From Care to Custody: Young Women in Out-of-Home Care in the Criminal Justice System

Introduction

Children in out-of-home care (those children removed from their homes and placed in state care by an order of the Children's Court) are vastly over-represented in the New South Wales juvenile justice system. The *Report of the Special Commission of Inquiry into Child Protection Services in New South Wales* (Wood 2008) found that 28 percent of males and 39 percent of females in detention had a history of out-of-home care (Wood 2008:556). The much anticipated Strategic Review of the New South Wales Juvenile Justice System, released in April 2010, noted these figures and stressed that addressing the risk factors of out-of-home care and its links to the juvenile justice system was a 'sound policy platform' (Noetic Solutions 2010:88).

This is a sadly familiar refrain. While the terminology may have changed (e.g. the term 'state ward' is no longer used to refer to this group), little progress has been made to reduce the number of children in care appearing before NSW courts and filling NSW's juvenile detention centres. In 1992, the NSW Parliament's inquiry into juvenile justice heard evidence that female state wards were 'forty times more likely to be detained in custody than other girls' and were 'frequently unable to meet the bail conditions regarding an approved place of residence, by default remain(ing) in detention' (Standing Committee on Social Issues 1992:141). Appalled, the Committee noted that 'state wards are a particularly vulnerable group to involvement in the Juvenile Justice System' and urged the then Department of Community Services (DoCS)[1] and the Office of Juvenile Justice 'to continue to monitor the numbers of state wards in the Juvenile Justice System with a view to developing strategies as to how best such young people might be diverted from contact with that system' (Standing Committee on Social Issues 1992:54).

The overwhelming bulk of the evidence on juvenile offending indicates that most young people do not commit offences. With one notable exception (NSW Bureau of Crime Statistics and Research 2005 (hereafter referred to as BOCSAR)) research has established that of those that do offend, most will not proceed to commit further offences. An experience in out-of-home care is however one factor that has been associated with juvenile reoffending (BOCSAR 2007:9). The pathway from the juvenile to the adult corrections system is by no means set in stone. Yet it is highly probable that many of the female state wards referred to by the Standing Committee twenty years previously would have graduated to the adult prison system. Cross-sectional studies of adult women in NSW prisons have revealed that approximately 30 percent of inmates were removed from their families as children and placed in care (Butler and Milne 2003:25; Hastings 1997). Similar findings have been reported in other Australian (Denton 1995; Kilroy 2000) and comparable

[1] In 2009 a machinery of government change resulted in the Department of Community Services being absorbed by the Department of Human Services into a new 'super-ministry'. This article continues to use the old terminology of DoCS for clarity and consistency, and in recognition that the old name is still in common everyday use. Similarly the old terminology for the Department of Juvenile Justice has been retained, although it too has been absorbed into the same Human Services super-ministry.

international jurisdictions (Trevethan et al 2001) and have remained fairly consistent over time despite frequent legislative and departmental policy changes.

Studies have established that offenders with a history of out-of-home care have different physical and mental health outcomes compared to others involved in the criminal justice system. For instance, recent NSW research found that young people on community orders were significantly more likely to experience a raft of social disadvantage indicators than their non-care counterparts, including: having relatives who had been in prison; having experienced a physical injury requiring medical treatment; having experienced unwanted sexual experiences; reporting having no close friends; having received special education; having had treatment for substance abuse; living in unsettled accommodation; being unemployed; and being in receipt of government benefits (Kenny et al 2008:11). Adult Aboriginal prisoners removed from their families as children were found to have experienced significantly worse outcomes with regards to mental health than their non-removed Aboriginal peers (Egger and Butler 2000:4) and they were significantly more likely to have been gaoled more than five times; to have experienced child sexual assault; and to have attempted suicide.

