# Out-of-Home Care

The purpose of this document is to collate published research, the findings of government reports and inquiries, and academic commentary in relation to out-of-home care, and the effects this may have on a person's behaviour; development; physical, mental and social well-being; and links to contact with the criminal justice system.

## Introduction

1 It is both nationally and internationally[1] recognised that children and young people entering out-of-home-care ('OOHC') are a vulnerable group in the population:

> Research indicates that those entering OOHC have poorer outcomes than the average child or young person. They have been identified as having increased developmental, behavioural, emotional and mental health issues and are less likely to access continuous education, treatment and medical care as a consequence of multiple placements, changes in caseworkers or alternating periods of placement at home and in OOHC.[2]

2 Child abuse and neglect are the dominant reported reasons for children entering care across Australian jurisdictions.[3] The literature recognises that child abuse and neglect commonly arise 'in environments affected by significant poverty, homelessness, mental illness, substance misuse and domestic violence'.[4]

3 Research shows a significant correlation between juvenile involvement in criminal activity, a history of abuse or neglect, and a history of being placed in care.[5] Care experience and juvenile detention have been described as 'key drivers of adult incarceration'.[6]

4 At 30 June 2020, approximately 46,000 children were in OOHC nationally, with 92% of these children in home-based care.[7] 67% had been continuously in OOHC for two years or more, and

[1] See, eg, Raven Sinclair, 'Identity Lost and Found: Lessons from the Sixties Scoop' (2007) 3 *First Peoples Child & Family Review* 65.

[2] Special Commission of Inquiry into Child Protection Services in NSW, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (November 2008) vol 2, 618 [16.127].

[3] See, eg, Department for Families and Communities (SA), *Certainty for Children in Care: A Study into the Placement History and Social Background of Infants Placed into South Australian Out-of-Home Care 2000–2005* (Research Report, July 2007) 26; Department of Children and Families (NT) *Annual Report 2015–16* (30 September 2016) 22.

[4] Department for Families and Communities (SA) (n 3) 26. See also Australian Law Reform Commission, *Family Violence – A National Legal Response* (Report No 114, 2010) 973.

[5] Australian Law Reform Commission, *Family Violence – A National Legal Response* (Report No 114, 2010) 973. See also New South Wales, Special Commission of Inquiry into Child Protection Services in NSW (n 2) 556 [15.1]; Australian Institute of Health and Welfare, *Young People in Child Protection and Under Youth Justice Supervision 2014–15* (Data Linkage Series No 23, 2016) 11; Katherine McFarlane, 'Care-Criminalisation: The Involvement of Children in Out of Home Care in the NSW Criminal Justice System' (PhD Thesis, University of New South Wales, 2015) 75–86; Senate Community Affairs References Committee, Parliament of Australia, *Forgotten Australians: A Report on Australians Who Experienced Institutional or Out-of-Home Care as Children* (Report, August 2004) 164 ('*Forgotten Australians*'); Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, 2018) 485 [15.1] ('*Pathways to Justice*'); Independent Review of Aboriginal Out-of-Home Care in NSW, *Family Is Culture* (Final Report, October 2019) 230, 235 ('*Family is Culture*').

[6] Australian Law Reform Commission, *Pathways to Justice* 485 [15.1]. Discussed further below at '5. Links to Contact with the Criminal Justice System'.

[7] Australian Institute of Health and Welfare, *Child Protection Australia 2019–20* (Child Welfare Series No 77, May 2021) v.

42% of these children were Indigenous.[8] The rates of children in OOHC for remote and very remote areas were more than twice that of those in major cities.[9]

5 One in 18 Indigenous children (around 18,900) were in OOHC.[10] Indigenous children in major cities were 15 times as likely as non-Indigenous children to be in OOHC, and Indigenous children living in remote and very remote areas were 11 times as likely as non-Indigenous children to be in OOHC.[11]

6 In the *Social Justice and Native Title Report 2015*, the Aboriginal and Torres Strait Islander Social Justice Commissioner stated that 'the overrepresentation of Aboriginal and Torres Strait Islander children and young people in the child protection system is one of the most pressing human rights challenges facing Australia today.'[12]

## Terminology

7 In 2019, a nationally consistent definition for out-of-home care was implemented in all jurisdictions:[13]

> Out-of-home care is overnight care for children aged under 18 who are unable to live with their families due to child safety concerns. This includes placements approved by the department responsible for child protection for which there is ongoing case management and financial payment (including where a financial payment has been offered but has been declined by the carer).
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> Out-of-home care includes legal (court-ordered) and voluntary placements, as well as placements made for the purpose of providing respite for parents and/or carers.
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> Out-of-home care excludes:
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> - placements for children on third-party parental responsibility orders (such as guardianship, in New South Wales, and adoption)
> - placements for children on immigration orders
> - supported placements for children aged 18 or over
> - pre-adoptive placements and placements for children whose adoptive parents receive ongoing funding due to the support needs of the child
> - placements to which a child enters and exits on the same day
> - placements solely funded by disability services, psychiatric services, specialist homelessness services, juvenile justice facilities, or overnight child care services
> - cases in which a child self-places without approval by the department.[14]

8 This chapter uses 'child' and 'children' to refer to all children and young people aged 0–17 years.

[8] Australian Institute of Health and Welfare, *Child Protection Australia 2019–20* (Child Welfare Series No 77, May 2021) 57.

[9] Ibid 53.

[10] Ibid 54.

[11] Ibid 47.

[12] Australia Human Rights Commission, *Social Justice and Native Title Report 2015* (October 2015) 138.

[13] Australian Institute of Health and Welfare, *Child Protection Australia 2018–19* (n 7) 45.

