



Impact of trauma and placement in residential or congregate care on the criminalisation of children in England/Wales and Australia

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ABSTRACT

Children in residential care have the most complex needs of all children growing up in Out-of-Home care (OOHC), due to complex trauma from pre-care experiences of abuse and neglect, inadequate therapeutic supports while in care and significant placement instability. Some argue that residential care settings are intrinsically criminogenic, as evidenced by significant over-representation of this cohort in youth justice. However, little is known about how children's experiences of trauma, including removal from family and placement in OOHC, is viewed by lawyers and decision-makers in criminal cases involving children in care. Criminal justice decisions can have long-term ramifications for children in care and custodial sentencing can often be a precursor to ongoing incarceration into adulthood. This qualitative, cross-national study explored the impacts of trauma and placement in residential or congregate care on the criminalisation of children in England/Wales and Australia. In-depth interviews were conducted with 28 legal, youth justice and judicial stakeholders in England, Wales (UK), New South Wales (NSW) and Victoria (Australia). While there are considerable differences in the operation of child protection and youth justice systems between these jurisdictions, thematic analysis using NVivo14 identified confirmed ongoing systemic factors associated with criminalisation identified in previous literature persists despite attempts to address these through policy and practice reforms. These factors include an absence of therapeutic supports, unstable and unsafe residential care placements, over-reliance on police to respond to minor incidents, increasingly punitive police responses lacking awareness of the impacts of childhood trauma and inappropriate use of custody as an 'alternative' placement. These findings suggest the similar systemic processes across these jurisdictions are likely to reflect deeply entrenched ideologies about 'care' and 'protection' that function to criminalise trauma. The implications of these systemic factors when children are exposed to formal criminal justice decision-making are considered.

1. Introduction

Out of home care (OOHC) involves placing children and young people in alternative living arrangements, such as foster care, kinship care,¹ or residential care facilities,² when they cannot safely remain with their primary caregivers. The 'OOHC to juvenile justice pipeline' has been well-established in England and Wales, Australia and elsewhere (see for example Baidawi, 2020; Ball, Baidawi and Fitzgerald, 2024; Shaw and Greenhow, 2021)), with extensive research establishing the

prevalence, characteristics, trajectories and needs of dual system³ involved children (Baidawi and Sheehan, 2019; McFarlane, 2018). A limited but important body of research explores the role of trauma as a mitigating factor in sentencing for violent crimes both among juveniles and adult offenders (Forsyth, 2016; Jackson et al., 2021) and the application of trauma-informed models of juvenile justice (Buckingham, 2016; Ezell et al., 2018). Despite growing research investigating the intersections between developmental trauma, experiences of OOHC and the criminal justice system (Malvaso et al., 2016; McGrath et al., 2020),

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¹ Kinship care is the preferred placement option for OOHC provided by a child's family or people known to the child (e.g., teachers, friends).

² Residential care refers to group homes or treatment centres staffed by professionals.

³ Refers to children who are simultaneously involved with both the child welfare system and the juvenile justice system.

few studies examine the opinions of legal advocates, youth justice practitioners, and decision-makers on how trauma and criminalisation impact formal justice decision-making when an OOHC child is charged with and processed for a criminal offence in England and Wales, or throughout Australia.

2. Background

Children in care are at a particularly heightened risk of criminalisation⁴ (Baidawi and Ball, 2022; Baidawi and Sheehan, 2019; McGrath et al., 2020; McFarlane, 2018) and care-criminalisation needs to be understood within the context of the developmental trauma many children in the OOHC system experience (Zaharieva and Anglin, 2019). Children in OOHC, particularly those growing up in residential/congregate care, exhibit more severe developmental trauma than children in the mainstream community. This is true cross multiple psychosocial domains. OOHC children are more likely to have significant mental health needs, histories of exposure to interpersonal aggression and violence, and challenges with substance abuse (Águila-Otero et al., 2020; Hallam et al., 2020). Emerging evidence suggests children in care are also more likely to have diagnosed or undiagnosed intellectual disabilities, cognitive impairments, neurodivergence, and developmental disorders (Baidawi and Piquero, 2020; McCausland and Dowse, 2022).

Early exposure to sustained interpersonal trauma adversely impacts brain development, resulting in difficulties with executive functioning (decision-making, impulsivity) and emotional regulation (Hambrick et al., 2019). This can be compounded when children experience significant placement instability and/or abuse within their care settings (Schofield et al., 2007). For example, (Paterson-Young, 2021) found that children in England and Wales experience trauma in secure care settings that mirrors the experiences of trauma in the family home. If unaddressed, the sequelae of developmental trauma can lead to increasingly complex and challenging emotional and behavioural difficulties that come to the attention of the criminal justice system (McFarlane, 2018; Day et al., 2023). Literature shows children who experience trauma and OOHC are exposed to increased risks of victimisation and involvement in criminal activity (Cauffman et al., 2005). Failure to tailor support for children in care also generates a cycle of exposure to future criminalisation (Paterson-Young et al., 2019).

