



CARE NOT CUSTODY

A new approach to keep kids in residential care out of the criminal justice system

 Victoria Legal Aid

#CareNotCustody
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Victoria Legal Aid

Access to justice for all Victorians

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We fund legal representation for people who meet eligibility criteria based on their financial situation, the nature and seriousness of their problem and their individual circumstances. We provide lawyers on duty in most courts and tribunals in Victoria.

Our clients are often people who are socially and economically isolated from society; people with a disability or mental illness, children, the elderly, people from culturally and linguistically diverse backgrounds and those who live in remote areas.

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In addition to helping individuals resolve their legal problems, VLA works to address the barriers that prevent people from accessing the justice system by participating in law reform, influencing the efficient running of the justice system and ensuring the actions of government agencies are held to account. We take on important cases and campaigns that aim to improve the law and make it fairer for all Victorians.

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Executive summary

Children living in out-of-home care are some of the most vulnerable and disadvantaged in our community. Many have been exposed to multiple traumas from a young age resulting from family violence, substance abuse, neglect or abandonment and/or sexual or physical abuse.

Unfortunately, as numerous studies have demonstrated, too many of these children are still ending up involved from a young age – often unnecessarily – in our criminal justice system.

The over-representation of children from out-of-home care in our criminal justice system is a matter of long-standing concern to Victoria Legal Aid. A recent review of our child protection client data found that:

- **Almost one in three young people we assist with child protection matters who are placed in out-of-home care later returns to us for assistance with criminal charges;**
- **Young people we assist placed in out-of-home care are almost twice as likely to face criminal charges as those who remain with their families;**
- **Young people we assist placed in out-of-home care are more likely than other children to be charged with criminal damage for property-related offending;**

Our practice experience suggests that this problem is particularly acute with respect to children placed in residential care. This is due at least in part to the continued practice in many residential facilities of relying on police to manage incidents of challenging behaviour by young people.

While serious offending by young people may warrant a police response, we also see cases where police have been called to a residential facility to deal with behaviour by a young person that would be unlikely to come to police attention had it occurred in a family home. We have represented children from residential care who have received criminal charges for smashing a cup, throwing a sink plug or spreading food around a unit's kitchen. As the case studies in this report demonstrate, frequently children who may never have had a criminal charge prior to entering care, quickly accrue a lengthy criminal history due to a cycle of "acting out" followed by police responses which develops in a residential unit.

"We have represented children from residential care who have received criminal charges for smashing a cup, throwing a sink plug or spreading food around a unit's kitchen."

The broader reforms to the residential care system being introduced by the Victorian Government provide an important opportunity to address this criminalisation of vulnerable young people. Plans already underway to significantly reduce the number of children placed in long-term residential care and introduce mandatory qualification and training requirements for staff represent big steps forward, but do not do enough to address this specific problem. The present expectation that care providers develop their own guidelines about responding to challenging behaviour and when police should be called leads inevitably to variable and inconsistent responses in the way children are treated.

Further guidance, support and training for care providers are clearly needed about more therapeutic ways to manage challenging behaviour so as to minimise the need for police involvement in cases where there is no immediate danger to staff or other young people.

In New South Wales and parts of the UK, this has been done through the adoption of protocols that apply across all residential care facilities and explicitly aim to reduce young peoples' contact with the criminal justice system. Such protocols, which have been developed in partnership with care providers and police, provide a clear and consistent structure for decision-making in residential units when a child exhibits challenging behaviour. Together with appropriate training for staff, they have been highly effective in reducing the numbers of offences recorded against children in residential care – in one UK county by as much as 66%.

The adoption of a similar Protocol in Victoria would have clear benefits for both staff and young people living in residential care.

It would provide staff with a structured process for responding to incidents which distinguishes between behaviour which is merely disruptive or confrontational versus situations that are dangerous for staff and other young people.

It would ensure a consistent process across the 240 residential care units in Victoria so that all young people, regardless of geography, are treated equally.

Finally, it would provide children and young people with a response that is therapeutic and based on principles of care, rather than one which entrenches them in a cycle of involvement with the criminal justice system.

Recommendation

As part of its reforms to the residential care system, the Victorian Government work with relevant stakeholders to develop and implement an inter-agency Protocol to reduce the contact of young people in residential care with police and the criminal justice system, akin to that recently implemented in New South Wales (see Appendix).

Introduction

The past five years have seen unprecedented scrutiny of the problems with Victoria's out of home care system. The 2012 *Protecting Victoria's Vulnerable Children Inquiry*,¹ the 2014 Auditor-General's *Report on Residential Care Services for Children*² and the 2015 Commissioner for Children and Young People's Report "...As a good parent would..."³ all identified serious systemic failures in the out-of-home care system that have contributed to widespread problems of sexual exploitation and violence, poor health and educational outcomes, disconnection from family and culture and disproportionate rates of trauma among children in state care.

The Victorian Government's Roadmap for Reform,⁴ announced in April 2016, lays out ambitious plans for addressing many of these problems, with initiatives to improve monitoring and oversight frameworks, strengthen home-based care options and introduce minimum qualifications and additional training for staff working with children in care.

Many of these initiatives are already underway, with announcements in June 2016 of the move of 140 young people out of residential care into kinship placements⁵ and in August of a \$5.44 million funding package to assist Aboriginal⁶ young people in out-of-home care to remain connected to their culture and heritage.⁷

One critical issue not currently addressed by the Roadmap, however, is the disproportionate number of children and young people in care who end up in our criminal justice system.

Every year, Victoria Legal Aid assists thousands of the state's most vulnerable children and young people with child protection matters, many of who end up in state care. Unfortunately, too frequently we see these same children return to us, many within months of their placement, facing criminal charges for minor offending which would be unlikely to come to the attention of police had it occurred in a traditional family home.

This is particularly true of young people placed in residential care. Our client data and practice experience suggests that the current practice in many residential care facilities of relying on police to manage disputes over behavioural incidents is leading to an excessive criminalisation of children in residential care - propelling them into the very criminal justice system they should be protected from.

"The current practice in many residential care facilities of relying on police to manage challenging behaviour... is propelling children into the very criminal justice system they should be protected from."

¹ Victorian State Government (2012) Report of the Protecting Victoria's Vulnerable Children Inquiry, Victorian State Government, Melbourne. Accessed 4 November 2016 at <<http://www.childprotectioninquiry.vic.gov.au/>>

² Victorian Auditor-General (2014) Residential Care Services for Children, Victorian Auditor-General's Office, Melbourne. Accessed 4 November 2016 at <http://www.audit.vic.gov.au/reports_and_publications/latest_reports/2013-14/20140326-residential-care.aspx>

³ Commission for Children and Young People (2015), "...as a good parent would..."", Commission for Children and Young People, Melbourne. Accessed 4 November 2016 at <<http://ccyp.vic.gov.au/downloads/inquiry/final-report-as-a-good-parent-would.pdf>>

⁴ Department of Health and Human Services (2016) Roadmap for Reform: strong families, safe children - the first steps. Department of Health and Human Services, Melbourne. Accessed 4 November 2016 at <http://www.dhs.vic.gov.au/__data/assets/pdf_file/0006/964455/Roadmap-for-Reform--strong-families,-safe-children-3.pdf>

⁵ Minister for Families and Children (2016) Auditor General Praises Residential Care Reforms [Press Release]. Accessed 4 October 2016 at <<http://www.premier.vic.gov.au/auditor-general-praises-residential-care-reform/>>

⁶ Throughout this report, the term Aboriginal is used to refer to young people of Aboriginal or Torres Strait Islander background.

⁷ Minister for Families and Children (2016) Keeping Aboriginal Children Connected with their Culture [Press Release]. Accessed 4 October 2016 at <<http://www.jennymikakos.com.au/media-releases/keeping-aboriginal-children-connected-with-their-culture/>>

This report aims to draw attention to this problem and highlight the need for urgent policy responses to address it.

Part one of the report gives a brief overview of the residential care system in Victoria and the backgrounds of the children placed in residential care.

Part two discusses the results of recent academic studies on the links between out-of-home care and criminal justice outcomes and the reasons why children in care more frequently end up in our juvenile detention systems.

Part three examines the experiences of VLA's clients placed in residential care and the reasons why their interactions with the criminal justice system tend to escalate upon entry into care.

Finally, part four discusses possible policy responses, including approaches currently being trialed in NSW and the UK, where inter-agency protocols and restorative justice processes have been developed to try to protect young people in residential care from needless involvement in the criminal justice system.

Children in out-of-home care in Victoria

The numbers of children in out of home care in Victoria have grown substantially over the past decade.⁸ Currently, over 8,000 children in Victoria live in out of home care.⁹ This includes children living in foster care, those placed with relatives or kin other than their parents, and those who live in residential care.

Residential care is out-of-home care provided by paid staff, usually in a “group home” unit accommodating up to six children. As at January 2016, there were 240 such facilities operating in Victoria, accommodating 442 children and young people.¹⁰ The Department of Health and Human Services (DHHS) funds a variety of community service organisations (CSOs) to run these facilities on its behalf.

Aboriginal children are heavily over-represented both in residential care and out-of-home care more generally. As at April 2015, 1,400 children in out-of-home care in Victoria were Aboriginal – a ratio of one-in-12.¹¹ Likewise 90 of the children then in residential care – nearly one in five – were Aboriginal.¹²

Across Australia in recent years there has been a policy emphasis on keeping children with their families wherever possible. Out-of-home care is generally considered to be the placement of “last resort”, and is only used where the Children’s Court deems that children are at significant risk of harm, abuse or neglect from their own families and cannot remain in the home.

Children in out-of-home care are thus some of the most vulnerable in the State. This is particularly true of children in residential care, many of who have complex needs that mean that they have been unable to be placed within a kinship or foster-care option, or such options have broken down. The 2014 Victorian Auditor-General’s report observed that:

“Children in residential care have generally been exposed to multiple traumas in the form of family violence, alcohol and drug abuse, or sexual, physical and emotional abuse since they were very young. They may have a parent who is in prison or a struggle single parent with mental health issues. Some have been born to mothers who were very young, often with a violent partner. They usually have other siblings in care, and one of their parents may also have been in care as a child. They are usually known to child protection at an early age. They come to residential care typically as a young adolescent, having experienced a number of placements in home-based care that have since broken down or were only available for short periods of time....”¹³

These comments echo the results of studies on children in out-of-home care across Australia. A 2006 Australia-wide survey of children with high support needs in out-of-home care found that of such children, almost 75% came from households with a history of domestic violence or physical abuse; 66% had parents with substance abuse problems; and 58% had suffered neglect. Half the sample had parents with mental health problems, significant financial problems, homelessness or who had themselves been victims of sexual abuse.¹⁴

⁸ Over the 10 years to June 2011, the number of children living in out-of-home care placements increased from 3,882 to 5,678 – a growth of 46 percent. Victorian State Government (2012) Report of the Protecting Victoria’s Vulnerable Children Inquiry, p. 233. Accessed 4 November 2016 at <<http://www.childprotectioninquiry.vic.gov.au>>

⁹ DHHS, Roadmap for Reform, above n 4, p. 7.

¹⁰ Victorian Auditor General (2016) Follow Up of Residential Care Services for Children, Victorian Auditor-General’s Office, Melbourne, pp. 1 & 15. Accessed 4 November 2016 at <<http://www.audit.vic.gov.au/publications/20160608-Resi-Care/20160608-Resi-Care.pdf>>

¹¹ DHHS, Roadmap for Reform, above n 5, p. 7.