[14] Ibid.

## Impacts

9 The 2015 Senate *Inquiry into Out of Home Care* found that children in OOHC 'experience significantly poorer outcomes than their peers'.[15] The Inquiry assessed the outcomes for children in OOHC 'against the key themes of the National Standards across the three main types of care (kinship care, foster care and residential care)', including safety and stability, participation in decision making, access to health and education, connection to family and community and transition from care.[16] It was found that '[o]verwhelmingly … outcomes for children and young people in out-of-home care across these indicators remain poor'.[17]

10 The final report of an earlier parliamentary inquiry, *Forgotten Australians*, had observed:

> Submissions refer frequently to a range of legacies including low self-esteem, lack of confidence, depression, fear and distrust, anger, shame, guilt, obsessiveness, social anxieties, phobias, recurring nightmares, tension, migraines and speech difficulties. Many who suffered in institutions could not cope with life in the 'real' world and have had life-long alcohol and drug problems or ended in the mental health or prison systems. Many have difficulties forming and maintaining trust in relationships, or have remained loners and never married. Some care leavers with emotional problems have contemplated or taken the ultimate step of suicide. Others have survived.[18]

11 The vulnerability of those entering OOHC is frequently compounded by past experiences of 'complex trauma', defined by the NSW Ombudsman as 'exposure to multiple and ongoing interpersonal trauma such as abuse, neglect or emotional or physical deprivation'.[19]

12 A 2008 study by the University of Sydney, the NSW Department of Juvenile Justice and Justice Health found that young offenders who had been placed in OOHC, in comparison to their non-care counterparts, were significantly more likely to:

- have received special education (49% vs 36%);
- have relative(s) who had been in prison (69% vs 60%);
- have experienced a physical injury requiring medical treatment (37% vs 28%);
- report having no close friends (11% vs 6%);
- be living in unsettled accommodation (23% vs 8%);
- report having treatment for substance abuse (25% vs 17%);
- have experienced unwanted sex (14% vs 6%);
- be unemployed (19% vs 27%); and
- be receiving some form of government benefit (62% vs 42%).[20]

[15] Senate Community Affairs References Committee, Parliament of Australia, *Final Report of the Inquiry into Out of Home Care* (2015) 275 [10.1].

[16] Ibid 79 [4.2].

[17] Ibid 79 [4.3].

[18] Senate Community Affairs References Committee, Parliament of Australia, *Forgotten Australians* (Final Report, August 2004) 145–6.

[19] NSW Ombudsman, 'Joint Protocol to Reduce the Contact of Young People in Residential Out-of-Home-Care with the Criminal Justice System' (2016) 5 [2.1].

[20] Dianna Kenny and Paul Nelson, *Young Offenders on Community Orders: Health, Welfare and Criminogenic Needs* (Sydney University Press, 2008) 2.13 [2.8].

***Increased risk of subsequent abuse***

13 The Royal Commission into Institutional Responses to Child Sexual Abuse in 2017 'identified persistent weaknesses and systemic failures that continue to place children at risk of sexual abuse' in OOHC settings, finding that 'sexual abuse by carers, their family members, visitors, caseworkers and other children in care continues to occur … and that sexual exploitation is a growing concern, especially for children in residential care'.[21]

14 The impacts of sexual abuse in OOHC were identified as follows:

> Children in out-of-home care may have been removed from their families of origin because of severe abuse and neglect. If these children are sexually abused while in out-of-home care, the compounding experience of abuse may result in complex trauma and cumulative harm. We heard that victims can experience feelings of betrayal and loss of trust when abused in this context. Sexual abuse can also lead to placement instability, as children may be removed from a placement as a result of disclosing abuse or because carers are unable to manage the ways in which children express complex trauma.
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> Experiences of sexual abuse, and a poor institutional response to that abuse, can compound other adverse experiences in childhood, setting some children on a pathway to drug and alcohol abuse, homelessness and criminal behaviour. We also heard that experiences of abuse and placement in care can have intergenerational effects. A number of survivors of sexual abuse in out-of-home care told us their parents had been sexually abused in care, or that their own children had been taken into care, or both.[22]

15 The Royal Commission also heard evidence which 'suggests that sexual abuse of children in contemporary out-of-home care seems quite frequently to be accompanied by physical violence and emotional abuse. Of the survivors from all institutional settings who described other forms of abuse and neglect in private sessions, 80.7 per cent said they experienced emotional abuse and 64.4 per cent told us they also experienced physical abuse.'[23]

***Psychological, emotional and behavioural impacts***

16 In 2004, the Senate Community Affairs Reference Committee found:

> Mental health issues, depression and post traumatic stress disorder are commonly experienced by care leavers. These issues can manifest themselves in a variety of behaviours and actions that affect their everyday life. The ultimate expression of this problem referred to in many submissions is post traumatic stress disorder. Many care leavers who have suffered PTSD have required psychiatric care.[24]

17 The Committee also found that a large number of children leaving care 'described holding suicidal thoughts or actually attempting suicide',[25] with suicide rates comparatively higher than for the general population.[26] Aboriginal people who had been removed from their families were more likely to attempt suicide while in prison.[27]

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[21] Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017), vol 12, 9.

[22] Ibid 14.

[23] Ibid 99.

[24] Senate Community Affairs References Committee, *Forgotten Australians* (n 18) 154.

[25] Ibid 155 [6.23].

[26] Ibid 16 [1.64]. See also New South Wales, Special Commission of Inquiry into Child Protection Services in NSW (n 2) 836 [20.50].

