‘I’m not getting out of bed!’
The criminalisation of young people in residential care

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Abstract
Evidence from both Australian and international jurisdictions show that children in residential care are over-represented in the criminal justice system. In the current study, we interviewed 46 professionals who had contact with young people in residential care settings in New South Wales, Australia. Our sample included police officers, residential care service providers, legal aid lawyers and juvenile justice workers, about their perceptions of the link between residential care and contact with the criminal justice system. Factors identified by the participants included the care environment itself, use of police as a behavioural management tool, deficient staff training and inadequate policies and funding to address the over-representation. These factors, combined with the legacy of Australia’s colonial past, were a particularly potent source of criminalisation for Aboriginal children in care.

Keywords
Criminalisation, Indigenous, juvenile offending, out-of-home care, residential care

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Children in out-of-home care (OOHC) are significantly over-represented in the criminal justice system both internationally and within Australia (McFarlane, 2017; Malvaso & Delfabbro, 2015; Raman, Inder, & Forbes, 2005; Ringland, Weatherburn, & Poynton, 2015). OOHC is the provision of care by the state for children who have been removed from their families and who are ‘looked after’ under alternative arrangements such as foster care, care by relatives (kinship care) or residential care. While we acknowledge the importance of foster and kinship care, our current study focusses on residential care, and specifically on the perceptions of frontline professional staff working with children residing in group homes. Our focus on residential care arose in part because previous researchers have identified these contexts as being an important source of criminalisation (Cashmore, 2011), and partly because little is known about the impact of reforms recommended by the Wood Special Commission into Child Protection Services in NSW (Wood, 2008), which resulted in the government expanding the contracting out of OOHC service provision to non-government agencies. We investigated respondents’ perceptions of the underlying causes of the involvement of young people in residential care in the criminal justice system in New South Wales (NSW), Australia.

We begin by building a context of the OOHC system in Australia and in NSW, the site of this Australian case study. We then review the international and Australian literature on the involvement of children in residential care in the criminal justice system. A description of our method is followed by a discussion of the key findings of the research.

**Children in OOHC**

The National Framework for Protecting Australia’s Children 2009–2020 (Council of Australian Governments, 2009) states that OOHC is a last resort for keeping children safe. Across Australia, each state and territory has different legislation providing for the care and protection of children, including their removal into various forms of temporary and permanent placements. These placement options may include residing with relatives (i.e. kinship care), foster care, or residing with other children in residential units staffed by paid workers (i.e. residential care). There are more than 46,500 children in OOHC in Australia and these numbers have risen every year for the past ten years (Australian Institute of Health and Welfare [AIHW], 2017). In NSW, there are currently just under 18,000 children in OOHC, over a third of whom are Indigenous (AIHW, 2017). The majority of children in OOHC reside in home-based placements such as foster care (39%) or live with relatives (49%), with around 5% residing in residential care (AIHW, 2017). The day-to-day care of these children has historically been provided by both the relevant government department (currently known as Family and Community Services, or FACS) and by non-government agencies. As a result of reforms recommended by the Wood Special Commission into Child Protection Services in NSW (Wood, 2008), the government expanded the contracting out of OOHC service provision resulting in secular, large-scale, for-profit private organisations entering a market that was previously dominated by more traditional, often religious-based, not-for-profit agencies (McFarlane, 2017).

The blurred boundaries between young people’s involvement in state care and the criminal justice system has a long history. Whilst the majority of young people do not
come to the attention of criminal justice authorities, those with experience of placement within state care are over-represented in the juvenile and adult prison population (McFarlane, 2010; Stanley, 2017). Historically, there has been little demarcation between the care and protection of young people and their characterisation as offenders. During the 19th century, it was common for young people to be imprisoned for poverty and neglect (Cunneen et al., 2015). The practice of ‘charging’ young people with neglect ended in 1969 although reportedly the practice continued for much longer (Cunneen et al., 2015). Even though the care and protection, and criminal jurisdictions of the Children’s Court in NSW are distinct, in reality the overlaps are pervasive (McFarlane, 2017; Seymour, 1988).

