

‘Just another policy document?’ Can a protocol end the criminalisation of kids in care?

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Abstract

This article examines the New South Wales *Joint Protocol to Reduce the Contact of Young People in Residential OOHC with the Criminal Justice System* (2016) from the perspective of residential out-of-home-care providers, police, lawyers and departmental staff involved in the child welfare and criminal justice systems in New South Wales.

Keywords

Out-of-home-care, children’s court, juvenile justice, young people, Joint Protocol, criminalisation

Children in out-of-home-care (OOHC) are at an increased risk of involvement in the criminal justice system compared to children without OOHC experience.¹ Studies indicate several explanations for this discrepancy. First, pre-care experiences, particularly of abuse or neglect, may increase exposure to the risk factors for delinquency.² Other factors associated with involvement in crime, such as familial antisocial behaviour, engagement in criminal activity, disrupted education, homelessness and lack of connection to community and society generally, present as ‘significant risks’³

for children in OOHC. Adverse pre-care experiences can be exacerbated at key transition points, such as moving into or leaving the care system, and may provoke or exacerbate offending. Second, the process of leaving OOHC has been identified as a time of increased risk for engagement in criminal activity such as ‘survival offending’, as children ageing out of OOHC encounter the challenges of independence in early adulthood without adequate agency support or financial assistance.⁴

Research has also identified the potentially criminogenic nature⁵ of residential care, which is designed to

¹Erin Gough and Legal Aid, *The Drift from Care to Crime: A Legal Aid NSW issues paper* (2011); Kath McFarlane, ‘From Care to Custody: Young women in out-of-home care in the criminal justice system’ (2010) 22 *Current Issues in Criminal Justice* 345; Victoria Legal Aid, *Care not Custody: A new approach to keep kids in residential care out of the criminal justice system* (2017).

²Caita Malvaso and Paul Delfabbro, ‘Offending Behaviour among Young People with Complex Needs in the Australian Out-of-home Care System’ (2015) 24(12) *Journal of Child and Family Studies* 3561.

³Gillian Schofield et al, *Looked After Children and Offending: reducing risk and promoting resilience* (University of East Anglia, 2012).

⁴Philip Mendes, Susan Baidawi, and Pamela Snow, *Good Practice in Reducing the Over-representation of Care Leavers in the Youth Justice System: Leaving care and justice, Phase Three Report* (Monash University, 2014).

⁵Carol Hayden, ‘Offending Behaviour in Care: Is children’s residential care a “criminogenic” environment?’ (2010) 15(4) *Child and Family Social Work* 461.

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provide for so-called high-risk children with multiple and complex needs.⁶ Pre-care trauma will be exacerbated if children's behaviour is viewed by carers or staff as challenging, and is responded to with police involvement.⁷ An over-reliance by poorly trained staff on police invariably results in the escalation of behavioural matters or minor offending that did not warrant this level of response.⁸ The process of care-criminalisation⁹ has also been shown to disproportionately impact children who abscond or go missing from OOHC.¹⁰ Factors such as multiple placements, damaging institutional cultures, social disadvantage, psychological harms, maltreatment in care, inadequate physical facilities, isolation from culture and community and limited access to education have also been shown to lead to an increased risk of children's involvement in the justice system.¹¹

Once involved with police or brought before a court, children in OOHC are subject to differential treatment, with onerous and complex bail conditions and the high levels of surveillance within residential OOHC leading to an increased risk of bail denials, breaches and custodial episodes.¹²

For Indigenous children in OOHC, the policies of official government, church and non-government interference demonstrated in the forced removal of children and the disintegration of communities have caused further immeasurable harm,¹³ including involvement in the criminal justice system.¹⁴

The *Joint Protocol to reduce the contact of young people in residential OOHC with the criminal justice system* (the Protocol) seeks to increase agency awareness of the consequences of criminalising practices and enhance efforts to divert children in OOHC from the justice system.¹⁵ Facilitated by the state's watchdog body, the New South Wales (NSW) Ombudsman, and designed with extensive stakeholder input, the Protocol is currently being implemented by the NSW government's child welfare department, Family and Community Services (FaCS). Drawing on interviews conducted before the commencement of

the Protocol, this article examines the aspirations and expectations of some of the organisations who advocated for the Protocol's creation and who will be responsible for its success: the residential OOHC providers, police, lawyers and departmental staff involved in the child welfare and criminal justice systems in NSW. This analysis is contextualised in national and international policy development to identify benefits and limitations that will ultimately help determine the Protocol's effectiveness.