[27] Katherine McFarlane, 'Care-Criminalisation: The Involvement of Children in Out of Home Care in the NSW Criminal Justice System' (PhD Thesis, University of New South Wales, 2015) 127, 207.

18 The NSW Special Commission of Inquiry into Child Protection Services in 2008 found that the disruption of attachment ties frequently experienced by children in OOHC can have 'major short term and long term consequences such as cognitive problems, psychological and behavioural problems, and delays in development'.[28] The Inquiry conducted a literature review of the available research, including a 2006 study which found that children in OOHC suffered 'exceptionally poor mental health and social competence'.[29] Over half the boys and girls in the study were reported as having 'clinically significant mental health difficulties', presenting 'with complex disturbances, including multiple presentation of conduct problems and defiance, attachment disturbance, attention-deficit/hyperactivity and trauma related anxiety'.[30] These findings have been replicated in other studies.[31]

19 In 2016, the NSW Ombudsman found that 'challenging behaviours' in some individuals may include risk-taking; poor impulse control; resistance to boundaries (such as being absent from care without permission); stress intolerance; alcohol and other substance abuse; self-harming behaviours; social isolation; limited capacity to form relationships with peers and/or adults; sexually inappropriate, anti-social behaviour; and/or potentially criminal behaviour.[32]

### *Physical health*

20 Research shows that those 'entering OOHC have a high prevalence of acute and chronic health problems and developmental disabilities'.[33] Once in OOHC, studies indicate that in addition to mental, emotional and behavioural ill-health, children and young people 'have significantly poorer health outcomes in relation to visual defects, dental health, hearing impairments, speech development, completed immunisations'.[34]

21 The Senate Community Affairs References Committee found that care leavers experienced ongoing health issues following their exit from care, frequently related to 'drug and alcohol addictions, homelessness, unemployment, unsafe sex practices and other destructive behaviours'.[35] The Committee heard evidence that many care leavers 'carry the legacy of injuries suffered through the abuse they received as a child', including hearing loss and other 'physical health problems or disabilities as a result of being assaulted in the institutions or through lack of medical attention received in their childhood'.[36]

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[28] New South Wales, Special Commission of Inquiry into Child Protection Services in NSW (n 2) 613 [16.105].

[29] Michael Tarren-Sweeny.and Philip Hazell, 'Mental Health of Children in Foster and Kinship Care in NSW', *Journal of Paediatrics and Child Health* (2006) 89–97, cited in New South Wales, Special Commission of Inquiry into Child Protection Services in NSW (n 2) 619 [16.129].

[30] Ibid.

[31] Michael Sawyer et al, 'The Mental Health and Well-being of Children and Adolescents in Home Based Foster Care' (2007) 186(4) *Medical Journal of Australia* 181, cited in New South Wales, Special Commission of Inquiry into Child Protection Services in NSW (n 2) 618 [16.125]; NSW Ombudsman (n 15) 5 [2.1].

[32] NSW Ombudsman (n 15) 5 [2.1].

[33] New South Wales, Special Commission of Inquiry into Child Protection Services in NSW (n 2) 617 [16.119].

[34] Ibid [16.120].

[35] Senate Community Affairs References Committee, *Forgotten Australians* (n 18) 153 [6.20]–[6.21].

[36] Ibid. **For a summary of research relating to links between hearing loss and contact with the criminal justice system, see the *Bugmy* Bar Book chapter 'Hearing Impairment'.**

### *Social impacts and stigma*

22 Children in OOHC often experience 'the stigma of being unwanted by their parents and being seen as second rate citizens for being in a home':[37]

> Home children were segregated at school: they often wore ill-fitting, second hand clothes, and were seen as 'being different' to their peers. They went to school together, ate together and rarely if ever had friends who weren't in the home with them. The stigma of homes has often had an enduring impact on the life of a care leaver particularly leading to feelings of low self-esteem and self-worth.[38]

23 The potential long-term impacts of OOHC on a person's relationships stem from 'past experiences of fear, intimidation, humiliation and abuse endured by the care leaver as a child'.[39] Care leavers often encounter 'difficulty in initiating and maintaining stable, loving relationships' as a consequence of growing up without a nurturing and secure environment.[40]

### *Educational attainment*[*]

24 As noted by the NSW Department of Family and Community Services in 2015, the poor educational performance of children in OOHC has been of international concern for a number of decades.[41] Australian research has found the following to be more common for children in OOHC: spending significant time away from school, falling behind academically, behavioural issues, social issues, suspension, expulsion, bullying, early school leaving and leaving without qualifications.[42]

25 A 2012 report published by the NSW Department of Families and Communities found that the available data 'indicates that children in care are performing more poorly than their non-care peers and face a range of barriers in engaging with their school life'.[43] The study, undertaken by Michelle Townsend between 2005–2010, found that

> educational outcomes for children and young people in care in NSW were significantly poorer than those of students in the general population. This was evident in their literacy and numeracy results during their primary and early high school periods, and continued into the later years of high school, where young people in care were participating in non-matriculation courses and withdrawing in high numbers. When compared with all other student equity groups, students in care under-achieved relative to these other equity groups of children other than Aboriginal children whose performance closely matched that of children in care. Aboriginal students in care had the poorest outcomes; in most tests their results were significantly lower than all Aboriginal children. The findings highlighted the poor performance in numeracy as a serious issue for many students in care throughout their schooling. The findings also suggest that children who lag behind academically when they enter high school are unlikely to catch up.

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[37] Ibid 146 [6.6].

[38] Ibid [6.7].

[39] Ibid 145 [6.3].

[40] Ibid 148 [6.9].