Australian studies indicate placement in OOHC is associated with increased risk of involvement in the criminal justice system (McFarlane, 2010; 2017; Malvaso & Delfabbro, 2015; Raman et al., 2005; Ringland et al., 2015), and similar results have been observed in the United States (Ryan & Testa, 2005). This disproportionate representation continues once children enter the juvenile detention system: across Australia, just over 30% of all children in detention in 2014–2015 had also been in the child protection system in the same year (AIHW, 2016a). More recent data show children in OOHC between 2014 and 2016 were 19 times more likely to be under juvenile justice supervision compared to youth from the general population (AIHW, 2017). In a study of 392 juvenile offenders under community supervision in NSW, 14.5% (\(N=57\)) were found to have a history of placement in OOHC (Weatherburn, Cush, & Saunders, 2007). Kenny, Nelson, Schreiner, Lennings, and Butler (2007) found that approximately a quarter of young people under both community and custodial supervision in NSW had previously been placed in care. In a more recent study of 17,638 young people coming into contact with the criminal justice system in NSW, Ringland et al. (2015) found that approximately 10% of their sample (9.1% of males and 12.5% of females) had previous OOHC placements. Similar findings have been observed in international jurisdictions. Carnie and Broderick (2015), in a survey of Scottish prisoners, found 26% of their prisoner respondents had been in OOHC, and 16% had been in care at the age of 16 (Carnie & Broderick, 2015). In a Swedish study of 700 young people with experience of OOHC, nearly 45% of the females and 75% of the males who were placed in care for behavioural reasons had committed a crime by the age of 24, compared to 3.2% and 15.7% of the general population respectively (Vinnerljung & Sallnäs, 2008). Although estimates of the degree of over-representation vary according to methodology and sample, it is clear a closer examination of the intersections of care and criminalisation is both timely and vital.

British colonisation of Australia brought frontier violence and policies – segregation, protection and assimilation – that criminalised Indigenous Australians (Cunneen, 2001). The contemporary legacy of these policies is measured in staggering disparities in health, education, employment and imprisonment outcomes for Indigenous Australians, compared to the non-Indigenous population. Indigenous Australians comprise 27% of the prison population, from a population base of 2–3% (Anthony, 2013; Australian Bureau of Statistics, 2016). The proportion of over-representation is higher for Indigenous women and children. A lack of disaggregated data prevents a complete understanding of how Indigeneity and care overlap. Yet we know that nearly half of all children in juvenile detention in Australia are Indigenous (AIHW, 2016b). Indigenous young
people are seven times more likely to be subject to child protection intervention, and are proportionally more likely to experience OOHC than non-Indigenous children (AIHW, 2017). There remains an absence of focused research on the impact of criminalisation processes on Indigenous young people in OOHC and particularly residential care.

A more developed understanding of the drift from care to the criminal justice system is evident in research from the UK. The Prison Reform Trust commissioned an independent review chaired by Lord Laming (2016) to examine the reasons for the over-representation of children with a history of care in the criminal justice system and how to address the phenomenon. As part of this report, an overview of the European, North American, and to some extent Australian literature, was produced by Staines (2015). Staines notes that the available literature tends to explain the link between care experience and offending using two approaches: the ‘risk factor’ approach, which focuses in the individual pathologies of the child in care; and, the ‘adverse influences’ of the care environment approach (Staines, 2015, p. 6). Further nuance is provided by Stanley (2017), who in a review of the extant literature, identified five explanations for the over-representation young people in OOHC in the criminal justice system: first, the history of abuse and neglect experienced by many of these young people; second, unstable care placements, which in turn disrupt education, social relationships, and health; third, the criminalisation of children’s behaviour while in care; fourth, the limited support given to adult care leavers; and fifth, the differential treatment of these children by the criminal justice system in terms of bail and sentencing.

Residential care

Our research focused on a specific type of OOHC that caters for a small but significant proportion of children in OOHC in Australia. Residential care is commonly thought to cater for ‘high-risk kids’ who have multiple and complex needs (Ainsworth & Hansen, 2008, p. 41). Australian research has found that, while most children in care do not offend, those in residential care are more likely than those in foster or kinship care to come into contact with the juvenile justice system (Cashmore, 2011). Previous research has shown reoffending rates were higher for children, particularly females, who had spent time in residential care (Ringland et al., 2015), and research on the intersection of gender and care has revealed that the latter was more likely to produce offending among females than males (Malvaso & Delfabbro, 2015). Residential care in Victoria was criticised by a recent report of the Commission for Children and Young People (CCYP) which found that rather than prevent sexual abuse, the residential care system created opportunities for the sexual abuse of children (CCYP, 2015).