¹² CCYP, “...as a good parent would...”, above n 3, p. 27.

¹³ Victorian Auditor General, Residential Care Services for Children, above n 2, p. ix.

¹⁴ Osborn, A. & Delfabbro, P.(2006) National Comparative Study of Children and Young People with High Support Needs in Australian Out of Home Care, University of Adelaide, Adelaide, p. 40.

The links between out-of-home care and the criminal justice system

Studies on children in out-of-home care in Victoria and elsewhere have also consistently highlighted their significant over-representation in the juvenile justice system.

A 2005 survey of care leavers in Victoria found that nearly half those interviewed had had some type of involvement with the police or justice system and 12% had spent time in detention in the year after leaving care.¹⁵ Another 2007 study found that 21% of 11-17 year olds living in out-of-home care in Victoria had been cautioned or charged by police in the previous six months.¹⁶ National surveys of care-leavers undertaken by the CREATE Foundation in 2008 and 2009 also found that disproportionate numbers of care leavers become involved in the youth justice system.¹⁷ This was particularly true of young Aboriginal people leaving care.¹⁸

“You think about your own family – if my child smashed a window or nicked something from me, I wouldn’t call the police...we go to that criminal response a lot more quickly for young people in care.”

- Former CP worker

Studies of youth justice populations have shown similar results. A 2010 review of the NSW justice system estimated that 28% of male and 39% of female youth detainees had a history of out-of-home care.¹⁹ Another recent report by the Australian Institute of Health and Welfare noted that in 2014-15, young people who were the subject of a care and protection order were 20 times as likely to be under youth justice supervision in the same year as the general population.²⁰ Studies on young people in custody in the UK and US have shown similar results.²¹

Statistics kept by the Victorian Youth Parole and Youth Residential Boards do not specifically monitor out-of-home care status, but do indicate that almost half of young people currently in custody in Victoria have had previous child protection involvement.²²

Research that has sought to explain the links between out-of-home-care and criminal justice outcomes has traditionally focused on the backgrounds of the children in out-of-home care and the greater exposure of this group to various factors that increase the risk of offending behavior, such as exposure to domestic violence or abuse, parental abandonment, substance abuse and traumatic experiences such as the death of family members.

¹⁵ Raman, S., Inder, B. & Forbes, C. (2005) Investing for Success: the economics of supporting young people leaving care' Centre for Excellence in Child and Family Welfare, Melbourne.

¹⁶ Wise, S. & Egger, S. (2007) The Looking After Children Outcomes Data Project: Final Report, Australian Institute of Family Studies, p. 15.

¹⁷ McDowall, J. (2008) Report Card: Transitioning from Care, CREATE Foundation, Sydney.

¹⁸ McDowall, J. (2009) Report Card: Transitioning from Care: Tracking Progress, CREATE Foundation, Sydney.

¹⁹ Murphy, P., McGinness, A., Balmaks, A., McDermott, T. & Corriea, M. (2010) A Strategic Review of the New South Wales Juvenile Justice System, Noetic Solutions Pty. Ltd., Canberra.

²⁰ Australian Institute of Health and Welfare (2016) Young People in Child Protection and Under Youth Justice Supervision 2014-15, Data linkage series no. 22. Cat. No. CSI 24, Canberra, p. 10.

²¹ A 2011 survey of over 1,000 young people in custody in the UK found that over a quarter of young men and half young women in custody had previously spent time in out-of-home care. Summerfield, A. (2011) Children and Young People in Custody 2010-11: An analysis of the experiences of 15-18 year olds in prison, HM Inspectorate of Prisons & the Youth Justice Board, London. See also Cusick, G., Coutney, M., Havelicek, J., & Hess, N. (2010) Crime during transition to adulthood: How youth fare as they leave out-of-home care, National Institute of Justice, Washington D.C.

²² The 2015 Annual Report of the Youth Parole Board, for example, showed 43% of young people in youth justice centres had previous child protection involvement. Youth Parole Board (Vic) (2015) Annual Report 2014-15, Victorian Government Printer, Melbourne, p. 26.

It is by now well-established, for instance, that young people with a history of severe maltreatment are more likely to engage in offending behaviours,²³ particularly where the maltreatment has occurred or extended into adolescence.²⁴ In the case of Aboriginal children in care, there also other complex contributing factors arising from the legacy of racist policies of past forcible removal, intergenerational trauma and disconnection from culture.²⁵

More recently, however, there has also been growing awareness of the role that aspects of the child protection system itself can play in exacerbating the risk factors that precipitate children's entry into the criminal justice system.

A recent 3-year study conducted by researchers at Monash University, which interviewed over 70 former care workers and young people with experiences of out-of-home care in Victoria, found that in addition traumatic childhood experiences, out-of-home care placement type and stability and the levels of support available to young people during and in transition from state care were important factors contributing to the risk of offending. Specific features of the out-of-home care system that were noted to contribute to the risk of offending included:

- Placement breakdowns, preventing the formation of relationships necessary to address trauma and other risks;
- Difficulty accessing specialist support services in care to address trauma, mental health issues or learning difficulties;
- Further traumatic exposure in care, whether due to adverse exposure during reunification attempts, abuse and neglect by caregivers, or abuse by other young people in care or from people outside the system;
- Co-location of "high risk" young people in congregate accommodation, raising exposure to behaviour and attitudes which increase the likelihood of offending behavior;
- The legislated age of leaving care (currently 18) and limited support structures for young people post-care, which make it difficult for many young people to cope on their own after leaving state care.²⁶

In relation to children placed in *residential* care units, the study found that the practice of adopting formal legal responses to behavioural issues was also a contributor to children's over-exposure to the criminal justice system.

"Some interviewees viewed the adoption of a legal response to behavioural issues, such as property destruction, theft and assaults (specifically in residential care) as criminalizing. As a former CP worker pointed out "...you think about your own family – if my child smashed a window or nicked something from me, I wouldn't call the police...we go to that criminal response a lot more quickly for young people in care." Participants also stated that there were circumstances where system responses, even when engaged for the protection of young people, exposed them to an excessive level of involvement with statutory bodies, authorities and the justice system: "If a young person...is taken into care, or put on a court order, often police are involved to investigate a crime that's been committed against a young person. Young people need to go to court, they need to have lawyers. If they run away, warrants can be issued and executed, often by plain clothes policemen".²⁷

Other studies on the links between residential care facilities and children's offending have reached similar conclusions. A 2010 UK study by Carol Hayden of 10 children's homes across the UK found that the high levels of offending behaviour in residential care facilities can be explained by two main factors: first, the "last resort" status of residential care facilities, which concentrates risk by caring for the children who are hard to place elsewhere; and second, the way the residential care system operates and is utilised. In particular,

²³ Stewart, A., Dennison, S., & Waterson, E. (2002) "Pathways from child maltreatment to juvenile offending" Trends and Issues in Crime and Criminal Justice 241; Ryan, J.P, Williams, A.B. & Courtney, M.E. (2013) "Adolescent neglect, juvenile delinquency, and the risk of recidivism", Journal of Youth and Adolescence 42, pp. 454-465.

²⁴ Smith, C.A., Ireland, T.O. & Thornbury, T.P. (2005) "Adolescent maltreatment and its impact on young adult antisocial behaviour", Child Abuse and Neglect, 29(10), pp. 1099-1119.

²⁵ Mendes, P., Saunders, B. and Baidawi, S. (2016) Indigenous Care Leavers in Victoria: Final Report, Monash University, Melbourne.

²⁶ Mendes, P., Snow, P & Baidawi, S (2014) Good Practice in Reducing the Over-Representation of Care Leavers in the Youth Justice System, Monash University, pp. 24-5.

²⁷ Mendes, P., Snow, P. & Baidawi, S (2012) Young People Transitioning from Out-of-Home Care in Victoria: Strengthening support services for dual clients of Child Protection and Youth Justice, Monash University, Melbourne, pp. 22-23.

Hayden noted that how staff manage children and young people's behaviour is central to how, and whether, a situation turns into a major conflict that could involve the police and (potentially) a criminal record.²⁸

“Over-reliance on police may indicate that some staff are not adequately equipped or supported to respond to trauma-related behaviours of vulnerable children”.

- Commission for Children and Young People

Another 2010 study by Kath McFarlane of criminal files in the New South Wales Children's Court of children in out-of-home care identified that half of those charged were before the Court for property-related offences, usually relating to damage to the group home or other 'specialist' facility in which they lived. She concluded that the practice by care home staff of relying on the police and justice system to manage and control children's behaviour in situations of conflict remains prevalent, despite the fact that many homes are engaged by the state to provide professionalist behavioural techniques to mitigate children's behaviour.²⁹

The over-use of police to manage children's behaviour in residential care facilities is also a theme also picked up on by the Commission for Children and Young People (CCYP) in its recent Report “...as a *good parent would...*”. The CCYP observed that:

“in some situations, there is an over-reliance on police being called to attend residential care units to respond to children's behavior that is not of a criminal nature. Such reliance on police may indicate that some staff are not adequately equipped or supported to respond to trauma-related behaviours of vulnerable children”.³⁰

The CCYP attributed this problem largely to a lack of qualifications, support and adequate supervision of staff within many CSOs and the highly casualised nature of the workforce (currently 55% of staff at CSOs are casual).³¹ It recommended the minimization of the use of labour-hire staff, improved training and the introduction of a minimum Diploma-level qualification in Child, Youth and Family Intervention for all direct-care staff, as well as funding and accreditation of CSOs that are linked to demonstrated outcomes for children, including a demonstrated reduction in police attendance to residential care units for behavior management issues that are not criminal.

²⁸ Hayden, C, (2010) “Offending behaviour in care: is children's residential care a 'criminogenic' environment?” Child & Family Social Work 15(4), pp. 461-472.

²⁹ McFarlane, K (2010) “From Care to Custody: Young Women in Out-of-Home Care in the Criminal Justice System”, 22(2), Current Issues in Criminal Justice, pp 345-353.

³⁰ CCYP “...as a good parent would...”, above n 3, p. 14.

³¹ Victorian Auditor-General, Follow Up of Residential Care Services for Children, above n 10, p. 9.

The experience of VLA's clients

The criminalisation of children and young people in residential care facilities described in the studies above is also a pattern that has been noted with concern by VLA's lawyers working in the crime and child protection jurisdictions.

VLA is in many ways uniquely positioned to observe this trend because we are the only legal organisation in Victoria with specialised child protection and youth crime units that operate across the state. Every year, VLA lawyers and private practitioners on grants of legal aid assistance assist over 1,800 children who are the subject of child protection proceedings. We also assist over 3,000 young people each year with criminal matters, including providing legal advice and representation in court.

Despite the fact that only around a third of children we represent in child protection proceedings are placed in out-of-home care, a disproportionate number of these young people return to us for assistance with subsequent youth crime matters.

In 2014, we conducted a longitudinal review of high-contact users of legal aid services over a 10-year period. This research found that people who became high-contact users were three times more likely than standard users to have been involved in a child protection or family violence matter while they were still children.³²

We recently undertook a further review of our internal data to assess the extent of "cross-over" between our child protection and youth crime clients and whether this cross-over was greater for children placed in out-of-home care.

We analysed the data of all children aged 11-17 seen for a child protection matter over the past five years that resulted in their placement in out-of-home care (1,318 children in total) and looked at how many reverted for assistance with a criminal charge. We then compared this with our data for clients in the same age range who had child protection matters which did not result in their placement in out-of-home care (3,845 clients in total).

The results of this review highlighted the stark contrast in the levels of contact with the criminal justice system by our clients who are placed in out-of-home care.