[*] **For a summary of research relating to links between hearing loss and contact with the criminal justice system, see the *Bugmy* Bar Book chapter 'Interrupted School Attendance and Suspension'.**

[41] NSW Department of Family and Community Services, *Pathways of Care Longitudinal Study: Outcomes of Children and Young People in Out-of-Home Care in NSW: Wave 1 Baseline Statistical Report* (June 2015) 126.

[42] Ibid (citations omitted).

[43] Michelle Townsend, *Are We Making the Grade? The Education of Children and Young People in Out-of-Home Care* (Research Report, Department of Family and Community Services, 2012) 5.

> …
>
> A key conclusion from this research is that the educational underperformance of children in OOHC cannot be solely attributed to the individual child; a significant proportion of the reasons lie in the ways in which the home, school, and particularly the care and education systems prioritise and support children's education.[44]

26 The *Special Commission of Inquiry into Child Protection Services in NSW* reported on the link between children and young people in OOHC and poorer educational performance:

> Those in care are less likely than their peers to continue their education beyond the minimum school leaving age. They are likely to attend a large number of different schools and to experience substantial periods of absence from school. Educational disruption was frequently a direct result of children and young persons in care having to change school as a result of a placement change. They also appear to have a significant risk of being suspended or expelled because of behavioural problems or truancy.[45]

27 The 2017 *NSW Ombudsman Inquiry into Behaviour Management in Schools* report found:

> Research has identified over-representation of certain students in suspensions. In particular, higher rates of suspensions have been found in relation to educationally challenged students or those with cognitive/learning impairments, especially where there are behavioural issues associated with the impairment; and students with a child protection/out-of-home care history. Aboriginal students have also been identified as being overrepresented in suspensions.[46]

### *Limited employment, financial hardship and housing insecurity*[*]

28 The 2018 *Forgotten Australians* report found that care leavers often face limited employment opportunities due to a 'lack of education and the personality traits that have been carried through life'.[47] The Inquiry recognised that inability to secure and maintain regular employment or being confined to low-paid work may result in a lifetime of financial hardship.[48]

29 Housing difficulties faced by care leavers often relate to financial insecurity, with many 'forced to live in public housing, subsidised rental accommodation or living on the street'.[49] The final report of the Human Rights and Equal Opportunity Commission's *National Inquiry into Homeless Children* (1989) found that 'a period of time spent in a child welfare or juvenile justice institution, or otherwise detached by the welfare system from the natural family, seems to increase significantly a child's chances of becoming homeless'.[50]

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[44] Michelle Townsend, *Are We Making the Grade? The Education of Children and Young People in Out-of-Home Care* (Research Report, Department of Family and Community Services, 2012) 5, citing Michelle Townsend, 'Are We Making the Grade? The Education of Children and Young People in Out-Of-Home Care' (PhD Thesis, Southern Cross University, 2011) 5, 40.

[45] New South Wales, Special Commission of Inquiry into Child Protection Services in NSW (n 2) 620 [16.135].

[46] NSW Ombudsman, *NSW Ombudsman Inquiry into Behaviour Management in Schools* (Report, August 2017) 38.

[*] **See also the *Bugmy* Bar Book chapters 'Unemployment' and 'Homelessness'.**

[47] Senate Community Affairs References Committee, *Forgotten Australians* (n 18) 160 [6.37].

[48] Ibid 160 [6.39], 163 [6.46].

[49] Ibid 162 [6.43].

[50] Human Rights and Equal Opportunity Commission, *Our Homeless Children: Report of the National Inquiry into Homeless Children* (10 February 1989) 109 [10.4].

### *Drug and alcohol addiction*

30 As noted above, research has identified a close connection between experiences of OOHC and care leavers' vulnerability to drug and alcohol addictions, with many resorting to substance use as 'a common practice to obliterate the past and present pain and suffering'.[51] Addictions to alcohol and other drugs exacerbate the challenges faced by OOHC care leavers in maintaining relationships, self-esteem and avoiding homelessness.[52]

### *Intergenerational impacts*

31 The Senate Community Affairs Reference Committee acknowledged that the impacts of OOHC may have intergenerational effects:

> The difficulties with establishing and maintaining relationships, the inability for many to provide secure and stable family environments for raising children, feelings of shame and fear of rejection about their childhood history can become cyclical. Each new generation, lacking a sense of security and parental role models, is unable to provide these vitally necessary foundations for the next generation.[53]

32 The 2018 *Independent Review of Out of Home Care in New South Wales* ('the *Tune Review*') found that

> overall, the NSW system is ineffective and unsuitable. Despite numerous reports and significantly increased government expenditure, over a long period of time, the number of children and young people in OOHC has doubled over the past ten years, and continues to increase. Moreover, the system is failing to improve long term outcomes for children and to arrest the devastating cycles of intergenerational abuse and neglect. Outcomes are particularly poor for Aboriginal children, young people and families.
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> …
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> Recent actuarial analysis found that young people leaving OOHC (care leavers) are more likely to have contact with the health system and the juvenile and criminal justice system, to require public housing, and to have children placed in OOHC.[54]

33 The 2019 *Family is Culture* report made the following findings:

> The data … demonstrate that a key risk factor for a child being removed is previous experience in the child protection system or having family members or parents in the system. If child protection authorities keep removing children for symptoms of neglect, rather than treating the root causes of that neglect, then numbers in OOHC will keep increasing as those children, in turn, have children who enter OOHC. The SNAICC Family Matters report indicated that one in five Aboriginal women, and over one in 10 Aboriginal men who were in OOHC, will have a child in OOHC at some point in the twenty years following their exit from OOHC. Compared with the general population, OOHC leavers are more than 10 times more likely to have their child in OOHC.[55]

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[51] Senate Community Affairs References Committee, *Forgotten Australians* (n 18) 155 [6.25].