While care experience does not inevitably lead to conflict with the law, children in OOHC are significantly overrepresented in the youth justice systems in England and Wales (McGrath et al., 2020) and throughout Australia (e.g., Baidawi and Sheehan, 2019; Malvaso et al., 2016). In the UK, Lord Laming's review titled 'Keeping children in care out of trouble' (Prison Reform Trust, 2016) highlighted that only 1 % of children are in care yet approximately 59 % of children in custody have experienced care. Research conducted in Secure Training Centres in England also found 43 % of children had experienced OOHC (Paterson-Young et al., 2019; Paterson-Young, 2021). According to the HM Inspectorate of Probation (2012), 98 % of children in care lived in privately-run children's homes or independent placements, with only 1 % living within 50 miles of their families. Taylor (2016) found 40 % of children in custody are from Black and Ethnic Minority (BAME) backgrounds, with 38 % experiencing care in Young Offender Institutes and 52 % in Secure Training Centres.

Australian data is consistent with these figures. The Victorian⁵ Sentencing Advisory Council (2019) found that 15 % of children appearing before the criminal division of the Children's Court had

experienced at least one OOHC placement, with 68 % of these children spending some time in residential care. Similar patterns are reported in NSW and South Australia (Malvaso et al., 2019; McGrath et al., 2020). Australia's colonial history also continues to differentially impact First Nations⁶ communities, with Aboriginal and Torres Strait Islander children grossly over-represented in the child protection, OOHC and juvenile justice systems. In the 2022–23 national reporting period, First Nations children were 12 times more likely to be in OOHC than non-Indigenous children (Australian Productivity Commission, 2024a), 21.5 times more likely to be on community-based supervision orders, and 27 times more likely to be in youth detention (Australian Productivity Commission, 2024b). This commences a disturbing pipeline directly linking care-criminalisation (McFarlane, 2018) with adult overimprisonment (Cunneen, 2015/2016).

3. Rationale

Dual system involved children often grapple with complex trauma, which is exacerbated by placement instability (Schofield et al., 2007; Day, 2021). Barriers to identity formation and negative self-perception (Ward, 2011), and exposure to environments that tend to criminalize (Taylor et al., 2014) are additional challenges of living in OOHC. While the role of trauma as a mitigating factor in sentencing for violent crimes by juveniles and adults (Forsyth, 2016; Jackson et al., 2021) and the application of trauma-informed models of justice in juvenile or youth justice settings (Buckingham, 2016; Crosby, 2016; Ezell et al., 2018) have been widely investigated, the intersection between developmental trauma, experiences within the OOHC systems and formal criminal justice decision-making, including how appropriate sentencing dispositions are made after conviction, remain to be examined. This cross-national comparative study involving interviews with key stakeholders engaged in the youth/juvenile court systems across England and Wales (UK), and NSW and Victoria (Australia), aims to address these gaps.

4. Methodology

4.1. Research aim

This paper draws from a broader comparative study examining professional views of the impact of OOHC on sentencing decisions before the Children's and adult courts in England and Wales, and NSW and Victoria. This paper focuses on the impact of a child's history of trauma and experience of OOHC, particularly in residential/congregate care, on decision-making processes in the justice system. It explores impacts of trauma and placement in residential or congregate care on whether and how criminal decision-making in England/Wales and NSW and Victoria considers the experience of trauma. These four jurisdictions were chosen because, the research team has extensive knowledge of the OOHC and youth justice systems within these jurisdictions, and despite considerable differences, the four jurisdictions share a common basis for the development of their child protection and youth justice systems. We therefore focus specifically on systemic similarities across the four jurisdictions.

4.2. Participants and procedure

Participants could engage in an online or in-person interview undertaken by members of the research team in their respective jurisdictions. Interviews focused on participants' understandings of the impacts of developmental trauma and histories of OOHC on criminalisation processes. It considers whether the legal systems in England and

⁴ The process of treating individuals as criminals through formal legal systems for behaviors that may stem from underlying issues such as trauma or socio-economic factors.

⁵ In Australia, each state and territory has separate jurisdiction over child protection and criminal justice. New South Wales and Victoria, where this study was conducted, are the two most populous Australian states.

⁶ The term First Nations refers to the multiple Aboriginal and Torres Strait Islander Nations that are the traditional custodians of the lands, seas, and waterways of the Australian continent.

Wales, and NSW and Victoria consider experience of trauma and OOHC in decision-making processes and whether the intersections of trauma/OOHC are considered. The interview schedules designed for the research involved questions such as:

- (1) What are some of the key factors that you consider when working with a care experienced young person?
- (2) What impacts do you think that a history of out-of-home care have on a young person?
- (3) How is this issue factored into decision-making when young people engage in criminal behaviour?
- (4) Do you think care experience is taken into consideration in sentencing children and young people?
- (5) How would you describe the ‘culture’ around sentencing those convicted who have an out of home care background?

Interviews lasted around 60–90 min and were recorded with participant consent. Transcription was undertaken by a registered service in the United Kingdom that adheres to privacy legislation and by the research team in Australia. In England and Wales, 14 interviews were conducted with Youth Justice professionals, Magistrates, and Lawyers/Barristers. In NSW and Victoria, interviews were conducted with 17 participants including judges, magistrates, lawyers and children’s advocates. The project received human research ethics approval from the institutional review board at X University and at the University of X (removed for peer review). Table 1 provides an overview of participants engaged in the project.