Talking to justice and OOHC agencies

We were interested in exploring the factors that professionals involved in both the OOHC and the criminal justice system in NSW believed were responsible for the disproportionate involvement of children in residential care placements in criminal matters. We felt it was important to examine this in light of the expanded contracting out of OOHC services to non-government agencies, a bipartisan position adopted following the reforms recommended by the 2008 Wood Special Commission of Inquiry into Child Protection Services in NSW. Our qualitative study comprises semi-structured telephone and face-to-face interviews and focus groups. Between 2014 and 2016, we interviewed 45 people who represented NSW private for-profit and not-for-profit, non-government providers of residential OOHC (n=14), NSW Police (n=10), Juvenile Justice (n=7), FaCS (n=5) and legal professionals (n=9). Our research design departs from previous NSW research examining the involvement of children in OOHC in the criminal justice system, which predominantly consisted of analysis of administrative datasets and court files.¹⁶ Ethics approval was granted by Charles Sturt University, and agreement was obtained from agencies whose representatives were interviewed. Participants were assigned pseudonyms to maintain anonymity. Four participants self-identified as Indigenous Australians.

⁶Frank Ainsworth and Patricia Hansen, 'Programs for High Needs Children and Young People: Group homes are not enough' (2008) 33(2) *Children Australia* 41.

⁷Mendes, Baidawi and Snow, above n 4.

⁸Kath McFarlane, 'From Care to Crime: Children in state care and the development of criminality' in Chris Cunneen and Michael Salter (eds), *Proceedings of the 2nd Australian and New Zealand Critical Criminology Conference*, 19-20 June 2008, Sydney, Australia (Crime and Justice Research Network and the Australian and New Zealand Critical Criminology Network); Kath McFarlane, above n 1; Iain Darker, Harriet Ward and Laura Caulfield, 'An Analysis of Offending by Young People Looked after by Local Authorities' (2008) 8(2) *Youth Justice* 134; Claire Fitzpatrick and Patrick Williams, 'The Neglected Needs of Care Leavers in the Criminal Justice System: Practitioners' perspectives and the persistence of problem (corporate) parenting' (2017) 17(2) *Criminology & Criminal Justice* 175; Carol Hayden, above n 5; Baron Laming, *In Care, Out of Trouble* (Prison Reform Trust, London 2016); S Paul, 'Reducing offending in residential child care' (2008) 9 *Scottish Journal of Residential Child Care: In Residence*; Julie Shaw, 'Residential Care and Criminalisation: The impact of system abuse' (2017) 16(3) *Safer Communities* 112; Jo Staines, *Risk, Adverse Influence and criminalisation: Understanding the overrepresentation of looked after children in the youth justice system* (Prison Reform Trust, 2015); Claire Taylor, *Young People in Care and Criminal Behaviour* (Jessica Kingsley, 2006).

⁹Kath McFarlane, *Care-criminalisation: The involvement of children in out of home care in the NSW criminal justice system* (PhD Thesis, University of New South Wales, 2016).

¹⁰Emma Colvin et al, "'We Don't do Measure and Quotes': How agency responses criminalise and endanger the safety of children missing in care in New South Wales, Australia' (2018) 57(2) *The Howard Journal of Crime and Justice* 231.

¹¹Elizabeth Stanley, 'From Care to Custody: Trajectories of children in post-war New Zealand' (2017) 17(1) *Youth Justice* 57.