Internationally, residential care has been recognised as potentially criminogenic (Hayden, 2010). Children in group homes are at least twice more likely to offend than those in foster care (Ryan, Marshall, Herz, & Hernandez, 2008). Shaw (2016) examined the views of frontline OOHC residential caseworkers and police to capture why children in residential care enter the criminal justice system. Shaw reported that these professionals perceived children’s offending behaviour was linked to a disruptive family background and that the residential care environment is not conducive to positive interaction and contributes to offending and the unnecessary criminalisation of children. In New Zealand, Stanley (2017) explored the trajectory from care to
criminalisation using a comprehensive review of 105 case files and interviews with participants. She concluded that children in state care are more likely to progress into custody as a result of maltreatment, multiple care placements, damaging institutional cultures, social disadvantage, psychological harms and differential treatment in the criminal justice system. Importantly, their involvement in the criminal justice system is closely associated with exposure to processes of both criminalisation and victimisation (Stanley, 2017).

Our research sought to extend the analysis of both Shaw and Stanley to better understand the mechanisms of criminalization in the Australian context. Our research captures the views of non-child welfare professionals, as well as residential care providers, on the involvement of young people in residential care in the criminal justice system. A novel contribution of our research is the inclusion of police, youth workers from Juvenile Justice, practitioners from the care jurisdiction of the NSW Children’s Court and lawyers engaged in representing children on criminal matters before the courts, and Department of Family and Community services staff, as the agency with parental responsibility for children in OOHC. In this research, we use the lens provided by the residential care experience to evaluate involvement in the criminal justice system, and explore, in the perceptions of our participants, whether this is a result of pre-existing risk factors or the criminogenic effect of living in group homes.

Method

We approached our research using grounded theory (Charmaz, 2003) – an iterative method that uses data gained from qualitative interviews with residential care and criminal justice professionals. This study represents a departure from much of the extant research in this area in Australia, which has focused on court files and administrative datasets (McFarlane, 2017, 2010; Malvaso & Delfabbro, 2015; Stewart, Waterson, & Dennison, 2002). Key frontline staff from agencies were interviewed, including non-government providers of residential care services (n = 14), NSW Police Force representatives (n = 11), Juvenile Justice officers (Department of Justice employees supervising children on community-based sanctions, n = 7), Department of Family and Community Services employees (n = 5), defence lawyers, community legal centre lawyers and those working in the care jurisdiction of the NSW Children’s Court (n = 9). A total of 46 frontline professional staff were interviewed. All had worked in their field for more than two years, with many having worked across stakeholder groups. The residential care service provider group comprised both junior caseworkers and senior experienced managers. The police representatives included relatively junior officers, as well as detectives/inspectors with in excess of 20 years’ experience. One-quarter of those interviewed were from regional NSW, with the remainder from outer metropolitan Sydney. Four respondents interviewed identified as Indigenous.

The interviews were semi-structured and focused around interactions with other agencies as well as children in residential care. All participants were asked about the characteristics of children in residential care and their perceptions of the reasons for the involvement of children in residential care in the criminal justice system. We then asked a series of questions tailored to the specific stakeholder group. Those providing
residential care services were asked about the frequency of children’s contact with police and the catalyst for such interactions (that is, what threshold of behaviour would trigger police involvement). We also asked about their role in court proceedings including bail and sentencing, and the level of training and professionalisation of residential care staff. NSW Police respondents were asked about their decision-making around charging, bail and their frequency of contact with residential care service providers. We also asked about the visibility of children in residential care and what police understood to be the most common offences committed. The defence lawyer stakeholder group were asked about the characteristics of children they represented, the types of offences and scenarios that commonly arose, and the nature of their contact with police and residential care agencies. We also asked about their perceptions of decision-making by judicial officers on sentencing and bail. Juvenile Justice officers were asked about their contact with residential care service providers, sentencing, bail and the types of offences committed by children in residential care.