4.3. Qualitative analysis

Braun and Clarke’s (2019) Reflexive Thematic Analysis, grounded in critical criminological and social work perspectives, was used to analyse the interview data. Fully anonymised interview transcripts were uploaded to QSR Nvivo version 14 (Lumivero, 2023), with analysis proceeding over multiple phases, including familiarisation and coding,

Table 1
Participant Overview.

Participant	Jurisdiction	Position
UKP01	Wales	Youth Justice
UKP02	England	Youth Justice
UKP03	England	Legal Professional
UKP04	England	Youth Justice and Academia
UKP05	England	Youth Justice
UKP06	Wales	Legal Professional
UKP07	Wales	Legal Professional
UKP08	England	Legal Professional
UKP09	England	Youth Justice and Children Services
UKP10	England	Legal Professional
UKP11	England	Legal Rights Organisation
VICP12	Victoria	Senior legal professional (youth crime)
VICP13	Victoria	Senior legal professional (youth crime)
VIC14	Victoria	Legal advocate (youth crime)
VICP15	Victoria	Senior legal professional (youth crime)
VICP16	Victoria	Legal professional (youth crime)
VICP17	Victoria	Magistrate
NSWP18	NSW	Magistrate
VICP19	Victoria	Independent Children’s Advocate
NSWP20	NSW	Judge
NSWP21	NSW	Judge
VICP22	Victoria	Judge
NSWP23	NSW	Magistrate
NSWP24	NSW	Senior legal professional (youth crime)
VICP25	Victoria	Senior legal professional (child protection)
VICP26	Victoria	Senior legal professional (child protection)
VICP27	Victoria	Senior legal professional (child protection)
VIP28	Victoria	Senior legal professional (child protection)
UKP29	England	Magistrate
UKP30	England	Magistrate
UKP31	England	Magistrate

theme development, review, and producing the analysis. Initial coding from each jurisdiction was undertaken separately, with regular reflective meetings amongst the research team designed to ensure consistency. As the analysis progressed, the research team combined and recoded all transcripts to ensure identified themes accurately reflected issues arising in the data within and across each jurisdiction.

Initial codes captured an important significant segment for analysis. These were gradually refined and abstracted into four key themes capturing latent constructs in the data (Braun and Clarke, 2019). These themes revealed profound systemic similarities across all jurisdictions relating to the ways structural disadvantage, including experiences of developmental trauma and placement in OOHC, are considered when the criminal legal system views the culpability and ‘just punishment’ of children. These systemic similarities are attributable to four overarching themes identified in the data: ‘criminogenic and traumagenic nature of placements – absence of stability and therapeutic support’; ‘police involvement in care’; ‘advocating for children in court’; and ‘sentencing children – understanding care experience’. While the first three themes reinforce and expand on trends identified in prior research (see: Baidawi and Ball, 2022; Baidawi and Sheehan, 2019; McGrath et al., 2020; McFarlane, 2018; Schofield et al., 2007; Day, 2021), the fourth is an original insight stemming from our analysis.

5. Finding and results

5.1. Criminogenic and traumagenic nature of placements – absence of stability and therapeutic support

The traumagenic nature of OOHC placements is a key aspect of the criminalisation of children in residential care. Respondents considered the lack of stability and safety associated with multiple placements impacts children’s psychological, social and educational wellbeing. While the primary purpose of OOHC should be to create safe and secure environments for children, many participants across the four jurisdictions noted that some placements were inappropriate and/or created negative environments for children.

The provision that was offered, the placement was just awful. It was worse than being at home and he spent the whole-time being a [missing person]. (UKP01)

Some interview participants reflected on the inappropriate nature of home-based placements, as opposed to residential placements. In Australia, this includes placement in kinship care.

I was working in a...very diverse borough ... [with lots of] multi-ethnic foster placements. You could not place a child necessarily with someone of the same ethnicity because in practical terms it wasn’t going to work... the poor level of foster care in many places is a real issue. (UKP02)
The foster care placements break down ...and then those kids will either end up in new foster care placements or end up in resi⁷ units. So, I think it’s just that complete lack of stability for them. (VICP25)

Dual system children in care in the UK also experience unregulated⁸ placements that create additional challenges for Magistrates and Judges in determining the suitability of available placements. However, respondents often felt courts have a duty to find appropriate emergency and longer-term placements for children in OOHC. As one participant noted:

⁷ Residential care.

⁸ Unregulated placements “do not meet the criteria of a children’s home and...fall into the category of “other arrangements” under section 22C of the Children Act 1989 and under the Care Planning, Placement and Review (England) Regulations 2010” (Foster, 2021, p.21).

I don't think we've progressed in anything ... we just talked about the unregulated placements post 16, the deaths and one of those deaths, the murder, was local. Nothing's changed, absolutely nothing... (UKP02)

In NSW, this issue was mirrored through the privatisation of OOHC placements operated by non-government organisations. One respondent indicated the privatisation of the residential care system raises concerns about the quality of care provided to children and the over-reliance on police to manage trauma-based behaviours.