¹²Kelly Richards and Lauren Renshaw, *Bail and Remand for Young People in Australia: A national research project* (Australian Institute of Criminology, 2013).

¹³Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997).

¹⁴Gerard et al, "'I'm not getting out of bed!'" The criminalisation of young people in residential care' (2018) *Australian and New Zealand Journal of Criminology* (forthcoming).

¹⁵NSW Ombudsman, *Annual Report 2014-2015* (2015) 83.

¹⁶Katrina Wong, Brenda Bailey and Dianna T Kenny, 'Bail me out: NSW young offenders and bail' (Youth Justice Coalition, September 2009).

Participants were asked about their perception of any link between residential OOHC experience and contact with the criminal justice system. Thematic qualitative coding was undertaken after the interviews were transcribed.¹⁷ Just under half of the participants (n=21) spoke about the establishment and implementation of the Protocol, which was designed to reduce the criminalisation of children in residential OOHC. Although we interviewed a broad sample, it is not suggested the views of participants were representative of those held by all professionals working in this area.¹⁸

Calling police for not eating dinner: Why we need the Protocol

According to the Office of the NSW Ombudsman, the Protocol was initiated 'after Legal Aid NSW approached [it] with their concerns that the most frequent users of the Children's Legal Service had a history of being in residential care'.¹⁹ Legal professional A, a lawyer closely involved in the development of the Protocol, explained that 'this great partnership' had come about when a handful of agencies and police commands recognised that they needed 'to do something different' if they were to reduce the involvement of children in residential OOHC in the criminal justice system. As Police participant A explained, police became involved in the project largely because residential OOHC staff relied on police to resolve minor behavioural matters, which was a drain on police resources: 'We said, look, you shouldn't be calling us for all these jobs. A lot of these you should be resolving internally.'

Participants indicated that the Protocol was intended to reduce incidents where it was perceived that children in residential OOHC were being arrested for things that would not lead to police involvement if the children were living in a family home. FaCS participant C, a staff member from the state's child welfare department, stated 'it's about giving these kids the chance to be treated equitably, no matter where they are, in a kind of home-like environment, where the parents aren't calling the police in the first instance.' Legal participant A explained that the Protocol was intended to guide parties through 'basically how to handle a child in OOHC who misbehaves. So, for example, if a child refuses to eat his dinner, as per your direction, you don't call the police, which is what has been happening'.

The Protocol took shape over an initial development phase which involved all the heads of jurisdiction 'buying in' to the Protocol. The initial development phase, conducted by the NSW Ombudsman, was shaped by extensive consultation with stakeholders. This is recognised in the Protocol itself, which acknowledges that it was 'inspired by collaborative interagency work' and notes

the 'significant contribution' of the subgroup of the Western Sydney Residential Providers Forum, which comprised four residential OOHC providers, four local area commands, FaCS and Legal Aid.²⁰ Stakeholders advised on matters such as a governance structure, recognising that sensitivities were likely to arise in multi-agency partnerships. As Legal professional A stated, 'there can't be any opposition, because you've got your heads going, "We've already signed up for this."' Stakeholders also advised the Ombudsman on the preparation of strategies to ensure agency awareness, facilitate education and training, and identify the components of an effective evaluation.

A formal State-wide Steering Committee was also established. This comprised representatives from the NSW government agencies, namely NSW Police, FaCS and Department of Justice; legal bodies including Legal Aid NSW and Aboriginal Legal Service; and the independent OOHC regulator, the Office of the Children's Guardian. Child welfare agency representatives, such as the Association of Child Welfare Agencies, the Aboriginal Child, Family and Community Care Secretariat (NSW), Youth Action and a residential OOHC service provider, were also members.