Data were analysed using thematic qualitative analysis (Braun & Clarke, 2006). All members of the research team read the transcripts and collectively determined the key themes of over-representation, criminalisation, interagency relationships, resources/funding, behaviour management and the residential care environment. Tree codes were developed underneath each of these categories and all codes were entered using Nvivo software. Overall, respondents engaged with the research and highlighted the need for further attention to this area and the difficulties presented by the over-representation of children in the criminal justice system. Although the sample was broad, it is not suggested that it is representative of the views of all professionals working in this area. Our findings do suggest, however, that there is general agreement about the key issues facing the sector that heavily influence the involvement of children in residential care in the criminal justice system.

Findings

Perceptions of criminal justice professionals of the involvement of young people in residential care in the criminal justice system

Our participants perceived the residential care environment to be criminogenic and provided a number of examples of young people who were charged with criminal offences for behavioural problems that might have been managed less punitively in other environments. Related to this was the use of police as a behavioural management tool. Almost universally, our police respondents reported frequent, and in their perceptions, unnecessary contact with the young people residing in group homes. Our findings also highlighted the lack of clear institutional behavioural management policies, which combined with deficient staff training and remuneration, were perceived to lead to unnecessary criminalisation.

The reports of our respondent criminal justice professionals provided a rich textual account of the residential care environment and its ramifications for the young people residing in the group homes. Our research confirmed international findings that the residential care environment should be properly characterised as a high-risk
environment for young people (Hayden, 2010). Our participants consistently reported relatively minor behavioural problems escalating into calls to police. For instance:

...the carers had gone to get the young girl out of bed for school and she’d sworn at them – she’s a teenager and she said, ‘F off, I’m not getting out of bed,’ or something, and then they said, ‘Get out of bed, we’re going to pour water on you.’ And ... they poured water on her. And then ... she got up and, but, was stomping around swearing and, oh, the other thing – and they had also gone to the kitchen and got saucepans and started banging them together to get her out of bed ... and they started taking the posters off the bedroom wall and then she ended up punching them or something and then they called the police. And so you think this is all before 9am, she’s already in custody and going off to a police station and then a court and over something really quite minor first thing in the morning. (Lawyer Respondent C)

A common characterisation of the group home environment was one which led to the escalation of tensions within the house, and the consequent involvement of police. One Juvenile Justice caseworker commented:

[We see] lots of children being brought to court repeatedly for offences within the placement, that the staff ... required to care for these children either didn’t have the skills or the capacity or the ability to manage the challenging behaviours that at times they presented with... (Juvenile Justice Officer A)

These observations are consistent with those of earlier Australian studies on OOHC. In the mid-1990s, the Australian Law Reform Commission reported that child welfare workers routinely use the criminal ‘justice system as a treatment, punishment and holding mechanism for children they find difficult to manage’ (ALRC/HREOC, 1997, p. 242) – a perception reinforced by more recent research analysing Children’s Court files (McFarlane, 2017, 2010). Previous UK research has suggested that the residential care population are more likely to face different consequences from those who commit the same behaviour in their family home (Gentleman, 2009; Moore, Gray, Roberts, Taylor, & Merrington, 2006). Children in residential care face a greater likelihood of police involvement for minor matters or behavioural problems, and, in turn, are more likely to be arrested for such behaviour. Recent NSW research found they are less likely to be granted bail by police and are more likely to be remanded in custody – often because they have insecure accommodation or lack a support network – when they come before the courts (McFarlane, 2017). Given previous research suggesting a strong correlation between bail status at sentencing and the subsequent imposition of control orders (McGrath, 2016; Richards & Renshaw, 2013), it is clear this structural inequality has significant ramifications for the exposure of children in residential care to the criminal justice system.

Our research highlighted differences in how residential care service providers and NSW Police Force officers view the behaviour of young people in residential care. Police respondents were frustrated and in many cases angry about what they saw as the overuse of police resources and the inadequacy of residential care staff in managing disputes ‘in-house’. The arrival of a residential care home in a particular Local Area Command
was reported to be accompanied by a sharp increase in police call-outs. One frontline officer we spoke to attended residential facilities ‘oh, seven days a week, at times’ (Police Officer D). Another officer believed that the frequency was ‘every second shift’ (Police Officer E). The frequent call-outs were viewed by police as contributing to the criminalisation of children in residential care. The following extract captures this frustration and the reliance on police by residential care staff:

But we are used quite often to sort out squabbles between residents, when really, there’s a carer there that should have the presence, who should have the training, who should have the support of management to go, righto, this is what I’m going to do – you go to your room . . . we get very frustrated . . . but it’s continual – continual. (Police Officer D)

Police respondents in our study felt it was their responsibility to charge the young person when called to residential care homes, and that they were being continually asked to respond to what were essentially non-policing issues. This was raised particularly in respect of children who are reported by residential care staff as ‘missing children’, when these children usually return to their residential facility within a few hours (Colvin, McFarlane, Gerard, & McGrath, 2018).