... they generally have carers that are not particularly paid well, not particularly trained well, and they're having to deal with kids who have really complex issues and complex backgrounds. And often the way to deal with it is calling the police. (NSWP24)

The suitability of regulated placements is also a concern for children 'ageing out' of care, who experience multiple challenges in accessing proper accommodation:

It appears that there just is no [suitable placement] – that isn't really a protection for these children who get caught up in the criminal justice [system]. (UKP03)

Another key contributor to the criminalising and traumatising nature of OOHC is the lack of suitable regulated placements for dual system involved children. This can often lead to children receiving custodial instead of community sentences.

...we do get kids being remanded and we do get kids sentenced to custody because there's nothing available... what was happening before the unregulated⁹ accommodation was that children were being placed in caravans and it being called 'a holiday' and then being moved every 28 days because the holiday could only last 28 days... that was their placement. (UKP04)

A similar challenge was identified in NSW and Victoria, with the following highlighting the way custody can be used as an 'alternative' placement option.

The court will say, okay, you've been granted bail. But you're not to be released until accommodation is found for you. Sometimes some of these kids are kept in custody for weeks at a time after that, because no viable accommodation placement has been found... I've always found it strange that a young person in custody doesn't fall within that definition of a young person at an immediate risk of harm... (NSWP24)

Instability in placements and the absence of therapeutic support for children in OOHC is a compounding factor in the criminalisation of children. When children are frequently moved between different placements and experience unregulated placements, in the disruptions to their sense of stability and continuity can exacerbate trauma. Without consistent therapeutic support to address their emotional and psychological needs, these children may struggle to develop coping mechanisms and resilience.

5.2. Police involvement in care

The over-reliance on police to manage trauma-based behaviour within residential care has been considered in previous research and practice (see [Hunter et al., 2024](#); [Day, 2021](#); [Day et al., 2023](#); [Shaw and Greenhow, 2021](#); [Walsh, 2019](#)). However, despite multi-agency protocols in all jurisdictions, participants expressed concerns over the continued criminalisation of children in care, which is perhaps most apparent when children are missing from their placements. Respondents in each jurisdiction noted the management of children missing from care

is a key factor in their criminalisation.

A big issue for me is the whole business about the police being called for missing incidents, which can be as simple as the child being 15 min late back [home].... the police are there waiting for them, the police are looking for them.... [its] the whole thing of being forced into this environment where that contact with the police is normal. I've seen incidents spiral out of that, numerous times... (UKP02)

In Victoria, children missing from placements are apprehended under 'safe custody' warrants issued by the Children's Court and enforced by the police. However, the overt criminalisation of children who are absent from their place of residence fails to acknowledge why children may be missing, and the inherent trauma of 'apprehending' a child and returning them to their placement.

There's a whole raft of very complex and pretty devastating reasons that children and young people leave resi. And the main way that the system uses to bring those children back is by a safe custody warrant. ... that whole process is for a warrant to be issued and police to go and retrieve those children...then the child or the young person will react... that also feeds the criminalisation of those children and young people because then they end up with charges for threatening police, for assaulting police, etc. (VICP19)

The risks associated with children missing from care include potential substance misuse, criminal exploitation and sexual victimisation. However, respondents expressed a shared concern that staff in residential homes were simply responding to internal management policies rather than exhibiting professional judgement when dealing with children missing from their placements.

More recently we've had a young chap who was 15. He was brought in because he kept going missing. He'd been put out of county for whatever reasons...he kept running away from the placement and coming back to [the area] ... his mother is in a hospital, she had terminal cancer and ... he wanted to be with her. It's as simple as that; he wanted to be with her. (UKP30)

Police involvement with children in OOHC is also related to the management of behaviour inside residential homes. Calling police to deal with minor behavioural issues (see [McFarlane, 2018](#)) was commonly cited in each jurisdiction as increasing the likelihood of arrests and care-criminalisation.

I think the other thing is ...children who commit offences within their places of living against care staff if they are post-16. It could be within their children's home; it could be within their (personal living) environment. (UKP05)

There can be a lot of difference between the different service providers as well around the willingness to charge or when they call police ...[Some] seem to be very willing to call police very quickly, while there are other service providers where they're less likely to call as quickly. (VICP25)

Introducing police to manage children's behaviour in OOHC, and different approaches by service providers to managing children in OOHC, illustrate the requirement for joint protocol and training programmes for child protection staff, residential care workers and police. These protocols should ensure a unified approach to crisis de-escalation and intervention that emphasises the child's safety and emotional well-being.

Criminal convictions resulting from behaviours exacerbated by the residential environment are addressed in England and Wales by the 'The national protocol on reducing unnecessary criminalisation of looked-after children and care leavers' (Department of Education, Home Office and Ministry of Justice, 2018). This protocol recommends the co-development of local arrangements to reduce, but not necessarily prevent, the criminalisation of children in OOHC.

⁹ An unregulated placement that is not registered under the terms of the Care Standards Act 2000 and provides accommodation (only) without care provision.