A draft Protocol was released to stakeholders for comment in late 2014 and an amended version was endorsed in late 2015. The Protocol aims to:

- promote better management by residential OOHC agencies of children's behaviour and so reduce reliance on police to respond to incidents in those placements;
- improve relationships, communication and information sharing between agencies, particularly police and residential services;
- facilitate a shared agency commitment to a collaborative early intervention approach to children's behaviour in residential OOHC;
- improve police understanding of how they can utilise their discretion in relation to children in residential OOHC; and
- ensure that appropriate responses are afforded to children in residential OOHC who are victims.²¹

In 2016, the Ombudsman stepped back from the development process. FaCS, the state's child welfare agency, assumed control of the state-wide rollout, implementation and education phases. An evaluation was commissioned and is due to report in 2018–19.

While the Protocol drew on international examples for inspiration, it is apparent that participants saw the key to its success as its relevance to the Australian local context. For example, Police participant A noted that, when international practice was examined, 'It was everything we'd done. Exactly what we'd been doing. So I said "well, we're on the money", because I said "that's what they're doing over there".' Legal professional A agreed: 'A lot of the UK protocols had defined

¹⁷Margarete Sandelowski, 'Whatever Happened to Qualitative Description?' (2000) 23(4) *Research in Nursing and Health* 334.

¹⁸More detail on our research methods are described in Gerard et al, above n 14.

¹⁹NSW Ombudsman, above n 15, 83.

²⁰NSW Ombudsman, *Joint Protocol to Reduce the Contact of Young People in Residential OOHC with the Criminal Justice System* (2016) 2.

²¹NSW Ombudsman, above n 15, 83.

particular offences where they would consider calling police and we wanted to steer away from that.'

The fact that the Protocol had been initiated by agencies and individuals working with children in residential OOHC on a daily basis, rather than being an expectation placed on agencies from senior management, was a source of immense pride to many participants. As Legal professional A observed,

[I]t's harder, I guess, when you do it on the ground and then you try to convince the upper echelons to support something. So we're doing it the other way around, which is incredible. I never in my wildest dreams thought we'd be able to do that.

Participants were pleased that they had come up with a plan for change and that they had been able to convince government and agencies to become involved. They gave themselves credit for changing how agencies were already working with children.

The Protocol was repeatedly referred to as the mechanism for 'reducing any criminalisation' of children in residential OOHC (FaCS participant D). FaCS participant B described the Protocol as 'one of the significant things that's happened of late'. FaCS participant C readily gave acknowledgement to 'the amazing collaborative work that's been done to get to this point'. FaCS participants, who are now charged with implementing the ground up initiative, were also very conscious of the government expectations placed on their agency:

I think we're under a very clear mandate from [the] Minister . . . to improve outcomes for all children in out of home care, and we're very aware that children in residential care aren't at times getting adequate support and supervision. So we're doing everything we can to address that and improve that. Absolutely. (FaCS participant D)

Yet, while there was recognition that 'we're all collectively aghast at the fact that going into out-of-home care means you're more likely to come in contact with police as a response to your behaviour' (FaCS participant B), the interviews revealed that considerable additional work would be needed to ensure a reduction in the numbers of children in residential OOHC appearing before the criminal courts. As Legal professional D and Legal professional E concurred,

[A] protocol, that's a good idea, but there's also an issue about the relational stuff between a young person and the people looking after them, and a more in-depth and

empathetic understanding of the issues these young people present with and the trauma they've been through.

As FaCS participant C acknowledged in relation to the staff's understanding of the needs of children in residential OOHC: 'We would think they'd very much need additional training and support. And I guess one of the more controversial proposals, which we're yet to get approved, is that there is mandatory training for all staff working in these settings.'

It was recognised that, while parties to the Protocol would be expected to follow its processes, a significant level of interagency trust will be needed if it is to succeed. As Legal professional A explained: 'Part of the protocol says that the police, when they get a report or a call from a worker, assume that all the steps have been followed pursuant to the Protocol' (emphasis added). The Protocol's success is contingent upon, in the first instance, care staff following the procedure and seeking to de-escalate the matter prior to calling police and, second, on police then having the training and capacity to respond appropriately. As the Protocol itself notes, improving police understanding of how they can utilise their discretion in relation to children in residential OOHC is paramount.