The need for a strategic policy framework to break the nexus between out-of-home care and criminal involvement is affirmed by this article's recent examination of 111 NSW Children's Court criminal files, where over one-third (34%) of the young people appearing before the court were, or had recently been in, out-of-home care.[2] In addition to those positively identified on the court papers as being under the formal Parental Responsibility (PR) of the Minister for Community Services, another 22.5% were thought 'extremely likely' to be in care.[3] Even if one adopts the controversial practice used in the review of state wards in juvenile detention (Community Services Commission 1999:17) and discounts those matters where no official Departmental notification as to PR is recorded, this still equates to a gross over-representation rate before the court. At less than half a percent of the NSW child population (Australian Law Reform Commission and The Human Rights and Equal Opportunity Commission 1997; NSW Department of Community Services 2007), children in care are 68 times more likely to appear in the Children's Court than other children.

In this study, young women comprised 26 percent of both the care cohort and the overall sample. This is slightly higher than the proportion according to the latest available court statistics, which place the proportion of females appearing before the Children's Court at approximately 23 percent of all finalised matters (BOCSAR 2010b). Sixty percent of the female care cohort was of Aboriginal or Torres Strait Islander descent—a not unexpected figure given the over-representation of Indigenous people in both the juvenile and adult

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[2] The file sample of 111 Children's Court criminal matters comprised all substantive matters heard at Parramatta Children's Court on specific days, chosen at random, from a six month period between June and December 2009. While all matters were initially reviewed, matters such as mentions, adjournment applications, DNA-sampling applications and other technical matters were excluded due to insufficient data being available for analysis. The sample was then divided into three cohorts: those currently or recently in Out-of-Home Care (OOHC) as identified on the court papers; those deemed 'extremely likely' to be or have been in OOHC but for whom no official documentation was on file; and those who were deemed unlikely to have been in OOHC and for whom no official documentation was evident.

[3] This determination was based on identification by a Children's Court Magistrate, Department of Juvenile Justice records, lawyers' submissions and other documentation.

criminal justice systems. This is twice the rate of non-care Indigenous females in the sample.

The young women in care were aged from 11 through to 17 years of age at the time of the offence, and their alleged offences ranged from offensive language through to robbery in company; their criminal histories varied from first time offender through to those who had had multiple episodes before the court. Many had been refused bail, or had bail conditions imposed which proved too onerous to meet, resulting in them spending periods in juvenile detention on remand. They shared a common background of homelessness and abandonment, with periods in refuges and on the streets, group homes and detention centres. Most offended in the company of others, generally siblings, cousins or other residents of welfare group homes.

In almost all cases the care status of the young women was identified by a Department of Juvenile Justice (DJJ) pre-sentence report. While noting that the child was in care, the reports frequently commented that the DJJ officer had not been able to speak to a Department of Community Services (DoCS) representative, nor could they provide details of the specific DoCS office with responsibility for the child. It was also rare to have a Department of Community Services report provided to the court. In those cases where a DoCS report was furnished, the information it contained was sparse, generally comprising no more than a brief acknowledgment that the child before the court was currently in out-of-home care. In several instances this acknowledgment was provided only after the child had spent at least one night in a juvenile detention centre. Officers from DoCS attended court in person very rarely—only one of sixty-two files noted that an officer had been present in court.

The lack of a DoCS officer, either physically attending court to assist a child in care or to make representations on the child's behalf via a written report, is an indication that the Department has failed in its duty to the young people in its care. Interdepartmental agreements between Juvenile Justice and Community Services regarding young offenders in care are clear: responsibility for such children is shared by the Departments, with DoCS having ultimate authority over children in its care who also happen to be in detention (NSW Legislative Assembly (Chadwick) 1993:3554-55; NSW Legislative Council (Tebbutt) 2002:1667). The absence of a representative from DoCS is particularly noticeably if one considers the most common charge that brought a child in care to court—that of malicious damage, generally inflicted on property belonging to the care home where the young person was residing. As has been previously reported both in NSW (Carrington 1993:129; Community Services Commission 1999:33) and internationally (NACRO 2003; Taylor 2006:81), being charged for relatively minor property damage offences while in out-of-home care is not an uncommon occurrence.