... a huge problem for children ...in the care system is charges that originate from reports from the care provider. I know they are trying to stop this.... I certainly would not be reporting my child to the police for writing on the wall but that happens... (UKP08)

NSW¹⁰ and Victoria¹¹ also have protocols to reduce the criminalisation of children in residential care. Participants in NSW noted the protocol has been “applied inconsistently across the state, but I actually think it’s been quite effective in authorising the cops not to necessarily take action when they’re called to an incident in a residential care home.” (NSWP21). However, it was also noted the “police paid lip service to it, but some of the more sophisticated, larger NGOs...took a lot more notice.” (NSWP20). In Victoria, while a similar protocol was yet to be implemented at the time of the interviews, one respondent indicated:

... there was really no activity on implementing the framework throughout 2020, 2021, I think probably much of 2022. I understand that there’s an ... 18-month action plan that is close to being signed off. But ... implementation hasn’t started at all, or certainly hasn’t started in any real meaningful way. And that is reflected in [the data] we see. (VICP19)

Criminalisation in care also occurs by minimising and negating children’s experiences as victims. Respondents in each jurisdiction noted children who experience victimisation are not looked after as ‘children’ but are labelled and criminalised for the harms they have experienced as victims of abuse, interpersonal crime and systemic neglect at the hands of systems aimed at protecting them.

...[I]f you look at something like exploitation, I found from experience (that) these children, they are just criminalised all the time, we’re not looking at them as children, as victims... If they have been caught and they have got drugs on them, they are not willingly carrying those drugs, they have been exploited into doing that. (UKP11)

...[E]ven the system wrongs them... because you’ll often hear people call children in residential care resi kids. Even the police do it, they’re labelling them. And so, there’s marginalisation that comes through...But if they slowed down and realised that this child’s been a victim... (VICP22)

Magistrates also commonly reflected on whether children charged with and convicted of a criminal offence should ‘even be in the courtroom’.

Before we even get to the sentencing point, one of the things that we’ve pushed in this county, and we’ve raised it to national significance over the last decade, is whether or not the young person or the child should be there in the first place... I would suggest that really we need to go all the way back to saying should the child even be in the courtroom? (UKP29)

Australian specialist judges and magistrates with extensive history of sitting in the family and criminal divisions of the Children’s Court raised the importance of diversion for children with histories of trauma and OOHC noting that: “...there are lot of kids in OOHC who are given diversions. And they’ll get multiple diversions before it moves beyond that. And you know, diversions have a got a pretty good success rate.” (VICP17)

5.3. Advocating for children and young people in court

In each jurisdiction, dual system involved children in contact with multiple professionals’ experience ‘the hot potato’ phenomenon, with responsibility for supporting children in court passed on to other organisations. This means dual system children are often unsupported in

court.

A significant proportion ... are supported by an individual, sometimes a social worker, sometimes a Personal Advisor.¹² They haven’t got that supportive network around them, whereas a young person with a family might. (UKP09)

For the kids in residential units, they don’t have someone consistently looking after them. They might have a group of workers who they consistently have caring for them, but they don’t have someone like a constant adult caring for them...they’re almost deliberately moving workers on to get experience or so that the children don’t get too attached to particular workers, which is kind of counterintuitive ... (VICP25)

One participant referred to youth justice as the ‘forgotten social work space’, where dual system involved children fall between the gaps and often appear with no appropriate support.

I think it makes a massive difference if a child’s social worker pitches up in court than if they don’t. And that isn’t standard practice across the country...And I think that thing about youth justice sits over here, and social care sits over here, and that’s why I talk about it being the forgotten social work space...[Workers] who can’t fulfil their statutory functions already and now taking on the statutory functions of another organisation. I despair of our mental health services. (UKP05)

Participants in all jurisdictions emphasised holding professionals accountable for providing appropriate support to children in OOHC who are brought before the criminal justice system for minor forms of offending.

We also need to hold professionals accountable, like having social workers of children present in the court to support (them). I believe this should happen, but ...in fact, in most cases it does not happen. Not just this, but also making sure reports are detailed. (UKP08)

The desire of a sentencing magistrate in the Children’s Court is to impose a sentence that allows institutions of youth justice and the care agency to have the opportunity to give as many resources as they can to that child so that they’ll recover and stop offending...the adult jail population is full of out of home care kids...if we don’t do something now... all we’re doing is creating a violent, angry, impaired group of adults who will offend in the future. (NSWP18)

Advocates and legal representatives who understand the needs and entitlements of children are central to supporting children in OOHC who face the criminal justice system. The Youth Justice Legal Centre in England and Wales has published a guidance document for legal representatives that highlights the importance of preventing the criminalisation of children in care, drawing on guidance from the Department of Education, Home Office and Ministry of Justice (2018). The need to adhere to this duty was identified in all jurisdictions examined in this study.