As set out in Figure 1 below, 30% of children we assisted who were placed in out-of-home care later went on to seek our assistance for a criminal matter, compared with 18% of those who were not placed in care. In other words, children placed in out-of-home care were almost twice as likely as those not placed in care to become involved with the criminal justice system.



Figure 1: Child protection clients aged 11-17 who go on to seek our assistance for criminal charges

³² Jolic, R. (2014) Victoria Legal Aid Client Profiles: high contact users of legal aid services, Victoria Legal Aid <http://www.legalaid.vic.gov.au/about-us/what-we-do/research-and-analysis/client-profiles>.

For the vast majority of those who were charged (83%), the first charge occurred within 12 months of their placement, suggesting most children are charged while still in care.

This pattern was fairly uniform across the state. Boys placed in out-of-home care were significantly more likely to revert to us with criminal charges than girls (38% vs 22%), particularly those in the 13-14 year- old age bracket. Sixty-nine percent of the “cross-over” children were aged 14 or under.

Consistent with their over-representation in the out-of-home care system more generally, indigenous children were also over-represented among those from this group who went on to have a criminal matter – 9% of the “cross-over” children identified as Aboriginal or Torres Strait Islander.

When we looked at the type of criminal charges laid, there were also some clear differences in the patterns of charging against children placed in care.

For those not placed in out-of-home care, the most common criminal charge was theft, consistent with youth crime statistics statewide.³³

Those in care, by contrast, were most frequently charged with criminal damage – 30% sought our assistance for a charge of criminal damage compared with 21% of those who were not placed in care. Overall, 77% of children who sought our assistance for criminal charges did so for property offences.³⁴

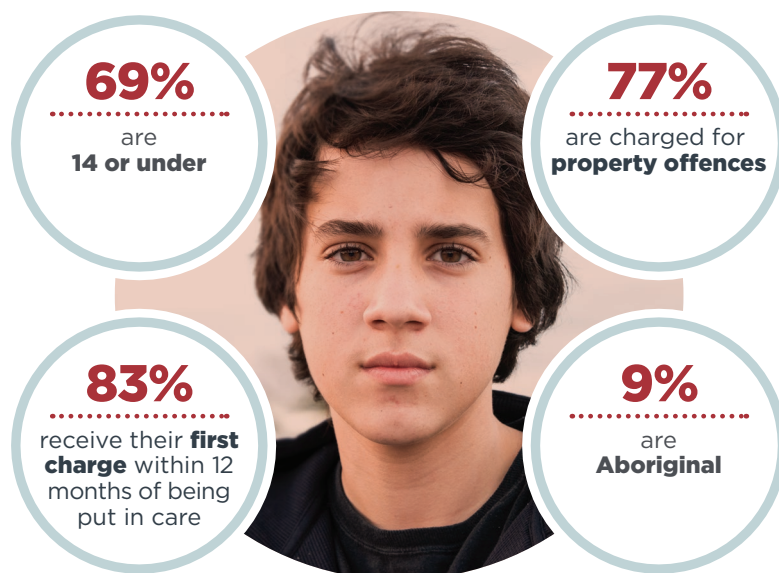


Figure 2: From care to custody: children in out of home care who go on to seek our assistance for criminal charges

The child protection data kept by VLA did not until very recently indicate the *type* of out-of-home care placement given to children we assist. It was therefore not possible to confirm from the review of this data whether children we see who are placed in residential care units are charged more often, or for different types of matters, than children placed in foster homes or with kin.

The anecdotal experience of our child protection and youth crime lawyers, however, suggests that children placed in residential care are charged more frequently than children in other types of out-of-home care – particularly with respect to behaviour that occurs within the units themselves.

³³ The most recent report by the Sentencing Advisory Council of Victoria shows that of the 20 most frequently sentenced offences in the Children’s Court for 2015, theft was the most common offence sentenced, accounting for 10% of all sentenced offences, followed by criminal damage which accounted for 7.5% of sentenced offences. Sentencing Advisory Council of Victoria (2016) Sentencing Children in Victoria: Data Update Report, Sentencing Advisory Council of Victoria, Melbourne, p. 21. Accessed 4 November 2016 at < <https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Sentencing%20Children%20in%20Victoria%20Data%20Update%20Report.pdf> >

³⁴ Within this 77%, some children sought our assistance for several offences involving both property and non-property related offences. Overall, 58% of the total criminal charges related to property offences.

Most commonly, we see children from residential units who have been reported to police by staff in the units for property damage or assaults associated with altercations with staff over “boundary setting”. The stories of “Jess” and “Luke” highlighted below are typical of the experience of many of our clients placed in residential care.³⁵

Jess' Story

Jess grew up exposed to domestic violence. Notifications to DHHS were made from when Jess was a few months old, and DHHS was involved at various stages through her childhood. When Jess was 10, her stepfather started to abuse her, physically and mentally. “He used to smash things over my head [...] He also used to take everything out of my room that could entertain me. I was just told to sit there. I was only allowed out for dinner. I was then told to go to bed. This happened for about a year”.

Jess was eventually placed in out-of-home care aged 13 when her school found out what was happening to her. After being moved through multiple foster homes, she was placed in residential care. She describes being in residential care as initially feeling like she was in jail. She was a “scared little kid” and “didn’t talk to anyone”. She was surprised to find cupboards were locked and she wasn’t allowed to use the phone.

In the next unit she was moved to, Jess had her first contact with drugs and was assaulted by another resident. Feeling no-one cared about her, she went into a downward spiral. She began smoking a lot of marijuana and skipping school. “I went really out of control at that unit...Life was nothing. Workers in that unit didn’t care about the kids taking drugs. They would just sit in their office”. At the next unit she was moved to, she had a scuffle with a worker and got her first criminal charge. This charge was subsequently withdrawn.

Jess moved unit again, and this time it was a positive change. Staff turnover was lower, and workers at the residence would drive her to visits with her mother. One night, however, she came home late and was grounded for a month. This meant the workers would no longer drive her to see her mother (despite contact being court-ordered), and it was too far for Jess to go on public transport. Jess was trying to improve her relationship with her mother and this upset her considerably.

During that month, Jess got into a dispute with a worker in the unit about using the phone to call her mother. The unit had a policy limiting phone calls to 10 minutes in length. At the end of the 10 minutes, Jess walked off with the cordless phone, and the worker disconnected it. Angry that she couldn’t get to see her mother or even talk with her on the phone, Jess threw the phone at the wall. The phone broke, the workers called police, and Jess was charged with criminal damage and discharging a missile. Despite offering to pay for the cost of replacing the phone, Jess now has a criminal record relating to this incident.

Often, as in the case of Jess, our clients have had no history of involvement with the criminal justice system prior to their placement in residential care. They do often have a significant history of behavioural problems that pre-date and are in many cases the reason for their placement in care. These are usually closely linked to previous trauma and/or other protective issues such as mental health problems, intellectual disability, autism-spectrum disorders or substance abuse problems. Predictably, these behavioural issues continue when they are placed in care – with the important difference that they begin to attract criminal sanctions.

Typically, a minor confrontation over, for example, a failure to obey an instruction by a staff member triggers an outburst by the young person and a display of challenging behavior. Unit staff call police and the young person is charged with assault, criminal damage or other related offences. In many instances, the attendance of the police further escalates the situation, with the young person then sometimes accruing additional charges for resisting arrest or assaulting police.

³⁵ All client names in this report have been changed and some details of cases changed to ensure de-identification.



Luke's Story

Luke is one of several siblings. He loves music and drama. His father is not involved in his life. When his mother's health deteriorated, her children were put into care. When she died shortly afterwards, Luke, aged 12, was devastated and began using alcohol and cannabis to help him cope.

Luke had received cautions and a couple of criminal charges prior to entering care, but once in residential care, the number of charges he received escalated substantially.

One charge arose when Luke was told he couldn't use the internet because of the offensive language he had used when asking to do so. Luke, then 14, was angry. He threw a cup at the wall and yelled at and threatened the care worker.

About six months later, aged 15, Luke was again charged in relation to his behaviour at the residential unit. He returned to the unit drunk and staff told him he was grounded. Luke was frustrated and threw a plate across the room and overturned a coffee table and stomped on it. Police were called and Luke was again charged with criminal damage.

When this pattern repeats itself, it quickly leads to the young person accumulating a lengthy criminal history. Even where these charges do not ultimately result in the imposition of a custodial sentence (whether because the court finds the child lacks capacity, the charges are withdrawn by the prosecutor once we put the child's history before the court or because the court finds the behaviour simply does not warrant a custodial sentence), they often result in children from residential care spending significant periods in custody on remand.

They also increase the likelihood of the child's future re-arrest and establish a precedent of interaction with the criminal justice system. "Bella's" story below is a good example of a case where an entrenched pattern of confrontations with carers, resulting in criminal charges, has developed.



Bella's Story

Bella's father is not involved in her life and her mother has serious mental health problems. She was placed in residential care aged 12 when her mother's illness deteriorated. Bella has very low IQ and has been moved around multiple schools and residential units.

By the time she was 15, Bella was regularly getting into trouble with the police and courts for her behaviour in the residential unit. On one occasion, she broke into the internal office of the unit and damaged a cabinet and some papers. She was charged with aggravated burglary and criminal damage. In the car on the way home from court, she had an argument with another child and threw a pen at the car door. She was charged with criminal damage.

Another day, after some of her possessions were stolen, she got into an argument with a carer and broke a coffee mug belonging to the unit in addition to smashing some of her own possessions. She was charged with criminal damage. The charges relating to the damage to her own possessions were later withdrawn.

Clearly more serious conduct by young people such as physical assaults or other behaviour that endangers or harms carers or other residents may require a police response. However, as can be seen from the case studies, police are also often called to manage behavior which, had it occurred in a family home, might result in a young person being grounded or otherwise disciplined, but not charged and detained.

While “criminal damage” is the most common charge we see against young people in residential care, the offences which give rise to it often fall well below the threshold for behaviour that one might consider criminal. As shown in the case studies, we have had clients who have been charged with criminal damage for matters such as throwing a pen at an air conditioning unit, breaking a coffee mug, breaking their own possessions, throwing a sink plug, spreading food around the unit, stuffing pasta into the keyhole of their bedroom door to stop a staff member spying on them and even breaking into a cupboard to get food because the cupboards in the unit were kept locked and they were hungry.

It is also clear that in many instances, had a different approach been adopted to the young person’s behaviour at the outset, the matter might never have escalated to the point of requiring police involvement. “Tamara’s” story below is a good example of how choices around the management of behavior can contribute to the unnecessary criminalisation of a child in residential care. The end result in this case, an assault on a staff member, is clearly more serious than the instances of minor property damage referenced above, but it is equally clear that this is a confrontation that could have been avoided.

Tamara’s Story

Tamara’s parents separated when she was very young, following a history of family violence and substance abuse. She originally lived with her mother and younger sister, but was eventually removed from her mother’s care following multiple instances of neglect and verbal abuse. Her mother would often disappear for prolonged periods leaving the children to fend for themselves. Tamara would wake up to find her gone and have to skip school to look after her little sister. When her school notified DHS, she was eventually placed in residential care, aged 12.

Not long after her placement in care, Tamara was charged in relation to a scuffle with workers in the unit. She had gone to sleep in her bedroom mid-morning feeling unwell. Around 11am, one of the residential care workers came into her room and woke her up to tell her lunch would be ready soon. Tamara was upset at being woken up and swore at the worker. The worker then returned with the shift manager, who told Tamara she would have to get up for lunch. Tamara refused and swore and told them to leave her alone.