In this article's sample, half of the young women positively identified as being in care were facing the court for property damage offences—all committed in foster care or against the group home or other 'specialist' facility in which they lived. Many of these homes are engaged by the state to provide professional behaviourist techniques to mitigate the child's allegedly 'challenging' behaviour or psychiatric issues. Almost half of the male care cohort had been charged with similar offences. In contrast, although malicious damage is a common offence which brings both males and females before the Children's Court (BOCSAR 2010a), none of the female non-care cohort and very few of the male non-care cohort had been charged with such an offence.

At least one of the files noted that the police had been called in order to teach the young person that such behaviour—putting several small holes in the wall of her room after an argument with a carer—was unacceptable. Of particular interest is that the use of the criminal justice system to modify the behaviour of young people in care is said to be a phenomenon only of the 'residential' care system.[4] This practice had supposedly been abandoned with the 1999 closure of the Ormond Centre, which had provided 'intensive support services for state wards and children in the care of the Director General, aged between 12 and 16 years' (Community Services Commission 1999b:1). Then Director General Carmel Niland's announcement that the 'historical legacy of congregate care which grew out of the nineteenth century orphanages, reform schools and even boarding schools' would end in NSW, was justified on the grounds that 'world experience has shown that this model of care which starts with the best intentions and the best staff can deteriorate over time to the worst model of care for troubled youth' (NSW Department of Community Services 1999). This article's research indicates that the model of care may have changed, but the practices of relying on police and the justice system in lieu of adequate behavioural management, remains. Whether the practices criticised in Ormond, where children entered care with no prior convictions but gained a criminal record within three weeks of their arrival (Community Services Commission 1999:33), are continuing today in foster care and group homes, is part of this article's ongoing investigation.

The criminal activities of young people in state care, and the almost inevitable progression to the adult corrections system, have been raised as issues of concern in the NSW Parliament for many years. Members of Parliament have highlighted individual cases which indicated that wards had been refused bail or had unnecessarily onerous bail conditions imposed upon them, such that they remained in detention for essentially welfare rather than justice-related issues. Much of the focus has been directed toward bringing the government of the day to some form of public acknowledgment of the responsibility exercised by the state for children in its care. From the parliamentarian's perspective of course, the potential political mileage generated from a government concession is a victory well worth pursuing. For its part, government has sought to minimise the damage inflicted through any admissions by quarantining the issues to 'time gone by'. Thus, when in September 1993 the Liberal Attorney General and Minister for Justice, the Hon John Hannaford, responded to allegations that wards had been placed in detention for essentially welfare matters, his concession was limited to acknowledgment that this had occurred 'in the past'. The Attorney General declared:

> [f]rom the information I have been given, I am satisfied that those issues are being properly addressed. From time to time there has been concern about particular issues but I am assured that, as a result of the discussions that have transpired, those issues are unlikely to arise again. (NSW Legislative Council (Hannaford) 1993:3244-45)

The response of successive governments to the issue of the 'drift' of wards to the criminal justice system (Community Services Commission 1999a) has trod a well-worn and familiar path, swinging between professed ignorance of the issues raised, underplaying the extent of the problem, reiteration of expressions of personal commitment or concern

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[4] Residential care is defined as a 'placement, funded by the NSW Department of Community Services (DoCS) under the Out-of-Home Care (OOHC) Program or on a fee-for-service (FFS) basis, in a property owned or rented by an agency, in which one or more children or young people are placed and which are staffed by either direct care staff employed on a rostered basis or by house parents or principal carers, who are not regarded by the agency or themselves as foster carers' (Flynn et al 2005:3).