By contrast, residential care service providers described a carefully planned process of intervention and support in cases of misbehaviour and going missing from care. One residential care worker reported ‘a young person might be, say, be verbally abusive and aggressive to anybody of authority . . . we had clinical psychologists that would come in and develop a plan of how we can deal with that young person’. Another worker commented

when you have three of four kids that are really angry, and really disconnected, then the work that we’re always trying to do is to increase their relationships, increase their social behaviours, increase the way they experience the world, and it takes time.

These accounts stand in contrast to police perceptions of the more reactive behavioural management procedures they encounter daily in residential care.

This police frustration is also problematic in light of McAra and McVie’s (2010) research that shows that the more that young people are identified as the ‘usual suspects’ within the youth justice system, ‘the more likely it was that their pattern of desistance from involvement in serious offending was inhibited’ (p. 198). Increased recognition of a young person as deviant greatly enhances their continued involvement in the criminal justice system, in many cases simply because they become a more visible target for law enforcement. One police respondent gave a vivid example of this by contrasting what would happen if he were stopped by police compared to a young female with over 100 incidents on her police file:

I say, mate, I’m just walking along the road here, he says, what have you got that stick for, I said for the dogs that aren’t on a chain or magpies, they’re in nesting season. And if he wants to check me up he’d have a look at that and he’d probably say it nicely. If (the young woman) was walking along the same road with a big stick and he pulled her up and her
profile came up – give me that stick, and why aren’t I charging you with carrying an implement?

Criminological research and theory has argued that association with peers or deviant peer groups is an identified factor in criminalisation (Melkman, 2015; Pratt et al., 2010). Peer-to-peer violence in residential care has also been identified as a key concern for children in residential care (Barter, 2003). For example, children in Shaw’s (2014) study of offenders in residential care expressly stated that being in an environment with other offenders was instrumental in their own offending. Evident in the perceptions of front-line workers in our research was an emphasis on the role played not by other children, but by care providers, and institutional policies, which contributed to the criminalisation of high-risk, vulnerable children.

**Residential care staff**

The role that residential homes and staff play in shaping the involvement of children in the criminal justice system was evidenced by the perceptions of all stakeholders in our research. With appropriate training and support, staff are able to de-escalate problems when they occur; however, this would require the implementation of considerably more thorough-going institutional policies and protocols than are currently in place. In the absence of such policies and support, minor problems are often responded to with police intervention. Residential care staff were reported to be both poorly remunerated and trained and also provided with limited support from service provider organisations. This is a problem identified within the sector according to one service provider we interviewed:

> I guess, for us, it’s always about education and training for our staff, and getting them not to use police as the first port of call when there’s a problem. And developing our team skills, so that maybe they can de-escalate things prior to police being called, and only using police as a very last resort, when it comes to real safety issues. (Residential care Service Provider 2)

Lack of funding was a common complaint among agency staff and management and was linked by respondents to low standards within residential care. As one respondent reported,

> ...care workers ... are going in to work with five children who are going to constantly all day abuse them, spit at them, throw food at them, threaten to beat them up, you get no reward for trying to help them, and then you’re paying them $21 an hour. (Residential Care Service Provider 1)

Respondents in our research perceived that there had been an acceleration in criminalisation tied to inadequate funding of OOHC, in particular residential care, and this was thought to have worsened since the funding model was altered following the implementation of the Wood Special Commission recommendations (Wood, 2008). Participants reported these changes led to residential care facilities’ quotas rising from of two to three to five residents per facility (Residential Care Service Provider 12).
The importance of training for staff in OOHC has been a familiar theme in Australian government reports and research for many years (McFarlane, 2017). Research suggests that positive interactions between staff and children in OOHC contribute to the stability of placements which, alongside education, has been recognised as crucial for keeping children in residential care out of the criminal justice system (Hayden, 2010; Shaw, 2014). Good practice in residential care creates positive cultures and fosters clear roles, aims and objectives (Kendrick, 2012; Shaw, 2014). Children in OOHC have less contact with police and courts where guidelines on managing behaviour co-exist with effective staff training (Beecham & Sinclair, 2006; Darker, Ward, & Caulfield, 2008).