According to FaCS participant D, fundamental to the Protocol's success will be ensuring 'a very consistent best practice approach, which is why we're very keen to roll it out state-wide'. FaCS participant D also noted the need for 'targeted support around the roll out . . . joint training around trauma and abuse that will touch on the therapeutic care'. FaCS participant C stressed the importance of 'a very small but pointed data collection process' to enable an effective evaluation to proceed. It was emphasised that funded services would carry a responsibility to demonstrate compliance with the Protocol: FaCS participant D confirmed that 'when funded services go through the recommissioning process, they will need to demonstrate that all staff are going to be trained in therapeutic care'.

Ending the criminalisation of children in residential OOHC

The interviews coincided with a series of inquiries and high-profile incidents involving the provision of inadequate residential OOHC services in almost every jurisdiction across Australia.²² These scandals led to major policy changes being announced in several jurisdictions: In NSW, this included the gradual phasing out of residential OOHC services. A comparable Protocol

²²ABC News Digital, 'Broken Homes: On the frontline of Australia's Child Protection Crisis', *Four Corners*, 14 November 2016 (Linton Besser); South Australia, Children in State Care Commission of Inquiry, *Allegations of sexual abuse and death from criminal conduct* (2008); South Australia, Royal Commission into Child Protection Systems, *The life they deserve: Child protection systems Royal Commission Report* (2016); Victoria, Commission for Children and Young People, ' . . . As a good parent would . . . ' (Inquiry into the Adequacy of the Provision of Residential Care Services to Victorian Children and Young People who have been Subject to Sexual Abuse or Sexual Exploitation whilst Residing in Residential Care, 2015); Senate Standing Committees on Community Affairs, Parliament of Australia, *Out of Home care* (2015); Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017); Queensland Child Protection Commission of Inquiry, *Taking responsibility: A roadmap for Queensland Child Protection* (2013); Queensland Family and Child Commission (QFCC), *When a child is missing: Remembering Tiahleigh* (2016).

to the NSW model was initiated in Victoria and was recommended as a means of addressing the care-crime pathway by the Royal Commission for the Protection and Detention of Children in the Northern Territory (2017).

It has been recognised internationally that a key element of the criminalisation of children in residential OOHC lies in the alacrity with which police are called by care staff to deal with children's minor infractions.²³ England and Wales, for example, introduced targeted agency and government interventions to reduce this reliance.²⁴ To date, the focus has been on educating residential OOHC staff about alternatives to ringing the police when children commit minor property damage, such as ripping posters, putting holes in plaster walls or breaking crockery. The idea has been to prevent police coming into contact with children in residential OOHC, unless there is a serious risk of harm to a staff member or child at the placement. This focus is reflected in the Protocol: Its first point highlights the importance of promoting better management of children's behaviour by residential OOHC agencies. This, in turn, is designed to 'reduce reliance on police to respond to incidents in those placements'.²⁵

This focus has largely sought to address residential OOHC staff's responses to children's behaviour. The Protocol emphasises the need to 'facilitate a shared agency commitment to a collaborative early intervention approach to children's behaviour in residential care' (emphasis added). The starting point is what the child has done wrong – not anything necessarily criminal, but conduct that is nonetheless challenging or problematic – to which the staff member and/or police have been required to respond. This arguably still presents the child as a nuisance and their behaviour as something that needs an intervention, albeit not a police response.