(generally followed by undertakings that there will be further inquiry into the matter) and obvious disbelief of the charges of ministerial neglect or incompetence. The response of the Liberal Minister for Education, Virginia Chadwick, to concerns raised by the Senior Children's Magistrate Mr Rod Blackmore, illustrates the tendency of governments to initially deny allegations regarding ward involvement in the criminal justice system. Asked whether she was aware that magistrates had been 'forced to gaol' state wards convicted of minor offences 'because the Department of Community Services refuse to accept responsibility for their welfare', the Minister was quick to deny the charge:

> I mean no disrespect to a person whom I hold professionally and personally in high regard when I say quite frankly that I would be astonished if the assertions and fears expressed (by Magistrate Blackmore) have basis in fact at all... Considerable work and commitment has been undertaken by the Government on the issues of children in care and children who are young offenders. (NSW Legislative Assembly (Chadwick) 1993:3554-55)

On occasion, Ministers have attempted to deflect criticism of Government practices by blaming the subject of the question—an individual child in care. One of the most blatant examples of this practice occurred in 2002, when the Labor Premier Bob Carr described a state ward who was forced to spend the night at Dee Why police station because the Department of Community Services could not find him proper accommodation, as 'almost uncontrollable' and 'probably one of the 20 most difficult young people in the state' (NSW Legislative Assembly (Carr 2002:4944). The local newspaper for the area expressed the sentiments of many in a horrified editorial:

> The boy is a state ward and therefore a responsibility of the state. These are facts that Mr Carr, as Premier of this state, cannot avoid no matter how 'difficult' the boy may be … Mr Carr has attacked the person rather than the problem. This tactic is made all the more unsavoury because the subject in question is just 13 years old. (The Manly Daily 2002:4)

Ironically, this 13-year-old ward, one of NSW's 'most difficult young people', had not committed any offence.

Governments of both persuasions have also resorted to active misdirection. Asked to justify the transportation to a city detention centre of two 13 year old boys, who were refused bail after being charged with minor offences, 'because the Department of Community Services and the Juvenile Justice Commission in Lismore was unable to find them accommodation', Labor Community Services Minister Ron Dyer saw the question as an opportunity to flag the need to build additional detention centres in regional areas (NSW Legislative Council (Dyer) 1996:3118-19). Reminded of the youth of the two boys, Minister Dyer then added a hasty personal expression of concern: 'If bail has been refused essentially for welfare reasons, that is a matter about which I am very concerned.' Advised that one of the boys was a state ward, and so his direct Ministerial responsibility, the Minister reiterated that he was 'passionately concerned to ensure that state wards are adequately cared for' although omitting to provide any specific details on how this would be achieved (NSW Legislative Council (Dyer) 1996:3119).

Despite her government holding parents at least partially responsible for offences committed by their children (*Children (Protection and Parental Responsibility) Act 1997*

(NSW)[5], Labor Community Services Minister Faye Lo Po strenuously refuted the rather blunt suggestion that 'the Minister and / or the Department of Community Services bear some responsibility for crimes committed by state wards and former state wards, whether as juveniles or adults' (General Purposes Standing Committee 2001a). The Minister's response was emphatic: 'Crimes which are committed by young people and adults are the responsibility of the individual, regardless of whether the young person is in the care of their parents, or is a ward or ex-ward' she declared. 'The responsibility of the Minister and DoCS is to provide support to young people whilst they are in care and after they have left care'. Ignoring the issue of young people who commit crimes whilst in care and neatly shifting the focus from the Department, the Minister added that supporting careleavers as they move to independent living 'can only assist in ensuring that young people do not drift into criminal activities.'