Many of our residential care participants recognised children have considerable therapeutic needs. A trauma-informed approach recognises that children with histories of trauma struggle to recognise emotions (Schofield, Biggart, Ward, & Larsson, 2015). By contrast, our findings, and international research, show common behavioural management practices in residential care attempt to use police to teach consequences and punish disruptive behaviour (Smith, 2009). This approach was encapsulated by one lawyer we interviewed: ‘The house manager has gone on record saying, “We wanted to teach... consequences. Like, she needs to know consequences”, and the young person has a cognitive impairment’. This is not teaching her a lesson. She had no prior criminal history up until residing in this particular house’ (Lawyer A).

Perceptions of the intersection of Indigeneity, residential care and the criminal justice system

Interviews with criminal justice professionals revealed a mixed understanding of the relationship between Indigeneity, residential care and the criminal justice system. Department of Juvenile Justice staff were aware of the high rates of removal of Aboriginal and Torres Strait Islander young people into care and the high rates of over-representation of Aboriginal and Torres Strait Islanders in the criminal justice system. They were also acutely aware of some of the practices of Aboriginal young people that might make them more susceptible to criminalisation. For example, one of our respondents spoke about the mobility of young people in residential care in terms of self-placement:

... before taking him down to his out-of-home care placement in Wollongong, and he refuses to get back in the car in Mt Druitt, just stays. He is self-placing, putting him in breach of his bail... he has a history of absconding lasting maybe a day, two days, three days, and he places back with family in areas where he is comfortable, he knows the area or the people, et cetera. ... some of them really do move around, particularly some of our Indigenous kids who want to be – I mean, this 17-year-old had a baby, and he wanted to live with his girlfriend and baby. (Juvenile Justice Respondent 5)

This excerpt shows the way in which resistance to residential care placement and expressions of agency in choosing a safer alternative, results in criminalisation. Departmental staff ultimately supported the change to this young person’s accommodation arrangements arriving at a common agreement to take the matter back to court to get the bail conditions amended was difficult. It also shows the difficulties in negotiating better
arrangements for young people and the pervasive inflexibility inherent in conditions that are meant to keep young people away from the criminal justice system (Richards & Renshaw, 2013). This scenario is not limited to the experience of Indigenous young people in care, but in the view of this respondent, more Indigenous young people were affected as they were more likely to have heightened mobility.

Amongst the nine lawyer respondents we interviewed, the most common perceptions expressed were the challenges of building a relationship of trust with Indigenous clients, so they could effectively represent the young person in Court, and the multiple and complex social and legal issues experienced by Indigenous children. Often these barriers and complex legal needs would exacerbate criminalisation:

My own experience with Indigenous kids is that it’s harder to get instructions, harder to get details, which means you have less to put on a bail application. Yeah, I think it’s probably – I would say it is harder for Indigenous kids to get bail, often just because you have less detail and their situations seem to be just more hopeless. (Lawyer Respondent 3)

The nature of a weekend bail court means the lawyer on duty will be asked to represent their client without having met them previously. Working effectively with Aboriginal Torres Strait Islander people requires building a relationship (Productivity Commission, 2016). Criminal justice processes demand an expedited relationship that hinders the ability of legal representatives to obtain instructions important to a bail determination. These barriers are compounded by the centralisation of weekend bail courts, where young people in a rural or remote location will be represented by metropolitan-based lawyers, with instructions are taken over a video conference.

There was also a sensitivity amongst lawyer respondents to the placement experience of Aboriginal and Torres Strait Islander young people as a result of the disconnection from family. Respondents perceived the similarity to trauma experienced as a result of exposure to policies and practices that contributed to the Stolen Generations – government policies that resulted in the forced removal of Indigenous children from family practiced up until the end of last century.