You need...a solicitor who understands the area of work. Someone who is able to advocate for that young person in court, that doesn’t have to be their solicitor. I’ve found that court is quite open to listening to ... advocates...[or] people that are working well with a young person. (UKP02) One way I personally deal with it is if they’ve got supportive parents, or a carer that the young person at least has a good relationship with, if you can get consent to have more involvement from them, that’s one way to go about it. I mean, there are little things that we can do. (NSWP24)

Respondents in England and Wales identified the need for professionals to support/advocate for children and young people in Problem-Solving Courts. This model requires legal professionals to attend court and provide meaningful support for young people in OOHC

¹⁰ NSW Ombudsman. (2019). Joint protocol to reduce the contact of young people in residential out-of-home care with the criminal justice system: <https://www.facs.nsw.gov.au/download?file=585726>.

¹¹ DFFH (2020) A framework to reduce criminalisation of children in residential care: <https://providers.dhhs.vic.gov.au/programme-requirements-out-home-care-services>.

¹² Personal Advisory roles were introduced by The Children and Social Work Act 2017 to provide care leavers up to age 25 with support (Department of Education, 2018).

who experience the criminal legal system.

... (this) places a duty on the agency that we are asking for the report from to come to court to deliver that report. ... [I]f we're going to do a complex sentencing then we will order those people to come to court because we need to hear from them what they are going to be doing for this child and this family. So, you'll have Youth Offending Service,¹³ case worker will be there ... and so will be the social worker and maybe the Family Support Officer and the substance abuse and all of those people who are going to be playing a key part. And as a Presiding Justice I will hold it as a meeting [by asking] 'What are you going to be doing for this family?' (UKP29)

While there is no equivalent model in NSW or Victoria, specialist courts take a restorative approach, particularly for First Nations children. The Koori Courts in NSW and Victoria were considered a more 'therapeutic' and culturally appropriate approach to working with dual system involved First Nations children despite legislative restrictions on their availability.

... [I]f it's a matter that's proceeding to a plea we'll be talking to the young person about whether the Koori Court is an appropriate option for them and if they want to participate in that process, then we'll support them through that process. And that's a much better culturally appropriate response for the young person. But at the moment, the Koori Court's only available post-plea. So young people don't have access to a culturally appropriate process all the way through ... and bail applications, for instance, are not heard in the Koori Court. So, you're in a mainstream court until your matter's resolved, and then is adjourned into the Koori Court. (VICP12)

5.4. Sentencing children – understanding care experience

Participants acknowledged awareness of trauma-informed practices is crucial for Magistrates and Judges when determining sentences for young people experiencing OOHC who are convicted of criminal offences.

I think magistrates are much more sensitive to and aware of trauma that impacts these children, and judges less so. We have one particular judge ..., a circuit judge, who is incredibly punitive ... – he's up for responsabilising children and doesn't really get it. (UKP05)

In England and Wales guidelines indicate that OOHC experience is an overarching factor in sentence determinations (Sentencing Council, 2017, 2019). However, interview participants were not convinced this requirement was appropriately considered in all cases.

There is guidance on sentencing that does note experience of care for sentencing young people and adults, but I don't think it is taken into consideration as much as it should. It is difficult because we can't say that being in care means you should 'get a free pass' but it does have an impact on the life of the child. (UKP08)

OOHC is not a specific factor that must be considered in sentencing in NSW or Victoria. However, the High Court ruling in *Bugmy v. R* (2013) acknowledges that a history of childhood trauma can be considered to mitigate legal culpability and reduce the sentences of adult offenders. The application of this ruling to trauma-related experiences associated with OOHC is unclear but will be balanced against other considerations such as age and maturity, that are viewed as more 'pertinent' in the Children's Court jurisdiction.

...[S]ome people are profoundly affected by levels of trauma that are lesser [sic]... but that might be the child's entire reality. What I look at is 'has the child got a diagnosis as a consequence of what has occurred?' Or

is it the case that the Bugmy and Fernando factors exist? So, it's just been so disorganised and dangerous growing up that it must lead to a finding that the child has not had the same capacity to make a refined moral decision. (NSWP18)

... I don't think with children you need to kind of start fishing around for legal reasoning and legal parameters to give proper acknowledgement to the effects of trauma on a child. (VICP17)

Sentencing reports seek to provide the court with a comprehensive assessment of the needs of the child in light of the seriousness of any alleged offending. Pre-sentence reports in each jurisdiction provide detailed information on children's experiences of OOHC for consideration by judicial officers. This is especially important as children do not always have adequate support or appropriate legal advocacy in each jurisdiction.

...I think we do provide quite a detailed response to the supervision report to court every time, not just for specific sentencing. We've got enhanced case management within the Youth Offending Team so we will discuss what they've been assess[ed] at in terms of their cognitive [and] social development... We'll make sure the court are [sic] aware of that and what level we are assessing them in terms of their trauma level and what we would be doing... (UKP01)

I have a youth justice background report on every child, because I want to know about them, because for me, sentencing is an exercise in communicating with a child. And I want to do it properly... I don't know anything about this kid's story except what the solicitor told me, and often that's the broadest possible brush, right? So, I love the reports. I love the fact that they go through their mental health. I like the fact that they give me their story. I like the fact that they indicate what could be done to assist the child in the future... (NSWP18)

Consistent with the ethos of children's courts, where the focus is predominantly on diverting children away from custodial sentences and providing support opportunities for rehabilitation, Judges and Magistrates reflected on the importance of positive reinforcement for children in OOHC. This emphasis highlights the importance of integrating problem-solving approaches into criminal justice decision-making.