In 2004, the Labor Community Services Minister Carmel Tebbutt neatly side-stepped concerns about departmental inaction on the 'Project formerly known as the Wards Project' (a joint Community Services–Juvenile Justice project intended to address the issue of ward over-representation in the criminal justice system), with the simple remark that 'there was always some debate about the level of overrepresentation' (NSW Legislative Council (Tebbutt) 2004:1111-12). Ignoring evidence to the contrary, the Minister implied that previous allegations of ward involvement in the justice system had over-stated the extent of the problem by including 'young people who were in the juvenile justice system who had some contact with the Department of Community Services, obviously a much larger number than the number of young people in the juvenile justice system who are in the care of the Minister and therefore in out-of-home care and under the responsibility of the Department of Community Services' (NSW Legislative Council (Tebbutt)2004:1111-12).

More recently, 'privacy', inadequate data collection and incompatible computer systems have been cited as reasons for the inability of government to address the ongoing over-representation of children in care in the criminal justice system. 'Legal issues over the exchange of client information' between government agencies (NSW Legislative Council 2005:2609) has effectively railroaded attempts at tracking young people's involvement with the criminal justice system, notwithstanding the hopes expressed a decade earlier by Attorney General Hannaford:

> 'that the problems that have occurred previously, which were caused by young people falling between the chairs of responsibility of the Office of Juvenile Justice and the Department of Community Services, will now be redressed' since 'an agreement has now been reached to overcome that problem'. (NSW Legislative Council (Hannaford) 1994:1694)

These examples serve as a reminder of the sudden shift in viewpoint that can occur when a party moves from Opposition to government. Minister Dyer's response in 1996, cited above, is a dramatic departure from statements made while he was in Opposition and calling for the Liberal Community Services Minister Longley to 'take immediate action to ensure state wards are not jailed for welfare reasons, and that his Government provides them with

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[5] The Carr Labor Government's *Children (Protection and Parental Responsibility) Act 1997* (NSW) expanded upon controversial elements of a Fahey Coalition Government Act, which essentially held a parent responsible for the criminal offences committed by a child. Courts were given extensive powers to: require parents to attend court proceedings; give undertakings to do certain things; or to act as security for the child's continued good behaviour of the child. An offence was also established whereby a parent could be held liable if, by wilful default or neglect, they had contributed to the commission of an offence by a child.

safe accommodation' (NSW Legislative Council (Dyer) 1993:1). Similarly, Minister Lo Po's denial of agency culpability for ward involvement in the criminal justice system is at odds with her attempt, seven years earlier and from the Opposition, to determine the number of state wards who were living on the streets and obtain details of government intervention programs for these children (NSW Legislative Assembly 1993:3437-38). Interestingly, Labor Minister' Tebbutt's public position also shifted from that professed just five years earlier, when she pledged government commitment for young people in care who 'represent a high-risk group in terms of poverty, homelessness, alcohol and other physical, emotional and sexual abuse' such that they 'may end up as a high-risk group within the juvenile justice system' (NSW Legislative Council (Tebbutt) 1999:784).

The impact of such position shifts are significant. Issues raised in Parliament by members of the Opposition face the risk of being viewed as shrill distractions by a Minister peevish at the expense and time required to respond to them— see for instance the comments of the NSW Legislative Council Budget Estimates Committee No 2 regarding DoCS Minister Lo Po's 'provision of less than comprehensive answers to questions on notice' pertaining to the progression of children in care to the juvenile justice system (General Purposes Standing Committee 2001b:10).

Despite its love affair with law and order, the 24 hour media cycle has ensured that scant attention has been paid to ward over-representation in crime. Coupled with inaction borne from defensive and perhaps politicised departments, the issue has remained unaddressed.

Almost 20 years ago, research establishing the over-representation of children in state care in juvenile detention centres (Carrington 1996) made national headlines. This article's research has established that this over-representation, and the specific issues affecting young people in care involved with the criminal justice system, have endured. If serious attention is not directed towards the development of effective policies that address the causes of young people's involvement with the justice system—for instance care workers' reliance on police and the courts to punish children's behavioural issues—and politicians perennial denial of the problem as 'historical abuse' only, then nothing will change, and the pathway from care to court to prison, will continue unabated.

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