If you are thinking about Aboriginal kids specifically, I think that the disadvantage that they’ve experienced is probably quite unique compared to other kids - the disconnection from their family...we just had - we’ve got a 13 year old young person who is going through Koori (a specialised Indigenous Court) court at the moment who has a 50 page record and every single one of the offences is from the care home and he has spent a significant period of time in custody and it’s only now that his offending has drastically decreased...the most recent offence was because he went to visit his mum. The carers hadn’t arranged the visit properly and it didn’t go ahead and he was really, really frustrated and basically took it out on the carer - kind of punched him on the arm and made some comments. And I think that is more likely to happen to Aboriginal kids.

Citing the importance of relationships, this lawyer respondent also felt that Indigenous young people would be more likely to be affected than non-Indigenous young people by shifts in placement and turnover of carers:
You definitely see more success when there’s been continuity, but there’s a lot of placements where the workers just change and especially for Aboriginal children – that’s extremely detrimental because it’s all about relationship building with Aboriginal kids and for most kids I guess, but specifically for Aboriginal children. (Lawyer Respondent 6)

Developing a relationship, stability in placements, flexibility and interagency cooperation can make an intrinsic difference to the outcomes for Aboriginal and Torres Strait Islander young people in care and prevent them from coming before the criminal justice system. A distinction was made between the availability of services and willingness to utilise them, with service providers perceived as being more likely to end contact with a young person instead of actively trying to cultivate a relationship and provide services to address identified problems. One example related to a young person going through Koori Court:

He was in a foster placement (but) the placement broke down and he went into a residential placement. The Aboriginal case worker who he had worked with for a number of years was, all of a sudden, not allowed to work with him anymore, and he got put into a new placement – had a new case worker and predictably that placement was not successful, and he started offending. He went into custody and just when he started building up a relationship with that placement and things started to go a little bit well, he turned 18. They gave him three days (and) he effectively, became homeless.

The respondent went on to describe how an energetic response from a juvenile justice worker resulted in the young person finding a home, and graduating from the Koori Court. In this respondent’s view, working flexibly with Aboriginal and Torres Strait Islander young people and utilising community supports, was the optimal practice, as was having Aboriginal workers engaged with young people in care.

Despite the Aboriginal Child Placement Principles and the emphasis within the OOHC Contracted Care Program Guidelines on the delivery of OOHC services that maintain cultural identity and connections with family and community for Indigenous young people, we found that few residential care service provider respondents were familiar with this aim. Out of the 14 residential care respondents interviewed, two recognised the lack of Aboriginal workers in the residential care as problematic. One of our residential care provider respondents reported:

Yeah, I don’t have as many Indigenous workers as I would like. In 2011 I put together an Indigenous strategy... but because we were a high cost placements before 2012 I had the infrastructure and the money to be able to pay them, to train them up, but I lost all of that when the funding changed.

In this respondent’s view, the decline in funding in 2012 coinciding with the new contractual arrangements and the shift to privatising OOHC services removed the opportunity in introduce programs incorporating Indigenous perspectives and cultural supports in residential care.

There were diverse views amongst the residential care staff we interviewed regarding the intersection of Indigeneity, care, and the criminal justice system. Four of the
fourteen respondents perceived there were no or minimal differences in the experience of Indigenous young people in care compared to non-Indigenous young people. The minor differences acknowledged were around the different legal services available to Indigenous and non-Indigenous youth. Three respondents perceived that Indigenous young people had particular needs in the residential care environment that resulted from their Indigenous status. One respondent spoke about Indigenous young people requiring ‘open spaces’ and the need to ‘go walkabout’ more than the non-Indigenous young people in care. This respondent described Indigenous young people having a genetic predisposition to alcohol and a communication style that was passive. This respondent attributed this to family background:

I think it’s the way they were bought up, they are more likely to be quiet; not express their feelings, not express themselves, because the father or the grandfather or whoever is the head of the family and everybody else – you talk, you get a belt in the ear, sort of thing. So again, where the European kids were quite out there, in their yelling and behaviours, and making noise. The Aboriginal kids would quite often withdraw, and just accept whatever as, well that’s fair; their lot in life, sort of thing. (Residential Care Service Provider 10)

Stereotypes around violence within Indigenous families, erroneous biological concepts of ‘race’ and managing conflict are combined in this quote with some awareness of cultural aspects, such as connection to land. Although it is important to note these are the words of only one respondent, the quote does raise questions about the level of cultural competence and safety within these residential care environments.

