating to the gender or ethnicity (other than Indigenous status) of the OOHC population are not readily accessible.

The pronounced lack of quality research in relation to the consequences of ‘care-criminalisation’ (Fitzpatrick & Williams, 2016; McFarlane, 2016; Sinclair et al., 2004; Taylor, 2006) is a matter of particular concern. The studies that have been conducted into juvenile offending have seldom sought to understand why children offend while in care (Shaw, 2012) or to examine the criminogenic processes that propel them into the justice system at such disproportionate rates. While some studies have reported on OOHC representation rates as one of a range of outcome measures, few have adopted methodologies that permitted or encouraged follow-up, particularly in relation to persistent, chronic or adult onset offending (DeGue & Widom, 2009; Doyle, 2007, 2008). Even in jurisdictions where the disproportionate representation of the OOHC cohort has been acknowledged – such as England and Wales, Scotland, Canada and the United States – these figures have tended to simply be reproduced year after year, with little academic analysis of the issue (McFarlane, 2008, 2010, 2016; Sinclair et al., 2004; Taylor, 2006).

Australian research into the involvement of children in OOHC in the CJS is particularly lacking. With very few exceptions, the consequences of the involvement of the OOHC cohort in this system have not been examined. For example, there is no published data on the proportion of children with current OOHC involvement who are cautioned, warned or charged by police; 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). To illustrate, OOHC status is not 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 (Forrest & Edwards, 2014). Australian academic literature has not examined the impacts of the criminalising practices which are often typical of the OOHC system (McFarlane, 2008, 2010, 2016), and there is minimal empirical data regarding the effectiveness of a police response to children’s behaviour, particularly in relation to that of children in residential group homes (Mendes et al., 2014). As this paper has identified, the troubling outcomes of the trajectories to incarceration evident amongst the OOHC cohort indicate that further research on the impact of care-criminalisation is required.

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Notes
1. For the purposes of this study, bullying by other children, homelessness and a history of parental imprisonment or the child’s placement in OOHC were not regarded as abuse or neglect.
2. This included staying at a friend’s place, moving between relatives, living 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) as per the *Strategic Review of the New South Wales Juvenile Justice System* (Murphy et al., 2010).
3. Caution should be exercised given the relatively small sample size: it was only possible to complete an analysis of the length of time spent on remand for 40% of the overall sample \((n = 64)\) due to limitations in file documentation. Where sufficient information for analysis was contained, 67% \((n = 43)\) were in OOHC and 33% \((n = 21)\) were not in care.
4. 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 & Westmore, 2010), 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). An 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.

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**Legislation**

*Children and Children (Care and Protection) Act 1998* (NSW)

*Children (Criminal Proceedings) Act 1987* (NSW)

*Mental Health (Forensic Provisions) Act 1990* (NSW)