[52] Ibid.

[53] Ibid 152 [6.19].

[54] Ibid 3–4.

[55] Megan Davis, *Family is Culture* (above n 5) 22, citing SNAICC – National Voice for Children et al, *The Family Matters 2019* (Report, 2019).

### *Aboriginal and Torres Strait Islander children*

34 It has been noted that the national definition of OOHC discussed at paragraph [7] above now excludes children removed from their families and placed on third-party orders (such as guardianship in NSW, and adoption) and that this may have particular implications for Indigenous children in OOHC:

> The exclusion of children on permanent care orders misrepresents the situation of children who have been removed from their families. The Family Matters campaign is concerned that this change may incentivise the use of permanent care orders to reduce the number of children and young people counted as in out-of-home care, and to reduce the costs and responsibilities for governments in ensuring their quality care. This carries an enormous risk to children's cultural rights and connections because available data indicates that the majority of Aboriginal and Torres Strait Islander children on these orders are placed with non-Indigenous carers.[56]

35 In 2017, the Australian Institute of Health and Welfare found:

> The legacy of past policies of forced removal, intergenerational effects of previous separations from family and culture, a higher likelihood of living in the lowest socioeconomic areas, and perceptions arising from cultural differences in child-rearing practices are all underlying causes for [Aboriginal and Torres Strait Islander children's] over-representation in child protection services.[57]

36 The 1997 *Bringing Them Home* report found that, for Aboriginal and Torres Strait Islander children, a principal effect of removal from their families is the destruction of important family and cultural connections, resulting in alienation, loss of identity, frustration and stilted development of skills and learning.[58] The report identified that disruption of attachment bonds between parents and children is most damaging during infancy and can lead to unresolved trauma and grief.[59]

37 Tilbury and Osmond note that '[c]hildren's lack of knowledge or understanding of their Aboriginality as a result of being placed in out-of-home care has been linked to poor emotional well-being and mental health problems in later life, with negative outcomes for individuals and communities'.[60] Impacts related to loss of culture and language are also experienced by children from other cultural and linguistic backgrounds.[61]

38 In 2015, McFarlane stated that Aboriginal people in prison who had been 'removed from their families as children experienced significantly worse outcomes with regard to mental health than their non-removed Aboriginal peers'.[62] They were also more likely to have experienced child

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[56] SNAICC – National Voice for Children et al, *The Family Matters 2019* (Report, 2019) 36.

[57] Australian Institute of Health and Welfare, *Child Protection Australia 2015-16* (Child Welfare Series No 66, 16 March 2017) 27.

[58] Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Report, 1997) ch 11.

[59] Ibid.

[60] Clare Tilbury and Jennifer Osmond, 'Permanency Planning in Foster Care: A Research Review and Guidelines for Practitioners' (2006) 59(3) *Australian Social Work* 265, 270. See also Karen Menzies, 'Forcible Separation and Assimilation as Trauma: The Historical and Socio-political Experiences of Australian Aboriginal People' (2019) 17(1) *Social Work & Society* 1, 11.

[61] See, eg, the Child Migrants Report, arising from the inquiry into the history and treatment of children who were sent to Australia from the United Kingdom, Ireland and Malta, which identified the impact of deprivation of language and culture for Maltese children (cited in Roslyn Atkinson, 'Denial and Loss: Removal of Indigenous Australian Children from their Families and Culture' (2005) 5(1) *QUT Law and Justice Journal* 71, 73–4.

[62] Katherine McFarlane, 'Care-Criminalisation: The Involvement of Children in Out of Home Care in the NSW Criminal Justice System' (PhD Thesis, University of New South Wales, 2015) 84.

sexual assault.[63] In 1991, the Royal Commission into Aboriginal Deaths in Custody reported that half of the prisoners whose deaths were investigated had been in care as children.[64]

39 The *Family is Culture* report referred to Redfern Legal Centre's submission 'that many Aboriginal children suffer "significant and horrific abuse" while in OOHC. It noted that Aboriginal young people rarely seek help for this trauma after leaving OOHC "due to shame, embarrassment or inability to identify a suitable agency to assist them"'.[65] In its submission to the *Family is Culture* review, Legal Aid NSW explained:

> Rather than supporting their recovery and healing, the OOHC system can compound and add to the trauma of Aboriginal children and young people. This inevitably compromises their ability to parent their own children in the future, and therefore results in more Aboriginal children and young people in OOHC.[66]

## Links to Contact with the Criminal Justice System

40 Links between OOHC and involvement in the criminal justice system 'is well established in Australia'.[67] The 2017 Australian Law Reform Commission ('ALRC') Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples considered that 'the links between these systems is so strong that child removal into out-of-home care and juvenile detention could be considered as key drivers of adult incarceration'.[68] The ALRC expressed the view that

> the incarceration rate of adult Aboriginal and Torres Strait Islander peoples cannot be fully and satisfactorily addressed without a national review of Aboriginal and Torres Strait Islander children in child protection, and the state and territory laws that see such children placed into out-of-home care.[69]

41 In 2004, the Australian Parliament recognised the strong links between OOHC experiences and contact with the criminal justice system:

> Other costs to society occur because of the high numbers of care leavers who enter the justice system. It was stated in evidence that one in five adult prisoners and one in three juvenile prisoners have been in care … The cycle is perpetuated as many children of women prisoners are made wards of the state while their mothers are imprisoned. 70 per cent of women in Victorian prisons are mothers and largely the sole-carer. A study of risk factors for the juvenile justice system found that '91 per cent of the juveniles who had been subject to a care and protection order, as well as a supervised justice order, had progressed to the adult corrections system with 67 per cent having served at least one term of imprisonment'.[70]

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[63] Katherine McFarlane, 'Care-Criminalisation: The Involvement of Children in Out of Home Care in the NSW Criminal Justice System' (PhD Thesis, University of New South Wales, 2015) 84.