Two further respondents called for more Aboriginal workers to promote connections to culture and land through Elders. However, we concluded there was a lack of awareness of the potential problems faced by Indigenous young people and the cultural imperatives that arise from exposing Indigenous young people to removal.

**Conclusion**

Criminal offending by adolescents is a result of a complex interaction of societal, familial and biological factors and this is particularly the case in relation to children with experience of out of home care, where a history of trauma and abuse compound these risk factors (Cauffman, Steinberg, & Piquero, 2005; Cottle, Lee, & Heilbrun, 2001; Moffitt, 1993). Our aim in the current study was to identify mechanisms that lead to the criminalisation of young people in residential care that occur over and above these pre-existing risk factors. We asked if there were factors specific to the residential care environment that increase the likelihood these young people come to the attention of police and courts. Our findings indicate that notwithstanding the traumatic backgrounds these young people suffer from, residence in OOHC, and specifically residential care, leads to significant, and in the perceptions of many of our respondents, unnecessary involvement in the criminal justice system. In the aftermath of the Wood reforms to OOHC, residential care has remained a persistent site of criminalisation. We have identified three areas of tension in the current operating environment that accelerate, rather than reverse, this trend.
First, the lack of interagency cooperation between key players within the sector heightens exposure to the criminal justice system. Our research revealed significant antagonism between stakeholders. The police respondents we interviewed were frustrated with residential care service providers and fatigued by what they saw as continued reliance on their resources, often for what they felt were trivial problems which did not warrant a police response. There is no doubt that staff and other residents sometimes face genuine threats to their safety, and under these circumstances, it is appropriate to call police. However, it is also clear transparent and effective guidelines governing behavioural management within group homes, including clear criteria to enable care workers to determine when calling police is justified is required. We note at the time the interviews were conducted a joint protocol was being implemented by the NSW Ombudsman to address identified problems with agency responses to children in residential care, based on trauma-informed behavioural management strategies. The protocol is currently under evaluation and at present the results of this evaluation are not available.

Second, the perceptions of criminal justice professionals on the relationship between Indigeneity, residential care and involvement in the criminal justice system show a low level of cultural competence amongst mainstream services and reinforces the need for additional training and specialist services for Indigenous children in care. Amongst most respondents there was limited awareness of the particular needs of Indigenous children, although many understood certain characteristics of Indigenous children heighten exposure to criminalisation. Certainly, more Indigenous staff working with children in OOHC was identified as having the potential to maintain links to culture and community for the young people in care. However, it is clear that further research into the involvement of Indigenous children in OOHC in the criminal justice system is required.

Third, this research confirms a widely held perception about the lack of professionalisation amongst staff in residential care, an observation widely recognised within the sector. Staff were perceived as lacking the skills and abilities to deescalate conflict within the residential care environment. Although some Australian states have introduced minimum qualifications for workers in this area, in Victoria, it was reported around one-third of residential care staff had no qualifications at all (Queensland Government, 2017; Victorian Centre for Excellence in Child and Family Welfare, 2012; Victorian Department of Health and Human Services, 2017). del Valle and Bravo (2013), in their review of international trends in OOHC, argue the lack of trained staff to deal appropriately with children in care is persistently a problem in the United Kingdom, Canada, the United States and New Zealand. In continental Europe, recent research on residential care in the Italian context shows a much higher quality of care and the absence of the same problems that plague the NSW setting in terms of staff skill levels (Carrà, 2014).

This study is limited by its focus on the perceptions of professionals (both welfare and non-child welfare) and the lack of voices from children in residential care in the research and adult care-leavers. Even though the sample size for each stakeholder group was relatively small, overwhelmingly the perceptions cluster around the same themes giving weight to the generalisability of our findings. Contracting out of OOHC to non-government agencies has not achieved the consistent improvement in quality of care delivered to children. Far from being diverted from the criminal justice
system, the factor identified as most instrumental in keeping young people out of crime (McAra & McVie, 2010), specific policies and practices within the residential care system appears to accelerate involvement with law enforcement agencies. There is an urgent need for reform in this area to arrest and prevent the criminalisation of children in residential care in NSW.

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