Rather than leaving Tamara in her room, the manager removed her computer from her room as punishment for swearing and she and the worker then attempted to physically pull her out of the bed. When Tamara continued to resist and swear, she was informed money would be deducted from her allowance for aggressive behaviour. At this point, Tamara hit the worker across the face and stormed out into the yard, overturning a pot-plant. Police were called and she was charged with assault on the worker.

This is not to suggest that the criminalisation of children in residential care boils down to poor decision-making by individual staff, many of who have to deal with very challenging situations on a regular basis. As highlighted by the Commission for Children and Young People, the highly casualised nature of the CSO workforce as a whole and insufficient training and support for staff in dealing with young peoples’ behaviour are clearly two important systemic factors underpinning this problem.³⁶

A lack of access to proper therapeutic and psychiatric services, particularly for children in residential care in regional areas, often compounds the problem. Jon’s story below clearly highlights the way in which, in the absence of the provision of more appropriate therapeutic interventions, staff may fall back on reliance on police to deal with behavioural issues.

³⁶ CCYP, “...as a good parent would...”, above n 3, p. 14.





Jon's Story

Jon was born with multiple difficulties, including autism, an intellectual disability and ADHD. From an early age, he displayed a range of challenging behaviours. His mother on occasion had to seek help from neighbours and local police to help calm him down, but the local community understood his problems and he had never been detained or received a criminal charge.

When Jon was 11, his mother was obliged to put him in care on a temporary basis due to doctors' concerns about his escalating behaviour. Due to his special needs, he was placed in a residential care unit over an hour's drive from where his family lived and case managed from the department's regional office over 200km away. Workers in the unit were ill-equipped to deal with his behavioural problems and constantly called police when he acted out.

In one occasion during his time in residential care, his mother was dropping him off at school after a weekend visit. When she tried to leave, Jon clung on and refused to move. Teachers tried to disengage him but were unsuccessful. Despite his mother's protests that she was happy to stay with him until he calmed down, the care worker called police to have him removed. They pulled him off his mother, kicking and screaming throughout. He was charged with assaulting police and resisting arrest.

On another occasion, Jon was playing monopoly with an 18-year old staff member from the unit. When the staff member won the game, Jon became very distressed about losing and took off one of his thongs and threw it at her, hitting her in the arm. He then followed her into the next room and picked up the nearest objects, a sink plug and a whisk and threw them at the wall. Jon then went back to his bedroom.

Police were called and Jon was charged with assault on the worker, discharging a missile and criminal damage. Police sought to remand him into custody, but the magistrate refused and decided to take a case management approach, including ordering a Children's Court Clinic assessment – in particular to have Jon's medication reviewed because a doctor had said this might be contributing to his behavioural problems. Because Jon was in a rural area, the process of arranging an assessment took months. In the meantime, the residential unit continued to report him when he misbehaved and police continued to charge him.

Jon ended up receiving twenty-five charges during the few months he was in care. He was ultimately returned to his family and has not received any charges since.

There may also be a need for further guidance at a Departmental level, however. The current DHS Program Requirements for Residential Care in Victoria require the formulation of written policies and practices that outline appropriate trauma-informed intervention and support in response to challenging behaviour (including employing therapeutic and trauma-informed responses and utilising de-escalation strategies).³⁷ However, they leave the details of the policies, and how they are implemented and enforced, to the discretion of individual CSOs.

The expectation that CSOs develop their own practice guidelines in this area leads inevitably to variable and inconsistent responses. When our lawyers have queried staff about why police were called in particular situations, they have often been told that the staff member in question was just following their agency's protocol, or that police had to be called so that an insurance claim could be made for the damaged property or for Work Cover purposes.

³⁷ Department of Health and Human Services (2016) Program Requirements for Residential Care Services in Victoria, Department of Health and Human Services, Melbourne (Requirement 2.3.3), p. 19.

Towards a new approach

The broader overhaul of the residential care system currently proposed under the government's Roadmap for Reform will undoubtedly go some way towards addressing the problems outlined above.

One of the aims of the Roadmap is to reduce reliance on residential care and to transform it from a long-term placement option into a short-term "intensive trauma-informed behaviour support service". It is unclear at this stage exactly what this new model will look like in practice, but presumably it will at least in part be based on current therapeutic models of residential care, which have been found to have better outcomes for children in terms of stability, continuity of care and support.³⁸

The Roadmap also identifies the need to improve support and training for care workers, in both the foster and residential care systems. The government has set aside \$8 million to provide mandated minimum qualification training for residential care workers and has also increased staffing levels in residential care facilities.

There is no indication at this stage, however, that the Roadmap will introduce any specific training around dealing challenging behaviour by young people, or additional policy guidance concerning when it is appropriate to call on police and the criminal justice system to manage that behaviour.

Given the clear evidence that some residential facilities, at least, are still frequently relying on police in lieu of employing de-escalation and conflict resolution procedures, additional guidance is clearly needed from the Department about more therapeutic ways to manage challenging behaviour, as well as an investment in specific training for care providers with respect to this issue.

In New South Wales, such guidance has been provided through the development of a state-wide Protocol to Reduce the Criminalisation of Young People in Residential Out of Home Care (see Appendix), implemented in August 2016.

The Protocol, developed by the NSW Ombudsman's office and endorsed by the NSW Police, Family and Community Services (FACS) and the Association of Child Welfare Agencies, is based on principles of trauma-informed care and has two key objectives. The first is to reduce the frequency of police involvement by ensuring police are called by workers only in appropriate circumstances, and not in cases of minor offending. It commits care providers to a range of measures, including:

- Developing tailored behavioural support plans where young people exhibit behaviour that exceeds what is normally expected;
- Giving consideration to how routines in the unit and environmental factors (such as sufficient privacy for young people and quiet spaces) can be improved to help prevent situations from escalating;
- Ensuring comprehensive handovers at the beginning of staff shifts;
- Applying de-escalation strategies according to the young person's behavioural support plans;
- Only calling police where there is an immediate threat or danger to staff or other residents or, if not, with the authorization of senior residential service staff.
- Appointing a senior member of staff as a police liaison officer to monitor all contact between staff in the unit and police.
- Ensuring that police, when called, are properly briefed on the young person's life circumstances so that these can be factored into any decision as to whether to pursue charges.

"The adoption of a protocol... would provide young people with a response based on principles of care, rather than one which entrenches them in a cycle of involvement with the criminal justice system."

³⁸ Stockley, C. (2013) "The Role of Out-of-Home Care in Criminal Justice Outcomes", Crime and Justice, Issue 8, Victorian Council of Social Service, Melbourne, p. 41.

The second objective of the Protocol is to promote the principle that criminal charges against a young person in residential care will not be pursued if there is an alternative and appropriate means of dealing with the matter. Under the Protocol, police are encouraged when called to respond to incidents in residential units to view arrest as a last resort, and to first consider other options such as cautions, warnings and diversion or a Youth Justice Conference – or indeed whether it is necessary to take any further formal action against the young person.

“In Leicestershire (UK), a program which aimed to encourage and enable staff to manage low level behaviour without recourse to police led to a 66% reduction in the number of offences recorded against young people.”

The development of the Protocol followed a successful pilot in Western Sydney under which Legal Aid NSW, police, Juvenile Justice, FACS and a number of CSOs worked collaboratively through case conferences and the development of a local protocol to try to minimize the need for call-outs to police for children in residential facilities in that area.

Similar protocols and restorative justice programs have also been implemented in various parts of the UK with significant rates of success.

In Leicestershire, for example, a restorative justice program run in residential children’s homes from 2007-2010 and which aimed to encourage and enable staff to manage low level behaviour without recourse to police, led to a 66% reduction in the number of offences recorded against the young people resident in the project homes over that period.³⁹

In Norfolk, the number of young people in care who became involved in the criminal justice system likewise dropped by 52% two years after the implementation of a county-wide restorative practice in children’s homes which involved inter-agency collaboration and the training of staff in restorative practice. The scheme was introduced in 2009 and involved the training of over 100 staff in children’s homes. The number of young people charged with criminal offences over the next two years fell from 7.2% in 2009 to 3.4% in 2011.⁴⁰ Comparable programs and protocols have been implemented in Leeds, Surrey, Staffordshire, Gwent, Hertfordshire and Waltham Forest, London.⁴¹

The success of these projects indicates that it is possible to reduce excessive involvement of young people in residential care in the criminal justice system while at the same time protecting the safety and welfare of staff and young people living in the facilities.

The adoption of a similar Protocol in Victoria would have clear benefits for both staff and young people living in residential care. It would provide staff with a shared understanding of how to best respond to challenging behaviour by young people and a structured process for responding which distinguishes between behaviour which is merely disruptive or confrontational versus situations that are dangerous for staff or other young people. It would ensure a consistent process across the 240 residential care units in Victoria so that all young people, regardless of geography, are treated equally. Finally, it would provide children and young people with a response that is therapeutic and based on principles of care, rather than one which entrenches them in a cycle of involvement with the criminal justice system.

³⁹ Knight, V., Hine, J., Patel, K., & Wilson, K. (2011) Evaluation of the Restorative Approaches Project in Children’s Residential Homes Across Leicestershire: Final Report 2011, De Monfort University, Leicester, p. 4.

⁴⁰ Restorative Justice Council (2015) Keeping Children in Care out of Trouble – an Independent Review, London, p. 1.

⁴¹ Lord Laming (2016) In Care, Out of Trouble, Prison Reform Trust, London, p. 28. Accessed 4 November 2016 at <http://www.prisonreformtrust.org.uk/Portals/0/Documents/In%20care%20out%20of%20trouble%20summary.pdf>

Conclusion

As the academic literature and our own case studies demonstrate, the reasons why children placed in state residential care end up over-represented in the criminal justice system are complex. One clear factor currently pushing children from care into custody, however, is an over-reliance by at least some residential care facilities on call-outs to police to manage young peoples' behaviour. Cumulatively, these practices are entrenching children, often from a very young age, in a cycle of involvement with police and the courts.

The current reform agenda for residential care provides a key opportunity for the Victorian government to come up with proactive policy responses to address this problem. Based on our significant experience assisting young people in residential care, we recommend the development of an inter-agency protocol to minimise children's contact with police and the criminal justice system, as exists in other comparable jurisdictions.

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Appendix

Joint Protocol to reduce the contact of young people in residential out-of-home care with the criminal justice system (NSW)



Joint Protocol to
reduce the contact of
young people in
residential out-of-
home-care with the
criminal justice
system

2016

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- Legal Aid NSW

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1. PURPOSE

This Protocol applies to young people under 18 years of age living in residential out-of-home care¹ (OOHC) in NSW. The implementation of this Protocol will be supported by Annexure A: Procedures for OOHC service staff and Annexure B: Policing responses to incidents in residential OOHC services.

The Protocol aims to:

- i. Reduce the frequency of police involvement in responding to behaviour by young people² living in residential services, which would be better managed solely within the service.
- ii. Promote the principle that criminal charges will not be pursued against a young person if there is an alternative and appropriate means of dealing with the matter.
- iii. Promote the safety, welfare and wellbeing of young people living in residential services, by improving relationships, communication and information sharing both at a corporate level and between local police and residential services.
- iv. Facilitate a shared commitment by police and residential services to a collaborative early intervention approach.
- v. Enhance police efforts to divert young people from the criminal justice system by improving the information residential services provide police about the circumstances of the young person to inform the exercise of their discretion.
- vi. Ensure that appropriate responses are provided to young people living in residential services who are victims.