[64] Ibid.

[65] Megan Davis, *Family is Culture* (above n 5) 228.

[66] Legal Aid NSW, Submission No 6 to Independent Review of Aboriginal Children and Young People in Out-of-Home Care in NSW, *Family is Culture*, December 2017, 17–18.

[67] *Family Is Culture* (above n 5) 235.

[68] Australian Law Reform Commission, *Pathways to Justice* 485 [15.1].

[69] Ibid 486 [15.4].

[70] Senate Community Affairs References Committee, *Forgotten Australians* (n 18) 168 [6.6] (citations omitted). These observations are supported by numerous recent studies: see, eg, Sentencing Advisory Council, *'Crossover Kids': Vulnerable Children in the Youth Justice System Report 1: Children Who Are Known to Child Protection among Sentenced and Diverted Children in the Victorian Children's Court* (June 2019); Queensland Family and Child Commission, *The Criminalisation of Children Living in Out-of-Home Care in Queensland* (2018); Erin Gough, *The Drift from Care to Crime: A Legal Aid NSW Issues Paper* (Report, October 2011) 3; Australian Institute of Health and Welfare, *Young People in Child Protection and Under Youth Justice Supervision 2014–15* (Data Linkage Series No 23, 2016) 11; New South Wales, Special Commission of Inquiry into Child Protection Services in NSW (n 2) 556 [15.2].

42 The correlation between the child protection and the criminal justice systems is accentuated when comparing outcomes against children with no involvement in the care system.[71] As at 2014, young people aged 10–17 in OOHC were '16 times as likely as the equivalent general population to be under youth justice supervision'.[72] The NSW Special Commission of Inquiry reported that in two surveys on juvenile offending, '28% of male and 39% of female detainees, and 21% of males and 36% of females subject to community orders had a history of being placed in care'.[73]

43 A 2015 New South Wales study examined 111 NSW Children's Court criminal files, finding that over one-third (34%) of the young people were, or had recently been in, OOHC.[74] In relation to the female care cohort, which comprised 26% of the care cohort and overall sample:

- they were aged from 11-17 years of age at the time of the offence;
- many had been refused bail or had bail conditions imposed that were too onerous to meet;
- they shared a common background of homelessness and abandonment, with periods in refuges, on the streets, group homes and detention centres;
- most offended in the company of others, generally siblings, cousins or other residents of welfare group homes; and
- half were facing the court for property damage offences committed in foster care, or against the group home or other 'specialist' facility in which they lived.[75]

44 The 2010 ALRC Inquiry into Legal Responses to Family Violence identified a strong correlation between involvement in criminal activity, time spent in OOHC, and rates of reported child abuse or neglect, drawing a conclusion that a child who offends 'is likely to have a history of abuse or neglect'. [76] The final report cited a 2001 Victorian study of young people sentenced to a term of imprisonment over an 8-month period which found that 86% had been in OOHC, with over half of these having experienced five or more care placements.[77]

45 The 2019 *Family is Culture* report discussed the process of 'care criminalisation', whereby children in OOHC are 'more likely to be involved in the juvenile justice system by virtue of their OOHC status'.[78] The Independent Review found that 'children and young people in OOHC are arrested for behaviour that would usually result in a disciplinary response from parents and not a criminal justice related response from police officers'.[79] Examples include children being arrested for damaging property or assaulting staff or kinship carers, and for breaching bail conditions arising from over-scrutiny and policing of residential care homes.[80]

[71] Katherine McFarlane, 'Care-Criminalisation: The Involvement of Children in Out of Home Care in the NSW Criminal Justice System' (PhD Thesis, University of New South Wales, 2015) 76.

[72] Australian Institute of Health and Welfare, *Young People in Child Protection and Under Youth Justice Supervision 2014–15* (Data Linkage Series No 23, 2016) 11.

[73] New South Wales, Special Commission of Inquiry into Child Protection Services in NSW (n 2) 556 [15.2].

[74] Katherine McFarlane, 'Care-Criminalisation: The Involvement of Children in Out of Home Care in the NSW Criminal Justice System' (PhD Thesis, University of New South Wales, 2015) 76.

[75] Katherine McFarlane, 'From Care to Custody: Young Women in Out-of-Home Care in the Criminal Justice System' (2010) 22 *Current Issues in Criminal Justice* 345, 346–7.

[76] Australian Law Reform Commission, *Family Violence – A National Legal Response* (Report No 114, October 2010) 973 [20.154].

[77] Ibid, citing Department of Human Services (Vic), *An Integrated Strategy for Child Protection and Placement Services* (Report, 2002) 52.

[78] *Family Is Culture* (above n 5) 230.

[79] Ibid 236.

[80] Ibid 237.