This child-centred approach ignores 'systemic, criminalising agency practices that also negatively impact on children in residential OOHC'.²⁶ There are wider elements at play than a residential OOHC staff member's response to an individual child's conduct. For example, agency reliance on police to apprehend children who go missing from care may create an impression in officers' minds that vulnerable children have committed a criminal offence. If the child then responds to police intervention by swearing, seeking to run away or striking out, the situation can escalate to the point that police may feel justified in laying criminal charges.²⁷

The circumstances that lead to children being detained in custody also warrant closer examination. In NSW, for example, children who run away or go missing while in OOHC may be placed in secure custody for their own safety.²⁸ Children who have been charged with a criminal offence may also be remanded in custody, notwithstanding the fact that bail has been granted, if a safe placement cannot be guaranteed.²⁹ These processes have been identified as key drivers in the criminalisation process and demonstrate that more innovative solutions are required.³⁰

Participants' responses emphasised that comprehensive training for residential OOHC staff and police is imperative if positive change is to be achieved. Unfortunately, the Protocol appears to have proceeded without commitments to training needs being finalised. As FaCS indicated, the extent of training, and whether it will be mandatory for agency staff, remains 'one of the more controversial proposals, which we're yet to get approved' (FaCS participant C).

The Protocol's success will be contingent upon cooperation and respectful partnerships between residential OOHC staff and police. As it clearly sets out, a major aim of the initiative is to 'improve relationships, communication and information-sharing between agencies, particularly police and residential services'.³¹ However, our research has already challenged the assumption that 'workable, inter-agency collaboration can be assumed'.³² Unless we learn from mistakes consistently highlighted in past Inquiries, the problem of siloed agencies will remain.

Conclusion

Only time will tell if the Protocol is able to deliver all that participants anticipate. Despite the optimism with which it has been greeted, it has the potential to be just another failed initiative unless supported and adequately communicated and resourced. There is danger in the bureaucratisation of a grass roots generated solution. It can be compromised if initial enthusiasm for what was an exciting initiative becomes an administrative burden or if it is viewed as a 'tick-the-box' procedural obligation imposed on staff by management. It also risks failure if, due to limited resources or poor communication, it does not actually reach all residential OOHC staff and police across the state. As was foreshadowed by participants, a

²³Darker, Ward and Caulfield, above n 8; Fitzpatrick and Williams, above n 8; Hayden, above n 5; Laming, above n 8; Paul, above n 8; Shaw, above n 8; Staines, above n 8; Taylor, above n 8.

²⁴Laming, above n 8; Sir Martin Narey, 'Residential Care in England' (Report of Sir Martin Narey's Independent Review of Children's Residential Care, Department of Education, 2016).

²⁵NSW Ombudsman, above n 15.

²⁶Colvin, above n 10; see also Anne-Marie Day, 'Hearing the Voice of Looked after Children: Challenging current assumptions and knowledge about pathways into offending' (2017) 16(3) *Safer Communities* 122; Staines, above n 8.

²⁷Colvin et al, above n 10.

²⁸Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report 1 & 2* (2014).

²⁹*Bail Act 2013* (NSW) s 28.

³⁰Kath McFarlane, 'Care-criminalisation: The involvement of children in out-of-home care in the NSW criminal justice system' (2017) *Australian & New Zealand Journal of Criminology* (forthcoming); Colvin, above n 10.

³¹NSW Ombudsman, above n 2, 83.

³²Colvin et al, above n 10.

programme of continuous training will be required if all staff are to comprehend and utilise the Protocol to reduce children's unnecessary involvement with the criminal justice system. As Legal professional I observed,

[I]t may take some time for a significant shift in culture and . . . require a constant reminder to all those involved, because all these agencies have reasonably high turnover of staff . . . it needs to be embedded constantly or re-embedded . . . into the practices and not just become another policy document.

The fact that the Protocol is to be run and implemented by FaCS, the state agency with ultimate responsibility for children in care, arguably raises questions of independence and effectiveness. FaCS participant C appeared to understand the agency's obligations: 'Our expectation would be that children get support. At the end of the day, they're under the parental responsibility of the minister and caseworkers need to be supporting children through those processes.' Whether FaCS can ensure that all agencies involved in the provision of residential OOHC are aware of the Protocol, understand their obligations to work together and receive an optimum level of training, however, is yet to be determined. Achieving significant and enduring cultural change among OOHC providers and police will not be an easy task, but without it the Protocol's ability to end the criminalisation of children in residential OOHC is doubtful.

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