The Protocol (and procedures) emphasise the importance of flexibility and proportionality in determining the most appropriate response to a young person's behaviour on a case by case basis. The procedures for residential staff stress that contact with police should only be made when the circumstances warrant it.

While the central purpose of the Protocol is to reduce unnecessary police contact with young people, it is equally important that residential service staff respond to the needs of any victim(s). In this regard, the Protocol also emphasises the importance of ensuring residential services promptly contact police when necessary – especially when there are immediate safety risks which require a police response. When police are called in these circumstances they will attend the service and take appropriate action to secure the safety of any alleged victim(s), the involved young person and service staff.

The Protocol makes clear that serious incidents fall outside its scope. Such incidents generally warrant a sensitive and comprehensive response from a number of agencies.

¹ OOHC is one of a range of services provided to children who are in need of care and protection. This can include a variety of care arrangements other than with their parents, such as foster care, placements with relatives or kin, and residential care.

² In this Protocol 'young person' means any person under the age of 18 who resides in a residential OOHC service. Generally children in residential services are at least 12 years of age, however younger children are sometimes also placed in residential care.

1.1. Guiding Principles

This Protocol is underpinned by the following guiding principles:

- i. Young people living in residential services have a range of complex needs arising from their traumatic backgrounds of abuse and neglect.
- ii. These young people may exhibit a wide range of behaviours associated with their experiences of trauma and neglect. These behaviours are best managed using trauma-informed approaches consistent with principles of therapeutic care.³
- iii. A multiagency commitment is necessary to divert young people in residential services from unnecessary contact with the criminal justice system.
- iv. Police should be called as a last resort in response to incidents arising from challenging behaviours by young people in residential services unless it is to prevent a significant breach of the peace.⁴
- v. Services should always call police to respond to incidents involving young people where there is a safety risk. For example, services have discretion not to call police for minor offences where no one is hurt and the victim wants no police action; or for minor breaches of house rules.
- vi. Young people living in residential services have the same rights as other young people to seek assistance from police. Residential service staff will provide appropriate support and assistance to young people who choose to report an incident to police.
- vii. The arrest and detention of a young person should only be used as a last resort.

³ The NSW Therapeutic Care Steering Committee leads a joint ACWA and FACS project to establish a common understanding of the definition of best practice in therapeutic care, with the goal of developing an accepted Framework for Therapeutic Care in NSW that will be used in planning and funding. The Steering Committee includes a range of government departments, residential care services, clinical practitioners and academic experts in therapeutic care and has agreed on the following definition of Therapeutic Care: Therapeutic care for a child or young person in statutory care is a planned, evidence-based, intensive and team approach to the complex impacts of abuse, neglect and separation from families and significant others. It seeks to provide positive, safe and healing relationships and experiences to address attachment and developmental needs.

⁴ A breach of the peace occurs when harm is done or likely to be done to a person or to property when a person is present. It includes, for example, a situation where a person is in fear of being assaulted. Police are empowered to arrest a person they reasonably believe will commit or cause a breach of the peace. There must be some level of violence, threatened or actual, in order to justify an arrest for breach of the peace. [*R v Howell* (1982) QB 416] This allows police to take action to prevent serious injury or damage to property. However, a person arrested in relation to a breach of the peace will not be charged unless they commit a statutory offence.

2. BACKGROUND

It is well established that for a variety of reasons, young people living in residential services are at increased risk of coming into contact with police and other parts of the criminal justice system.⁵

In NSW, less than 3% of young people in OOHC live in residential care – about 480 young people.⁶ However, these young people have typically experienced numerous placement breakdowns and often present with multiple, complex needs. The placement of these young people in residential care aims to provide a safe and supportive environment in which to address the combined impacts of abuse, neglect and separation from family.

In 2008, the link between OOHC and contact with the criminal justice system was highlighted by the Special Commission of Inquiry into Child Protection Services in NSW, which observed that significant proportions of juvenile detainees had a history of being placed in care.⁷ In its 2011 issues paper, *The Drift from Care to Crime*,⁸ Legal Aid NSW identified a growing trend towards the criminalisation of young people living in OOHC. According to the Children's Legal Service, a large number of their 'high service user' clients have a history of being in OOHC, with a significant proportion of these having lived in residential services.

In NSW, residential care is primarily provided by accredited non-government OOHC agencies funded by the Department of Family and Community Services (FACS). Specialist Homelessness Services (SHS) also provide care and accommodation for young people with backgrounds of trauma and/or neglect. It is anticipated that this Protocol will be extended to SHS in future.

The NSW Police Force (NSWPF) has responsibilities under the *Young Offenders Act 1997* (YOA) to divert young people from the criminal justice system. The *NSWPF Youth Strategy* also promotes the use of collaborative approaches to policing young people. The NSW Police Force *Corporate Plan 2012-2016* explicitly endorses prevention and early intervention strategies for young offenders and has set a target of diverting at least 58% of young offenders from court.

⁵ Legal Aid NSW, *The Drift from Care to Crime: A Legal Aid NSW Issues Paper*, October 2011; Katherine McFarlane, *From Care to Custody: Young Women in Out-of-Home Care in the Criminal Justice System*, Current Issues in Criminal Justice, Vol 22. No. 2, November 2010, p. 345; Special Commission of Inquiry into Child Protection Services in NSW, *Report of the Special Commission of Inquiry into Child Protection Services in NSW*, 2008.

⁶ Australian Institute of Health and Welfare, *Child Protection Australia 2012-13*, Child welfare series no. 58, 2013.

⁷ Special Commission of Inquiry into Child Protection Services in NSW, *Report of the Special Commission of Inquiry into Child Protection Services in NSW*, 2008. The Commission reported that between 2003 and 2006, 28% of male and 39% of female juvenile detainees had a history of OOHC.

⁸ Legal Aid NSW, *The Drift from Care to Crime: A Legal Aid NSW Issues Paper*, October 2011.

2.1. Trauma and challenging behaviour

Many young people in OOHC have experienced ‘complex trauma’ – exposure to multiple and ongoing interpersonal trauma such as abuse, neglect or emotional or physical deprivation.⁹ The impact of past experiences of trauma often surface for young people in a range of disruptive and difficult behaviours harmful to themselves and/or others. These behaviours are often referred to as ‘challenging behaviours’. Challenging behaviours can involve risk taking, poor impulse control, resistance to boundaries (for example being absent from care without permission) and in some situations, can escalate into violent and/or criminal behaviour.¹⁰

While some challenging behaviour exhibited by young people in residential services may meet the threshold of criminal behaviour, the same behaviour occurring in family homes would likely be managed without the involvement of police. Challenging behaviours need to be managed in the residential care environment in a way that not only supports the young person who is exhibiting the behaviours but also ensures the safety of all residents and workers. Residential services have a duty to ensure the safety of their staff and the young people in their care. Police are also responsible for taking action to ensure community and individual safety.

A ‘trauma informed’ approach recognises the presence of trauma symptoms; and acknowledges the role of trauma in patterns of behaviour and aims to support young people to manage their emotions and regulate their behaviour. A key responsibility for those involved in providing care to this group of young people is to provide planned, positive and supportive strategies to assist them to work towards more positive patterns of behaviour, and where possible, to avoid more punitive approaches. Individual Behaviour Support Plans (BSPs) can be useful in identifying strategies to assist carers and young people to manage behaviour.

A trauma informed approach also seeks to protect young residents in residential services from further trauma caused by conflict with, or victimisation from, other young people living at the service. It is important that ‘client mix’ is a key consideration in the placement of young people and that the needs and views of any victim are always taken into consideration when responding to incidents at residential service.

2.2. Interagency collaboration

Young people with complex and multiple needs are likely to require the combined support of a number of different services and agencies. The parties to this Protocol share a commitment to working collaboratively on early intervention and prevention strategies which support vulnerable young people, enhance their wellbeing and assist them to develop

⁹ Toro, Dworsky and Fowler 2007; Kezelman and Stavropoulos 2012, cited in Youth Health Resource Kit, NSW Kids and Families, 2014, p.84.

¹⁰ Other examples of challenging behaviour include stress intolerance; alcohol and other substance abuse; self-harming; behaviours; social isolation and limited capacity to form relationships with peers and/or adults; sexually inappropriate behaviour; anti-social behaviours, including aggression and or violence towards people, and in some instances, criminal behaviour. (Source: *Out-of-home Care Service Model – Residential Care*, April 2007.)

positive behaviour patterns which are less likely to bring them into contact with the criminal justice system.

It is widely acknowledged that collaborative interagency approaches which facilitate integrated responses to vulnerable young people are preferable to dealing with incidents in isolation. This kind of collaborative case management should ideally lead to improved service delivery by reducing duplication and clarifying roles and responsibilities. It can also enhance the opportunity for creative solutions.¹¹ Incidents in residential services can present opportunities for collaborative problem solving and trigger revision of current strategies and/or involvement of additional partner agencies in the support for the young person.

3. ROLES AND RESPONSIBILITIES

3.1. Joint Responsibilities

While each agency has a specific role to play in implementing the Protocol, all parties endorse the Guiding Principles (above) and agree to:

- i. Act within the spirit of the Protocol when responding to incidents involving young people living in residential services.
- ii. Implement procedures for residential services and police to ensure the safe, appropriate and proportionate response to individual incidents at residential services (i.e. consistent with Annexures A and B).
- iii. Ensure systems are in place to facilitate the implementation and evaluation of the Protocol, including appropriate record keeping.
- iv. Liaise and share information with other parties to the Protocol (and where appropriate, with other prescribed bodies such as schools, health providers and other support services).
- v. Promote the safety, welfare and wellbeing of young people in accordance with the provisions of Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998*.
- vi. Develop, implement and promote the delivery of appropriate training and guidance about the Protocol and related policies.

3.2. Family and Community Services

As the government agency with the lead role for ensuring the safety, welfare and wellbeing of children and young people in NSW, FACS has an overriding interest in the promotion of interagency practices which minimise the involvement of young people in the criminal justice system. As the funding body for OOHC, FACS is responsible for promoting good practice in providing services to vulnerable young people assisted by residential services through its ongoing management of service contracts and related performance monitoring.

FACS will promote the effective implementation of the Protocol to residential services through existing governance mechanisms such as interagency meetings within each District. FACS will develop resources and work with peak bodies to encourage local implementation

¹¹ http://www.community.nsw.gov.au/kts/guidelines/case_management/case_management.htm

of these protocols as part of their annual planning, including information sessions and practice forums to promote provider requirements. In this regard, FACS will work with peak bodies and the residential OOHC sector to identify and promote examples of best practice in relation to behaviour management in individual residences and local processes between residential services and police.¹²

The Children's Guardian is responsible for the accreditation of designated agencies in accordance with the NSW Standards for Statutory Out-of-home Care.¹³ Designated agencies are required to meet the requirements of their accreditation and funding obligations outlined in the Out-of-home Care Contracted Care Program Guidelines and the Out-of-home Care Service Model: Residential Care (the Residential Care Service Model). A key feature of the Residential Care Service Model is that residential service staff need to have an understanding that the behaviour of young people often has its basis in past traumatic experiences and that this should be taken into account when responding to the behaviour to avoid inadvertently adding further trauma. It also suggests that when responding to crisis situations, residential care agencies should have clear guidelines around the involvement of the police with an understanding that attempts should be made to minimise police involvement where possible.