46 This phenomenon is particularly problematic in the residential care system,[81] where children 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'.[82]

47 Further, 'children in OOHC are also more likely to be remanded in custody, often because they have insecure accommodation or lack a support network'.[83] The Queensland Family and Child Commission has acknowledged that children's 'exposure to the criminal justice system can come through many pathways, however, contact with the police is usually the first point of exposure.'[84]

48 In 2019, the Victorian Sentencing Advisory Council acknowledged the link between the trauma experienced in care and contact with the criminal justice system:

> A child's experience of abuse and trauma can disrupt healthy brain development; it can 'damage the brain's crisis response system', resulting in a child 'remaining constantly in crisis mode, even when there is no threat'. Such a child 'remains hyper-vigilant and overreacts to minor events', and 'feeling constantly threatened [they] can engage in frequent fight or flight behaviors'. Maltreated adolescents who start 'acting out' may be 'less likely to receive sympathetic attention than younger children, and are more likely to run away, become homeless and engage in illegal and survival activities that bring them to the attention of police'.[85]

49 Other impacts of OOHC that may increase the risk of criminal offending include: lack of access to support services to address trauma, mental health problems or learning difficulties; the risk of trauma occurring as a result of care experiences (for example, as a result of abuse by a carer); the criminalising influence of other children in residential care; failed restoration attempts; and limited support for OOHC leavers.[86]

### *Aboriginal and Torres Strait Islander Children*

50 The risk of contact with the criminal justice system is increased for Aboriginal and Torres Strait Islander children,[87] with Aboriginal and Torres Strait Islander children known to be disproportionately represented within both the child protection and criminal justice systems in all states and territories.[88] At 30 June 2018, there were 20,421 Aboriginal and Torres Strait Islander children in OOHC, a rate 10.2 times that of non-Indigenous children.[89] This disproportionate

[81] Katherine McFarlane, 'From Care to Custody: Young Women in Out-of-Home Care in the Criminal Justice System' (2010) 22 *Current Issues in Criminal Justice* 345, 348.

[82] Alison Gerard et al, '"I'm Not Getting Out of Bed!" The Criminalisation of Young People in Residential Care' (2019) 52(1) *Australian & New Zealand Journal of Criminology* 76, 82.

[83] *Family Is Culture* (above n 5) 237.

[84] Family and Child Commission (Qld), *The Criminalisation of Children Living in Out-of-home Care in Queensland* (Report, June 2018) 8.

[85] Sentencing Advisory Council, *'Crossover Kids': Vulnerable Children in the Youth Justice System Report 1: Children Who Are Known to Child Protection among Sentenced and Diverted Children in the Victorian Children's Court* (June 2019) 94 [8.8] (citations omitted).

[86] *Family Is Culture* (above n 5) 443.

[87] See, eg, Australian Law Reform Commission, *Pathways to Justice* 486–89; Australia Human Rights Commission, *Social Justice and Native Title Report 2015* (October 2015) ch 5.

[88] Family and Child Commission (Qld), *The Criminalisation of Children Living in Out-of-home Care in Queensland* (Report, June 2018) 6. The Commission noted that '[i]ntergenerational trauma and the legacy of colonisation continues to underpin this overrepresentation': ibid.

[89] Family Matters, *The Family Matters Report* (2019) 3.

impact was identified in 1991 by the Royal Commission into Aboriginal Deaths in Custody,[90] and further highlighted in the 1997 *Bringing Them Home* report.[91]

51 In 2017, the ALRC noted a sense of 'normalisation of incarceration in many Aboriginal families, and in particular those where children have been removed, or have been in juvenile detention'.[92]

52 The 2019 *Family is Culture* report found that 'loss of connection to family and culture may also increase the risk that Aboriginal children in OOHC will become involved in the criminal justice system'.[93]

53 A 2021 expert report by Vanessa Edwidge and Dr Paul Gray, *Significance of Culture to Wellbeing, Healing and Rehabilitation*, found:

> Experiences in out-of-home care, including placement instability, lack of cultural and family connection and poor support leaving care, as well as the unique contribution of the out-of-home care system increase the likelihood of contact with the juvenile or adult justice systems, thereby increasing the risk and vulnerabilities experienced by the next generation.[94]

## Treatment and Healing*

### *Adult offenders*

54 Mental health issues arising from experiences of OOHC which find expression in post-traumatic stress disorder require psychiatric care and support.[95] The Senate Community Affairs Reference Committee also noted that 'deep feelings of anger are strongly held by care leavers', which 'seems to strengthen with age, as feelings of abandonment, and of being absolutely and totally alone in their life are intensified with the passing of the years'.[96]

### *Children and young people*

55 The Special Commission of Inquiry into Child Protection Services in NSW argued that long-term care arrangements aim to establish stability of care, which is critical in reducing the likelihood of 'cognitive problems, psychological and behavioural problems, and delays in development' that can arise from ruptured attachment ties.[97]

56 The NSW Special Commission of Inquiry found that 'research clearly identifies the need for children to have security and continuity of attachment in order to develop optimally'.[98] It was

[90] Royal Commission into Aboriginal Deaths in Custody, *Final Report* (1991) vol 1 [2.2.9].

[91] Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Report, 1997) 164, cited in Australian Law Reform Commission, *Pathways to Justice* 486–7 [15.7].

[92] Australian Law Reform Commission, *Pathways to Justice* 486 [15.5].

[93] *Family Is Culture* (above n 5) 237.

[94] Vanessa Edwidge and Paul Gray, *Significance of Culture to Wellbeing, Healing and Rehabilitation* (Report, 2021) 48.

[*] *Note*: The research contained in relation to treatment and healing does not attempt to prescribe or recommend what is required for any individual. This will of course be determined by factors such as the individual's personal experience or condition, the advice of any relevant experts, health providers or other support persons and the availability of treatment and opportunities to recover and heal.

[95] Senate Community Affairs References Committee, Parliament of Australia, *Forgotten Australians* 154 [6.22].

[96] Ibid 156.

[97] New South Wales, Special Commission of Inquiry into Child Protection Services in NSW (n 2) 614 [16.105].