But you might be saying to the kid, it's really great what you're doing at the moment, you did something of course, and that's why you're here. You're saying and doing the right things... So, the sentencing process for me, is focusing very much on positive reinforcement. Because the accountability, in many respects is already reflected before the court so you don't have to keep ramming that home (VICP22)

...because some children have even more complex difficulties than all the others we see, and they all have some degree of complexity, then we initiated in [the area] what we call a problem-solving hearing... But we were recognising that this was going to need a really concerted effort from a team of professionals, both for the family and for the child. (UKP29)

6. Discussion

Children in OOHC, particularly residential/congregate care, represent some of the most vulnerable children in our communities. This vulnerability is exacerbated within systems that function to criminalise and punish the trauma these children have experienced. Our findings from in-depth interviews with legal, judicial, youth justice and children's advocate stakeholders in England/Wales, NSW and Victoria illustrate that despite explicit sentencing guidelines in England and Wales, and multi-agency protocols in all jurisdictions, children continue to be criminalised by virtue of being in residential care (Hunter et al., 2024; Shaw and Greenhow, 2021; Walsh, 2019). Despite some important legal differences, participants in all jurisdictions pointed to consistent factors that contribute to the overt criminalisation of children in residential care.

Our findings reinforce trends identified in a growing body of

¹³ Youth Offending Service or Youth Offending Teams are responsible for supervising children on out of court disposals and youth sentences.

literature that emphasises significant structural and systemic issues influence the criminalisation of these vulnerable and marginalised young people (Baidawi and Ball, 2022; Meiners, 2017). Our study revealed consensus that the OOHC system directly contributes to the criminalisation of children through several interconnected systemic issues and processes, including a lack of residential stability and an absence of physical and relational safety for many children (Cameron-Mathiasen et al., 2022; Day et al., 2023). These factors contributed to children absconding from their placements, which triggers responses from residential care services, courts and child protection authorities that rely almost exclusively on their ‘apprehension’ by police. This response is experientially punitive, as highlighted by the Victorian Commission for Children and Young People report on systemic responses when children are absent or missing from residential care.

Many children and young people experience the processes designed to find and return them to care as criminalising. They describe being ‘arrested’, transported in police cars and held in police stations when they have not engaged in criminal conduct and, indeed, even when they have been victimised during their absence from care (Commission for Children and Young People, 2021, pg. 19).

These challenges within residential care systems, and the over-reliance on police to ‘manage’ trauma-based behaviours, contribute to a cycle of instability where children are constantly moved between placements. Participants noted children are often placed far away from their family and social connections, leading to increased distress, disconnection and dysregulation. The absence of adequate therapeutic supports within the residential care system in all jurisdictions leaves children vulnerable to further exploitation and criminalisation (Commission for Children and Young People, 2021; Edwards et al., 2023). This sets up a vicious cycle, where the risk of criminalisation increases due to trauma-based behaviour and the responses relied upon by child protection, OOHC, and criminal legal systems to protect then control these children.

Our findings also highlight challenges experienced by legal and judicial authorities when dealing with dual system involved children. Participants appeared to understand the impacts of childhood trauma on children’s developmental trajectories and appreciated the challenges associated with residential care placements, emphasising disconnection and lack of stability as key factors contributing to the increased risk of criminalisation of these children. This is consistent with a large body of research demonstrating that residential care is an important predictor of contact with the youth and adult criminal legal systems (Baidawi and Ball, 2023; Ball, Baidawi and Fitzgerald, 2024; Herz et al., 2023).

However, participants in all jurisdictions recognised the need to ensure judicial officers and legal representatives are provided with sufficient and pertinent information about a child’s trauma history and their experiences in care, even though the impact of this information in sentencing dispositions was unclear. Importantly, while specific sentencing guidelines in England and Wales compel judicial officers to consider OOHC as a mitigating factor, participants noted these guidelines are likely to be applied inconsistently. In Australia, judicial officers rely on case law to guide decisions involving the impact of childhood adversity and their placement in OOHC in mitigating legal culpability. However, as with participants in England and Wales, Australian participants highlighted the application of the *Bugmy* principles is variable and depends on how individual judicial officers weigh the impacts of trauma and OOHC against other established sentencing principles, such as a child’s age and maturity.

Our findings reinforce that the narrow lens of over-policing, or challenges within the residential care system, are insufficient to deal with the criminalisation of children in residential care. As Baidawi and Ball (2022) highlight, criminalisation occurs at the intersection of multiple systems. Courts have an important role to play in recognising long-term therapeutic supports are necessary to ensure impacts of trauma diminish over time. Despite ongoing debate around the

operationalisation of ‘trauma-informed’ care, there is recognition that person-centred approaches rooted in strength-based practice and awareness of the intergenerational impacts of historical trauma (Paterson-Young, 2021; Struik, 2017) can result in improved outcomes for these children (Giroletti and Paterson-Young, 2023). However, this requires multi-system responses to be consistently therapeutic, rather than simply applying ‘trauma-informed’ principles in ad-hoc and disconnected ways (Zelechowski et al., 2021). Arguably, by the time a child appears before a Children’s Court on criminal charges, the options for therapeutic responses are limited.