To support the implementation of the Protocol, FACS will review the existing behaviour management/support policy in collaboration with NSW Health, the Office of the Children's Guardian (OCG) and non-government agencies. FACS, in partnership with ACWA, is also developing a Therapeutic OOHC Framework to support agencies to embed trauma theory, child brain development and attachment theory in service delivery, aiming to improve the wellbeing and outcomes for young people in OOHC whilst also supporting carers, staff members and significant others caring for the young people (see also Annexure A).

3.3. Residential out-of-home care services

As day-to-day care givers, residential service staff are uniquely placed to know about the history, relationships and current situation of young people residing at their service. They are frequently called upon to decide whether to contact police in response to incidents and should be provided with the necessary support and guidance to make these decisions in often difficult and demanding circumstances. To effectively implement this Protocol, it is acknowledged that residential service staff require appropriate training and guidance to appropriately manage challenging behaviour. This includes training about the effective use of strategies in behaviour support plans,¹⁴ and to more easily identify situations which require a call for police assistance.

The Residential Care Service Model provides guidance to services about appropriate procedures for the management of crisis situations and advises services to have in place 'clear guidelines around the involvement of the police in response to crisis situations, with

¹² See also Section 5: Training and Identifying best practice.

¹³ The Office of the Children's Guardian will reflect the principles of this Protocol in its revised standards which are currently being reviewed.

¹⁴ Where a young person exhibits challenging behaviour that exceeds what is normally expected to be managed by the carer, a Behaviour Support Plan may be required. These are prepared by a psychologist or other skilled professional in behaviour management of young people who display challenging behaviour.

the understanding that attempts should be made to minimise police involvement, wherever possible'.¹⁵ This Protocol will assist services to meet this objective.

To implement this Protocol, residential services will nominate an appropriate senior residential staff member (e.g. service coordinator or manager) as the 'liaison officer' to regularly liaise with local police. The liaison officer is also responsible for ensuring information is provided to police following an incident involving police attendance at the service according to the *Procedures for residential OOHC services* (Annexure A).

3.4. NSW Police Force

A key aim of the Protocol is to provide practical guidance for police in implementing their existing legislative responsibilities in the context of dealing with young people in residential OOHC.

The NSW Police Force (NSWPF) recognises the benefits of early intervention and prevention to divert young people from the criminal justice system.

Each Local Area Command's Crime Management Unit (CMU) is the 'hub' for community information and plays a significant role in local crime prevention strategies. The CMU within each Local Area Command will be responsible for Protocol case management, including engagement with local residential services, information sharing and recording. In addition to the Crime Manager and Crime Coordinator, CMUs typically also include the various liaison roles within the command such as the Domestic Violence Liaison Officer (DVLO) and Youth Liaison Officer (YLO), and unsworn officers such as the Aboriginal Community Liaison Officer and Multicultural Community Liaison Officer.¹⁶ The Crime Coordinator will have responsibility for liaison with residential services within the local area command.

Police usually attend residential services in response to calls from staff members, young people or other members of the community, such as neighbours. Some behaviour, such as 'boundary testing' behaviour of young people, may reflect normal teenage behaviour and should generally be managed without police assistance where there is little risk of harm to the young person or any other person. However, where criminal or other behaviour that could lead to a breach of the peace occurs, police involvement is necessary. Frontline police will often subsequently consult with the YLO in relation to incidents they attend which involve young people. Better engagement between the CMU and residential services will allow frontline police to gain a better understanding of a young person's circumstances and ideally will lead to a more informed response.

When responding to incidents at residential services, police will consider information provided by staff members, victims and witnesses, and have regard to relevant legislation, Standard Operating Procedures, and their own judgement in applying the Protocol. The Young Offenders Act makes clear that criminal charges should not be pursued against a

¹⁵ *Out-of-home Care Service Model – Residential Care*, NSW Department of Community Services, April 2007, p.9.

¹⁶ The DVLO and YLO roles are sworn officers. A primary aspect of their role is stakeholder engagement. However, these officers do not generally attend incidents.

young person if there is an appropriate alternative for dealing with the matter.¹⁷ For appropriate offences which are not dealt with by warning or caution, police in consultation with the Specialist Youth Officer will consider whether the young person is entitled to be dealt with via a Youth Justice Conference.¹⁸

Local CMUs will ensure frontline police officers are provided with appropriate training and guidance to ensure consistent implementation of this Protocol. (Annexure B provides an outline of Police responsibilities in implementing the Protocol.)

The NSW Police Force Domestic and Family Violence SOPS advise frontline police about responding to personal and domestic violence offences in accordance with the *Crimes (Domestic and Personal) Violence Act* and other relevant legislation. The SOPS make clear that although the YOA 'does not apply to stalking, intimidation and breach AVO' offences, the YOA may be applied to other domestic violence offences.¹⁹

A statutory review of the *Crimes (Domestic and Personal) Violence Act* is currently underway and will consider the definition of 'domestic relationship'. A number of submissions to the review have argued that certain relationships – including those involving young people living in residential services – should no longer fall within the category of 'domestic relationship' unless the requisite dynamic of coercion and abuse in the relevant relationship exists. This Protocol will be amended to keep pace with the legislative review and any related legislative change.

4. GOVERNANCE

A state-wide interagency governance structure underpinned by local arrangements will be established to ensure the consistent and effective implementation of the Protocol and will provide clear pathways for resolution of any systemic issues.

4.1. State-wide Steering Committee

The implementation of the Protocol will be overseen by a steering committee – chaired by FACS – that is comprised of representatives of the following agencies:

- NSW Police Force
- Family and Community Services
- Department of Justice
- Office of the Children's Guardian
- Association of Children's Welfare Agencies
- AbSec
- Youth Action
- Legal Aid NSW
- Aboriginal Legal Service
- Residential service provider representative(s)

¹⁷ *Young Offenders Act, 1997, s.7(c).*

¹⁸ *Young Offenders Act, 1997, s.37.*

¹⁹ *Domestic and Family Violence Standard Operating Procedures, 2012, NSW Police Force, p. 31.*

The State-wide Steering Committee (SSC) from time to time will invite other agencies and experts to participate in its deliberations on discrete issues. In this regard, it is noted that the Ombudsman's office will have observer status on the committee and the Advocate for Children and Young People will provide advice and feedback to the committee in relation to the engagement of young people in relation to issues being considered by the committee.

The functions of the SSC include:

- i. Identifying the type of data residential OOHC services and police will need to systematically collect, and report on, to inform the effective implementation and evaluation of the Protocol.
- ii. Developing a communication and promotion strategy to support the implementation of the Protocol.
- iii. Ensuring that local arrangements are in place to guide the implementation of the Protocol (these should not be prescribed by the committee and wherever possible, should seek to utilise existing suitable mechanisms).
- iv. Monitoring the initial rollout of the Protocol and related procedures, and identifying the need for any other processes or related tools to be developed to support this process.
- v. Identifying and addressing any systemic issues associated with the Protocol's implementation.
- vi. Developing a strategy for identifying and promoting good practice in implementing the Protocol, including effective strategies used by services to manage challenging behaviour and households more generally.
- vii. Providing regular feedback to local police and services in relevant locations to inform the ongoing rollout of the Protocol.
- viii. Overseeing provision of training to support the Protocol's implementation, including providing specific information relevant to supporting Aboriginal young people²⁰ and young people with disability.
- ix. Developing an evaluation strategy, including identifying key benchmark data and outcome measures.

The SSC will initially establish two working groups to provide advice to the committee on priority issues associated with the initial rollout of the Protocol including data collection, training and evaluation; as well as how best to involve young people²¹ in the ongoing implementation and evaluation of the Protocol.

²⁰ The NSW Police Force *Aboriginal Strategic Direction 2012-2017*, requires police commands with significant Aboriginal populations to work with local Aboriginal agencies – including providers of residential and/or other OOHC – to prevent contact between Aboriginal young people and police and promote the diversion of Aboriginal youth from the criminal justice system through initiatives such as the Cautioning Aboriginal Young People (CAYP) protocol and the Protected Admissions Scheme (PAS). In implementing the ASD, police will have regard to the application of this Protocol in locations where Aboriginal residential OOC services exist.

²¹ This working group will provide an avenue for the Office of the Advocate for Children and Young People, CREATE Foundation and Youth Action and other stakeholders to advise the SSC about how best to engage young people in decision making about the Protocol's implementation and evaluation.

4.2. Internal agency governance

Signatory government agencies – the NSWPF and FACS – will identify suitable internal governance processes to facilitate consistent implementation of the Protocol across each agency. Residential services will also need to ensure consistent implementation of the Protocol occurs across their organisation.

Agencies will assign responsibility for implementation of the Protocol to a suitably senior officer.

4.3. Local level arrangements

Local police, local FACS representatives and frontline residential services will determine the nature and frequency of liaison necessary to meet the objectives of the Protocol. Where appropriate, existing local governance structures will be utilised.

At a local level, residential services and local area commands will agree on the practical arrangements and information required to implement the Protocol, such as:

- relevant parties e.g. 'X' Local Area Command and 'Y' Residential Service
- designated liaison officer for each party and contact details e.g. service manager and crime coordinator (or other member of the CMU)
- other local agencies/organisations (for example, Juvenile Justice) that should participate in meetings associated with the Protocol's implementation
- governance processes e.g. frequency of liaison, location of meetings, secretariat support for meetings, and local dispute resolution/escalation and processes for reporting outcomes.

Residential services vary according to governance structures, size and geographic distribution. Some of the larger service providers will have individual frontline services across a number of local area commands. Accordingly, it will be a matter for each provider to determine the best way to ensure that arrangements are in place with the corresponding local area command to ensure consistent implementation of the Protocol across its service outlets.

4.4. Dispute resolution

Open and honest communication will be maintained between parties to the Protocol. Parties should aim to resolve any disputes about procedures or actions in relation to this Protocol at the local level as soon as possible. Local level resolution includes escalation of unresolved issues to the local area commander (or region commander where relevant), district director and/or residential service chief executive officer (or equivalent).

As needed, local level disputes about how best to resolve systemic issues can be escalated to the SSC when attempts to resolve the issue locally have been unsuccessful. The SSC will not be involved in resolving concerns about the performance of individual services or police commands.

5. TRAINING AND IDENTIFICATION OF BEST PRACTICE

Initially, the relevant working group will provide advice to the SSC about the nature and delivery method of training on the implementation of the Protocol and any related subject areas.

A range of training methods will be considered within and across agencies. Training will be informed by a process which seeks to identify good practice across organisations in relation to their management of residences, behaviour management of young people, and the relationship between residences and local police. The training will also address the type of data and key outcomes measures that will be used to inform the Protocol's ongoing implementation and evaluation.

6. EVALUATION AND MONITORING

Initially, the relevant working group will provide advice to the SSC on developing a strategy for evaluating the Protocol's implementation and the necessary data collection and reporting processes to support the evaluation process.

The process for collecting data should not be onerous and should be consistent with the type of records that should already be made by police and residential services in responding to incidents. A critical component of evaluation and monitoring will involve assessing not only the contact between residential services and police, but also the systems and processes residential services have in place to monitor and guide their ongoing collaborative work with police; and how services manage challenging behaviour and incidents more generally.

7. TERM AND REVIEW OF PROTOCOL

The Protocol will be reviewed on an annual basis and a comprehensive review will be conducted every three years.