[98] Ibid [16.104].

also recognised that 'maintaining safe contact between children and birth families and/or wider kinship networks is an important step towards continuity'.[99]

57 Family and Community Services (NSW) identifies additional support in the form of a 'Behaviour Support Plan' ('BSP') as necessary for children who exhibit 'more complex or concerning behaviours and psychological symptoms'.[100] The aims of a BSP include understanding the causes of the presenting behaviour, including the effects of trauma.[101]

58 Educational intervention programs are critical in addressing the increased risk of 'poor educational achievement, unemployment, homelessness, substance abuse and mental health problems' for children in OOHC.[102]

***Aboriginal and Torres Strait Islander children***

59 Developmental evidence from the Harvard Centre on the Developing Child, cited in the Aboriginal Child, Family and Community Care Secretariat's 2016 report *Achieving a Holistic Aboriginal Child and Family Service System for NSW*, found:

> - Aboriginal families and communities are stronger and better able to meet the needs of their children and young people when empowered to identify and address the issues that impact on their lives;
> - Aboriginal communities themselves are best placed to develop and deliver services aimed at supporting Aboriginal children and families; and;
> - Culture represents a significant positive factor in overcoming adversity and disadvantage for individuals, families and communities, strengthening our families and communities to raise strong, connected children.[103]

60 The *Family Is Culture* review found that contact with family and kin is crucial for Aboriginal children in OOHC:

> It is vitally important that Aboriginal children in OOHC remain in contact with their family, which commonly includes 'grandparents, aunts, uncles, cousins, nieces and nephews, and members of the community who are considered to be family' … 'family is the cornerstone of Aboriginal and Torres Strait Islander culture, spirituality and identity'.[104]

61 The *Family Is Culture* report also discussed the nature of 'connection' to family and culture:

> For Aboriginal and Torres Strait Islander people, 'connection' to family, community, culture and country is a fundamental concept which is central to one's sense of identity, belonging and wellbeing. Aboriginal and Torres Strait Islander people understand 'connection' to be gained through social experience and involves interaction with families, communities and ancestors associated with a particular area that is related to them. In this sense, 'connection' refers to interdependent and reciprocal relationships between Aboriginal peoples and country which is sustained through cultural knowledge and practices.[105]

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[99] New South Wales, Special Commission of Inquiry into Child Protection Services in NSW (n 2) 616 [16.114].

[100] Family and Community Services (NSW), *Behaviour Support in Out-of-Home Care* (2018) 10 [4.1.2].

[101] Ibid 20 [5.1].

[102] New South Wales, Special Commission of Inquiry into Child Protection Services in NSW (n 2) 620.

[103] Aboriginal Child, Family and Community Care Secretariat, *Achieving a Holistic Aboriginal Child and Family Service System for NSW* (Report, 2016) 6–7.

[104] *Family Is Culture* (above n 5) 322 (citations omitted).

[105] Ibid 320 (citations omitted).

62 The Australian Institute of Family Studies ('AIFS') has recognised that measuring the wellbeing of Aboriginal and Torres Strait Islander children in care 'should include cultural and spiritual dimensions as well as physical, emotional and social status. These should be considered in holistic terms in relation to the wellbeing of the Aboriginal and Torres Strait Islander child's community'.[106] The AIFS also found that 'Indigenous children and young people should be provided with culturally appropriate counselling to help them deal with the trauma of being separated from their birth parents and families'.[107]

63 The *Family Is Culture* report identified Family Group Conferences as one method of enabling participation, involving a family-focused, strengths-based form of alternative dispute resolution.[108] However, the Review noted concerns that the current approach is not culturally appropriate or safe for Aboriginal participants, recommending a model that is led and delivered by Aboriginal controlled organisations.[109]

64 Approaches which recognise and effectively implement the right of Indigenous peoples to self-determination (specifically, approaches which are 'planned, developed, managed, implemented and reviewed by Aboriginal people themselves')[110] have been recognised as more effective for meeting the needs of Aboriginal and Torres Strait Islander children.[111]

65 Associate Professor Terri Libesman, a legal specialist in OOHC for Indigenous children, has stated that 'the most effective and significant way to maintain cultural connection is for children and young people to stay with or be returned to their families as soon as it is safe for them to do so'.[112] The *Family is Culture* report similarly identified the preference for restoration, which involves physically returning children to their parents.[113]

66 The nationally adopted Aboriginal and Torres Strait Islander Child Placement Principle ('ACPP') 'outlines a preference for Aboriginal and Torres Strait Islander children to be placed with other Aboriginal and Torres Strait Islander people when they are placed outside their family'.[114]

[106] Nicholas Richardson, Leah Bromfield and Alexandra Osborn, *Cultural Considerations in Out-of-Home Care* (Research Brief No 8, 2007) 3.

[107] Richardson, Bromfield and Osborn (above n 87) 8.

[108] *Family Is Culture* (above n 5) 310.

[109] Ibid xxxvii, 312–13.

[110] Ibid 86.

[111] See, eg, Aboriginal Child, Family and Community Care Secretariat, *Achieving a Holistic Aboriginal Child and Family Service System for NSW* (Report, 2016) 6–7; Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Report, 1997) 276; Megan Davis, *Family Is Culture* (above n 5) 78–92.

[112] Terri Libesman, 'Cultural Care for Aboriginal and Torres Strait Islander Children in Out of Home Care' (Report, SNAICC Secretariat of National Aboriginal and Islander Child Care, August 2011) 53.

[113] *Family Is Culture* (above n 5) 344. This is the preferred NSW Government position, as reflected in the Permanent Placement Principles contained in s 10A(3) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW).

[114] Australian Institute of Health and Welfare, *Child Protection Australia 2017–18* (Child Welfare Series No 70, 8 March 2019) 49.