7. Limitations

There are some limitations to this study, including its representativeness and generalisability. We do not claim this data is either representative of or generalisable to all legal professionals, or judicial officers working with dual system involved children. Our data emphasises legal perspectives in each jurisdiction and does not include perspectives of child protection and OOHC service providers, or people with lived experience of dual system involvement. Including the views of service providers may have revealed additional insights into how children in care become criminalised through exposure to multiple statutory systems. The perspectives of dual system involved children would have provided a richer understanding of the process of criminalisation and the lived experiences at the intersections of OOHC and the criminal justice systems. This study was limited to four jurisdictions. Choosing to investigate the most populous jurisdictions in each country seems justified in terms of representativeness and accessibility to research participants.

8. Implications

An inspiring element within the often-dispiriting evidence from this research is the participants’ deep understanding of and commitment to these vulnerable children. Participants drew upon extensive experience and practice wisdom to suggest cultural, structural and systemic changes, including consistent therapeutic responses, would improve outcomes for care-experienced children who come before the criminal courts. Suggestions about how such a complex cultural shift might be achieved were deeply reflective and meaningful, and involved the following potential changes to policy and practice:

- Development of joint protocols and training programmes in crisis management for child protection staff, residential care managers and workers and police drawing upon evidence-based Therapeutic Crisis Intervention to support fewer traumatising responses to children in distress (Nunno and Leidy, 2003).
- Stability as a core priority for placing children in OOHC, by ensuring placements are as proximate to kith and kin, and the community with which all children, and First Nations children specifically, identify.
- Statutory requirements should be developed and enforced to ensure children under charge be appropriately supported, represented, and advocated for at court.¹⁴
- Statutory requirements should be enhanced to ensure incarceration is confined to situations of extreme risk rather than using OOHC as a ‘placement of choice’ or a response to lack of resources.
- Secure options for OOHC children and care leavers, when unavoidable, should always occur in developmentally appropriate, trauma

¹⁴ Individualised best practice responses are likely to be most effective when time and space is allowed for welfare, mental health and legal professionals to be fully appraised of the trauma history of the young person and to fully inform the court about how this may have contributed to any offending behaviour. The presence of the child welfare professional or case manager in court should be legislatively mandated.

responsive and culturally safe settings. Secure short to medium term small residential assessment and trauma response units managed by highly skilled multidisciplinary therapeutic teams might be developed as cross-sectoral initiatives between child protection, child welfare and youth justice.¹⁵

- Better informed decision-making may be achieved through statutorily managed judicial conferencing that includes court officers, the child, their family and key stakeholders invested in their wellbeing and responsible for ongoing case management.

9. Conclusions

The findings from this study point to entrenched nature of the criminalising processes within the child protection and OOHHC systems. Despite previous research highlighting similar themes to those discussed in this paper, little seems to have changed. Our findings are also consistent with longstanding evidence of a child welfare and protection culture that is insufficiently focused on healing trauma and preventing criminalisation. These deficits are exacerbated by residential care systems characterised by unstable and unsafe placements. This research affirms ongoing over-reliance on increasingly punitive police responses that lack awareness of childhood trauma and its impacts, and an inappropriate use of custody as a criminalising 'alternative' placement. Trauma awareness in the youth justice and child welfare sectors remains to be translated into consistently applied trauma responsiveness. While understanding trauma and its impacts and showing a desire to ensure children in OOHHC are given additional supports, judicial decision-making remains constrained by restrictive legislative requirements and the inability to compel statutory systems, including child protection, to better support children in their care. Participants in this study recognised these shortcomings and advocated moving away from an entrenched causation narrative that holds traumatised children in OOHHC responsible for criminality, to one that recognises their exposure to longstanding systemic and structural failures that generates complex understandings requiring intensive therapeutic interventions rather than punitive responses. Participants offered innovative suggestions about how such a cultural shift might be achieved that should be explored in further large-scale comparative research given the widespread cross-sectoral appetite for a more compassionate and constructive approach to child protection, youth justice and sentencing of children growing up in care in England and Wales and Australia. As one participant suggested: 'if only they slowed down and realised that this child's been a victim'.

Declaration of competing interest

The authors declare the following financial interests/personal relationships which may be considered as potential competing interests: The authors report that financial support was provided by University of Northampton to support the research.

Data availability

The data that support the findings of this study are not publicly

available due to restrictions outlined in consent agreements with participants and the identifying nature of the data.

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¹⁵ Care experienced children and young people presenting with extreme trauma and serious criminality require more intensive programmatic responses. Short-medium term residential facilities might be designed to break cycles of high-risk behaviour, placement breakdown, serious offending, recidivism and incarceration through effectively assessing and addressing complex trauma. Secure therapeutic placements would aim to facilitate stabilisation, therapeutic interventions and in-depth psycho-social assessments of a small number of children and young people in OOHHC with multiple needs who face major criminal charges. This, in turn, could inform judicial and child protection decision-making and case planning.

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