8. SIGNATORIES

The following parties agree to the terms and guiding principles of this Protocol

- NSW Police Force
- Family and Community Services
- Association of Children's Welfare Agencies
- AbSec

The following agencies support the principles of this Protocol:

- Legal Aid NSW
- Department of Justice
- Youth Action
- YFoundations
- NCOSS
- CREATE Foundation

- Office of the Children’s Guardian
- Office of the Advocate for Children and Young People
- Mental Health Commission of NSW
- Aboriginal Legal Service (NSW/ACT)
-

9. RELATED LEGISLATION AND GUIDELINES

- *Young Offenders Act 1997*
- *Children Young People (Care and Protection) Act 1998*
- NSW Office of the Children’s Guardian, *NSW Standards for Statutory Out-of-Home Care*
- NSW Police Force Youth Strategy 2013 – 2017
- Protected Admissions Scheme (Information Sheet)
- *Out-of-home Care Contracted Care Program Guidelines*
- *Out-of-home Care Service Model: Residential Care*
- The report of the NSW Therapeutic Care Steering Committee (when available)
- Charter of Victims Rights, Part 2, Division 2, *Victims Rights and Support Act 2013*
- NSW Police Force *Aboriginal Strategic Direction 2012 -2017*

10. ANNEXURES

- A. *Procedures for residential OOHC services*
- B. *Policing responses to incidents in residential OOHC services*

PROCEDURES FOR RESIDENTIAL OOH SERVICES

1. Overview

This document:

- i. Provides residential service staff with additional guidance for managing young people's behaviour consistent with principles of therapeutic care.²²
- ii. Promotes adherence to the *NSW Standards for Statutory Out Of Home Care*.²³
- iii. Reinforces the right of young people who are victims of crime to report an incident to police, and to be provided with appropriate assistance from residential service staff to do so.²⁴
- iv. Recognises the right of residential service staff to a safe workplace and to exercise informed judgement about when a call for police assistance is required.
- v. Encourages residential services to use a measured and consultative decision-making process to determine whether a call for police for assistance is necessary - except in circumstances where there are immediate safety risks requiring an expedited response.

2. Behaviour Support Plans and other support issues

Where a young person exhibits behaviour that exceeds what is normally expected, a Behaviour Support Plan (BSP) may be required. These are prepared by a psychologist or other skilled professional in the area of behaviour management. A BSP may also be appropriate where existing strategies have had little impact in addressing the behaviour or the behaviour continues to escalate. Residential services should develop a BSP tailored to the needs of each individual young person. BSPs should demonstrate a positive approach to behaviour support and address presenting behaviour in the context of the young person's overall support requirements. Intervention should be child-centred and culturally appropriate.

The nature of the relationship between residential services, neighbours and the local community can also be a factor in the frequency of police attendance at a service. A focus by services on developing positive relationships with neighbours and other community members is critical to encouraging discussion of non-urgent issues with service staff before police are contacted for assistance.

Residential services should give consideration to:

- i. The training provided to staff to:
 - manage challenging behaviour
 - identify the situations and behaviours that require police assistance
 - minimise client-initiated conflict, and
 - implement, review or refine the BSP.

²² These Procedures should be read in conjunction with the young person's current Behaviour Support Plan.

²³ The Office of the Children's Guardian will reflect the principles of the Protocol in its revised standards which are currently being reviewed.

²⁴ In responding to an incident, it will be important for residential service staff to take into account the age of the young people involved. In particular, when responding to the victim's wishes about police involvement, the victim's age and any other relevant factors such as mental health or intellectual disability should be considered.

- ii. The routines in the household and environmental factors such as the provision of quiet spaces and privacy which can help regulate behaviour.
- iii. The client mix in the household.
- iv. Household strategies promoted to support residents to manage stressful and escalating situations.
- v. Strategies to improve the relationship between the household and the neighbourhood if police are being called by neighbours to deal with concerns about the residential service.

3. Appointing a liaison officer for Police

The residential service will appoint a senior residential staff member (e.g. service coordinator or manager) to be the liaison officer for the purposes of this Protocol. The liaison officer is the main (though not necessarily the only) point of contact between the local police Crime Management Unit and the Residential Service. The liaison officer should be kept informed of all contact between the staff of the residential service and police.

The liaison officer is responsible for ensuring that regular meetings occur with local police to implement the aims of this Protocol according to the local level arrangements set out in section 4.2.

4. Before calling police

Before calling police, be clear about the purpose of the call.

Police should always be called in circumstances where a staff member believes there are immediate safety risks.

4.1 The Helpline and the Mandatory Reporter Guide (MRG)

Where there is a risk of significant harm to a child under 16 years of age, a report should be made to the Child Protection Helpline. When the staff member suspects there is risk of significant harm to a child under 16 years of age, the MRG should be applied to inform whether or not a report to the Child Protection Helpline should be made. If the MRG indicates a report should be made to FACS, contact the Child Protection Helpline on 133 627.

The MRG may recommend that the Child Protection Helpline not be contacted if the circumstances do not reach the risk of significant harm (ROSH) threshold. The MRG may recommend other actions, including that the staff member:

- talks through concerns with their supervisor or a colleague, or a person nominated by the relevant residential service
- refers the young person to another service for assistance
- documents the concerns, continues a professional relationship with the young person and monitors the situation.

Young people in residential services with a history of complex trauma may have limited ability to regulate their behaviour. As a result, service staff should implement trauma-based

responses through identifying a young person's trigger points and ways to de-escalate their behaviour.

4.2 Strategies for residential service staff

Some strategies for residential service staff to consider are outlined below:

- i. Ensure there is a comprehensive handover at the beginning of every shift. The changeover should include an outline of the events of the day (including the young person's mood, presence of conflict or tension, any incident that occurred during the day) as these may provide a context to any triggers that arise later.
- ii. When a young person starts exhibiting challenging behaviour, apply the strategies for de-escalation contained in the young person's BSP.
- iii. If the behaviour cannot be de-escalated, contact senior residential service staff (i.e. House Co-ordinator, Residential Program Manager, Head Office (business hours) or the On-Call Manager (after hours)) to discuss options, including on-call attendance at the residential service, deployment of additional staff etc. Senior residential service staff will discuss:
 - the nature and seriousness of the incident
 - any legal requirements to notify police and/or the Child Protection Helpline
 - the views of any victim about calling the police (including any age or capacity issues)
 - the current behaviour and situation of the young person and any victim
 - the age of the young person involved in the incident
 - steps already taken to de-escalate the behaviour
 - previous incidents or behaviour of a similar nature by the same young person
 - the staff member's views about calling police
 - any relationships which may have an impact on the young person's behaviour e.g. between young people involved in the incident
 - potential impact (positive and negative) on the young person if police involvement is requested and whether the situation can be managed safely without police involvement, and
 - alternative courses of action.

5. Authorisation to call police

In emergency situations residential service staff should not hesitate to call 000.

For non-emergency situations, the following guidance applies:

- i. Only senior residential service staff (i.e. House Co-ordinator, Residential Program Manager, Head Office (business hours) or the On-Call Manager (after hours)) can *authorise* seeking police assistance.
- ii. Once authorisation has been given, the relevant staff member will contact local police and provide the following information:
 - an explanation of what has occurred

- the wishes of any alleged victim
- any historical context
- any relevant information about the young people involved e.g. mental or physical health issues, intellectual disability
- the existence of any bail/AVO conditions
- what has been done so far to de-escalate the behaviour
- the strategies contained in the BSP which have already been implemented, and
- the nature of the police assistance sought.

6. After calling police (post-incident response)

6.1 Records

An incident report must be completed before the end of the staff member's shift. The incident report provides a summary of the incident(s) leading up to a request for police involvement, including what was done to de-escalate the presenting behaviour. Records should be sufficiently detailed (although not onerous) to ensure continuity of care at staff changeovers and inform agency liaison meetings, risk assessments and evaluation of the Protocol.²⁵ Records should be made in all circumstances where police assistance is requested. Ideally records will be made whenever the Protocol is utilised, including where a decision is made not to call police.

Record keeping should also have regard to any Insurance and/or Work Cover requirements.

6.2 Within two weeks of incident*

[* Two weeks is the maximum period and is indicative only. Police and senior residential service staff may agree on a different and lesser time period as appropriate.]

- i. Senior residential service staff will undertake a review of the incident with the staff member on duty at the time the incident occurred. This will allow for discussion and consideration of the options which were available throughout the course of the incident. The circumstances leading up to the incident and any previous similar incidents will be considered. Behaviour support strategies will also be reviewed.
- ii. As a result of the incident review, the BSP will be reviewed and (where appropriate) amended.
- iii. Where the care team assesses it is appropriate, a meeting with the young person will be arranged to reflect upon the incident and identify what could be done differently in future (including alternative behaviours). Where appropriate, the meeting may include local police (preferably the police officer who responded to the incident or the Youth Liaison Officer or Specialist Youth Officer). The young person may choose to have a support person present.
- iv. Where there is on-going conflict between the young person and another resident or a staff member involved in the incident, ideally all people involved in the conflict

²⁵ This is consistent with the current Standard 21, *NSW Standard for Statutory Out-of-Home Care*, which encourages services to develop processes that monitor performance and decision making procedures and identify systemic and operational weaknesses.

should attend a mediation meeting facilitated by a senior residential service staff member or external clinician.

- v. Senior residential service staff will give consideration to whether the service should engage other support services for the young person, including liaison with their school where relevant, to ensure that the young person is supported through an integrated case plan.
- vi. After discussing the above actions with the appointed liaison officer,²⁶ an appropriate staff member will update the Police and provide relevant information about the actions taken. (Police will use the information provided in exercising their discretion to determine whether and how to proceed.)

²⁶ The Protocol requires that a senior residential staff member be nominated as the liaison officer.

ANNEXURE B:

POLICING RESPONSES TO INCIDENTS IN RESIDENTIAL OOHC SERVICES

The NSW Ombudsman, in consultation with the NSW Police Force (NSWPF), has prepared this document to outline how local police will work with service providers in responding to incidents that occur in residential services.

The NSWPF has committed to providing guidance and training to frontline police to facilitate the effective implementation of the Protocol; and ensuring it has adequate processes in place to support the evaluation of the Protocol's use and impact.

This document outlines:

- Police responsibilities when responding to incidents notified by residential OOHC services.
- Factors to be considered by police when determining how to respond to incidents at residential services
- Available options for dealing with young people, including diversionary measures under the *Young Offenders Act 1997*
- Police responsibilities to take action to protect victims consistent with the *Crimes (Domestic and Personal Violence) Act 2007*, and
- Recording incidents and relevant information.

1. Responding to incidents in residential OOHC services

The appropriate and informed use of police discretion is central to the effective operation of this Protocol. Police will respond to incidents reported by residential service providers consistent with usual police practice.

Once police have attended a residential OOHC service in response to an incident, they will determine the appropriate action. Police will adopt a consultative approach with services in reaching a decision however police retain the ultimate authority to make the decision.

Police may need to take immediate action to deal with the young person involved however where immediate action is not necessary, police will consult with their local Crime Management Unit (CMU) to determine the most appropriate way to respond. All matters involving young people residing in residential services will be reported to the CMU as soon as practicable for its review.

In considering what action should be taken by attending police, the following factors will be considered:

- the seriousness of the offence
- the degree of actual or threatened violence involved and any harm caused to alleged victims
- age of any alleged victims and any capacity issues
- the wishes of any alleged victim
- the age of the involved young person, and

- any other matter the investigating officer thinks appropriate in the circumstances.²⁷

Following the initial response, and in consultation with the CMU, police should consider the following factors:

- the number and nature of any offences committed by the young person, including the number of times the young person has been dealt with under the Young Offenders Act
- information provided by the service about the young person's situation (including disorders/illnesses/medication issues) or other factors impacting on the young person's behaviour
- the young person's behaviour management plan and any proposed actions to amend it
- the views of the victim/s
- whether the young person has shown remorse, apologised or made reparations (e.g. damage has been repaired), and
- the views of staff as to the potential effect of a criminal justice intervention on the young person

An approach which first considers the appropriateness of exercising discretion to deal with a young person informally or by issuing a warning is likely to leave police with more diversionary options down the track. This is especially applicable to young people in their early or pre-teens who have already been the subject of three cautions and as a consequence are more likely to be dealt with via criminal proceedings.

Where police attending a residential service initially determine that formal action is required (e.g. under the YOA or by instituting criminal proceedings), they will consult with the relevant residential service liaison officer, and directly with any alleged victim within two weeks of the incident and prior to making a final determination about taking action. This consultation will allow police to take into account any measures which have been put in place by the service to manage the young person's behaviour and any additional information which the service may provide.

2. A stepped approach to deciding how best to respond

2.1. No further action

Police may determine, after discussing the incident with relevant residential service staff, the young person and any victim/s, that no further action is required in response to an incident.

2.2. Use of diversionary options under the Young Offenders Act

If police determine that an offence has been committed, they must identify whether it can be dealt with by one of the diversionary options provided by the *Young Offenders Act*. If the offence is covered by section 8 of the Act police, may:

- issue a warning, pursuant to Part 3

²⁷ See NSW Police Force, *Young Offenders Act Pocket Guide*.

- issue a caution, pursuant to Part 4 (including by utilising the *Protected Admissions Scheme*²⁸ where appropriate), and
- refer the matter to a specialist youth officer to determine, pursuant to Part 5, whether a youth justice conference should be held.

Police must first consider whether a warning – the least punitive sanction – is appropriate. If a warning is not appropriate, police should consider whether the young person is eligible to receive a caution and if so, follow the requirements of the Act. These include informing the young person of the nature and circumstances of the offence; their rights to obtain legal advice and have the matter dealt with by a court; and the purpose, nature and effect of the caution.²⁹ Where the young person does not initially admit to the offence, police are encouraged to make use of the *Protected Admission Scheme*, which provides a guarantee to the young person that any information they disclose in relation to the relevant offence will not be used against them in criminal proceedings.

Where the police officer considers that the young person is not entitled to a caution, the police officer must refer the matter to a specialist youth officer who will decide whether the matter should be dealt with by caution, through a Youth Justice Conference or the Children’s Court.

Police will liaise with the residential service to help ensure that the young person has access to legal advice (e.g. Legal Aid or the Aboriginal Legal Service) and/or other services. Police will ensure contact is made with the service within 14 days of the incident to discuss action taken by the service to manage the young person’s behaviour and any additional information which the service may provide.

2.3. Criminal Proceedings

Criminal proceedings are only to be pursued against a young person in the absence of appropriate alternatives.³⁰ The age³¹ and capacity³² of a young person are relevant factors for police to consider when determining whether to initiate criminal proceedings. Where a decision to initiate formal criminal proceedings is made, police will continue to liaise with the service to ensure the ongoing wellbeing of the young person, including linking them with programs and services to divert them from crime.

²⁸ The reluctance of young offenders to make admissions to an offence, which is a precondition for police giving a caution, was impeding police use of cautions under the YOA. Operating since April 2014, the PAS is designed to enable young offenders to seek advice on whether they should make admissions to an offence whilst preserving their right not to provide self-incriminating evidence.

²⁹ *Young Offenders Act 1997*, s.22 & s.39.

³⁰ It is noted that children under 10 years of age are legally incapable of committing a criminal offence. See *Children (Criminal Proceedings) Act 1987*, s.5.

³¹ The common law presumption known as ‘doli incapax’ is a legal presumption that a young person between 10 and 14 years of age is incapable of forming the necessary intent to commit a criminal offence. This is often understood to require the prosecution to prove that the child knew what they did was seriously wrong in the criminal sense.

³² The question of legal capacity (or fitness to be tried) may be raised in relation to some young people for reasons such as intellectual disability or mental health. The *Mental Health (Forensic Provisions) Act 1990*, sets out the law in relation to fitness to stand trial, which refers to the accused’s capacity to understand and participate in the court proceedings.

3. Police responsibilities to take action to protect victims consistent with the *Crimes (Domestic and Personal Violence) Act 2007*

Domestic violence law in NSW is largely governed by the *Crimes (Domestic and Personal Violence) Act 2007*. This legislation obliges police to apply for an AVO in certain circumstances.³³ In line with legislative provisions, NSWPF *Domestic and Family Violence Policy* ‘enforces a proactive victim support response and will ensure appropriate protective measures are taken to keep victims safe and prevent further violence against them, including applying for an Apprehended Violence Order (AVO)’.

The *Crimes (Domestic and Personal Violence) Act* broadly defines ‘domestic relationship’ and includes relationships between long-term residents living in the same residential services (s.5(e)), and between carers and the young people dependant on their care (s.5(f)). This broad definition was designed to protect the most vulnerable in our community – in particular to protect people with disabilities, older people and young people from abuse and violence in formal care settings.

The legislation requires police to proactively apply for AVOs in a wide range of circumstances and settings, which can include within residential services. Police must apply for AVOs for the protection of victims of violence who are under 16 years of age, including situations where young people are the alleged perpetrators of violence. The sole fact that a victim is reluctant to apply for an AVO does not override a police officer’s obligation to apply for an AVO in circumstances where the officer believes there has been violence to the victim or where a significant threat of violence exists.³⁴

The NSWPF *Domestic and Family Violence Policy* recognises that ‘domestic and family violence involves an abuse of power’.³⁵ While the relationships between young people and their carers are within the legislative definition of domestic relationship, they do not typically demonstrate the kind of power imbalance which sets domestic violence apart from other forms of personal violence.³⁶

Police attending residential services will consider all the circumstances of an incident and any history of violence between the parties before determining whether an AVO is necessary. The routine use of AVOs can further disadvantage vulnerable young people who have often been placed in care as a consequence of their own experience of trauma and abuse. The NSWPF recognises that AVOs are designed to protect victims from violence and should not be viewed as a tool for behaviour management.

Breaching an AVO can expose young people to criminal sanctions, loss of a dwelling and the possibility of incarceration – NSWPF policies seek to divert young people from this kind of

³³ *Crimes (Domestic and Personal Violence) Act 2007*, s.27 and s.49.

³⁴ *Crimes (Domestic and Personal Violence) Act 2007*, s.27(6) and s.49(6). In addition, where the victim is reluctant to apply for an AVO and the police officer believes that the victim has an intellectual disability and no guardian, this reluctance cannot be the sole reason for not applying for an AVO (s.49(6)(b) and s.27(6)(b)).

³⁵ *NSW Police Force Domestic and Family Violence Policy*, 2012, p.8.

³⁶ Legal Aid practitioners report that the majority of protection orders dealt with in the context of the Children’s Court in NSW do not demonstrate the type of power imbalance which the legislation seeks to address.

pathway into the criminal justice system. The use of AVOs may not always be the most effective or suitable method to address the behaviour of young people towards carers and other residents of residential services. In many circumstances, a collaborative interagency approach between the service and other relevant agencies may achieve better and more enduring outcomes.

Police will always focus on the protection of the victim when responding to incidents of violence.

However, there are a number of options currently available to police dealing with incidents at residential services. In some circumstances, police may determine that there is a good reason not to apply for an AVO. The *Crimes (Domestic and Personal Violence) Act* provides that where the police officer investigating the matter believes that there is good reason not to apply for an AVO, and any victim is 16 years of age or older, an application for an AVO need not be made.³⁷

In determining whether there might be good reason not to apply for an AVO against a young person in a residential service, a police officer should take into account all the circumstances of the incident, including consideration of the:

- nature of the incident, including whether there was violence or significant threats of violence to the victim
- views of the victim, including whether the victim wants an AVO in place
- age of the victim and any capacity issues, and
- nature of the relationship between the people involved in the incident, including whether the incident occurred in the context of a coercive and abusive relationship.

If a police officer decides not to apply for an AVO the *Crimes (Domestic and Personal Violence) Act* requires that they make a written record of the reason.³⁸

‘[T]here has been a misconception that the YOA does not apply to domestic violence offences,’³⁹ when in fact, the YOA may be used in relation to many domestic violence offences. ‘Domestic violence offence’ is defined in the *Crimes (Domestic and Personal Violence) Act*⁴⁰ as a ‘personal violence offence’⁴¹ where the victim and offender are, or were, in a ‘domestic relationship’. It should be noted that the *Crimes (Domestic and Personal Violence) Act* includes personal violence offences such as breaching an AVO and stalking or intimidation offences – these offences cannot be dealt with under the YOA.⁴² Young people

³⁷ *Crimes (Domestic and Personal Violence) Act 2007*, s.49(4) and s.27(4).

³⁸ *Crimes (Domestic and Personal Violence) Act 2007*, s.49(5) and s.27(5).

³⁹ *Domestic and Family Violence Standard Operating Procedures*, NSW Police Force, 2012, p.32.

⁴⁰ *Crimes (Domestic and Personal Violence) Act 2007*, s.11.

⁴¹ Personal violence offence is defined in s.4 of the *Crimes (Domestic and Personal Violence) Act 2007* to mean: ‘(a) an offence under, or mentioned in, section 19A, 24, 25, 26, 27, 28, 29, 30, 31, 33, 33A, 35, 35A, 37, 38, 39, 41, 44, 46, 47, 48, 49, 58, 59, 61, 61B, 61C, 61D, 61E, 61I, 61J, 61JA, 61K, 61L, 61M, 61N, 61O, 65A, 66A, 66B, 66C, 66D, 66EA, 80A, 80D, 86, 87, 93G, 93GA, 195, 196, 198, 199, 200, 562I (as in force before its substitution by the *Crimes Amendment (Apprehended Violence) Act 2006*) or 562ZG of the *Crimes Act 1900*, or (b) an offence under section 13 or 14 of this Act, or (c) an offence of attempting to commit an offence referred to in paragraph (a) or (b).’

⁴² *Young Offenders Act 1997*, s. 8(2)(e).

may, however, be dealt with under the YOA in relation to certain 'eligible' domestic violence offences as set out in the YOA.⁴³

4. Recording incidents and relevant information

There are concerns that some young people living in residential OoHC services attract numerous police records in relation to minor incidents and that this can impact the decisions of police when they attend an incident involving these young people. The Protocol aims to reduce the frequency of police attendance at residential services in relation to behaviour which could be safely managed within a service and this in turn, should lead to a reduction in or prevention of the number of police records held about a young person relating to minor incidents. Even where police attend a residential service, there may still be scope for police to determine that no formal action is required and no entry needs to be made against the young person's record on COPS. If the attending officers choose to make a record of the incident on COPS, the entry should record the factual events of the incident and reference any decision not to take further action based on the Protocol, such as any consultation with the OoHC residential service.

Residential services may provide police with information about a young person's history (for example relevant medical conditions, behavioural issues, and/or traumatic events) where this information will assist them to provide an appropriate response to a young person. It will be a matter for the residential service to determine the nature of any additional information that should be provided to police to inform their responses to the young person, in accordance with the principles and objects of Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998*.

If a young person moves to another residential service, the Local Area Command's Crime Coordinator will ensure the new command is promptly provided with relevant background information about the young person.

The NSWPF has committed to ensuring it has adequate processes in place to support the appropriate recording of information about its response to incidents which occur in residential OoHC services.

⁴³ The YOA does not apply to strictly indictable offences and some drug and other offences are otherwise ineligible for the application of the YOA (*Young Offenders Act s.8*).

