Care not Custody

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

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Published by Corporate Affairs, Victoria Legal Aid

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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.

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]](#footnote-1)the 2014 Auditor-General’s *Report on Residential Care Services for Children[[2]](#footnote-2)* and the 2015 Commissioner for Children and Young People’s Report “…*As a good parent would….*”[[3]](#footnote-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]](#footnote-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 placements[[5]](#footnote-5) and in August of a $5.44 million funding package to assist Aboriginal[[6]](#footnote-6) young people in out-of-home care to remain connected to their culture and heritage.[[7]](#footnote-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 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.

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.

# 1. 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]](#footnote-8) Currently, over 8,000 children in Victoria live in out of home care.[[9]](#footnote-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]](#footnote-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]](#footnote-11) Likewise 90 of the children then in residential care – nearly one in five – were Aboriginal.[[12]](#footnote-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]](#footnote-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]](#footnote-14)

# 2. 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]](#footnote-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]](#footnote-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]](#footnote-17) This was particularly true of young Aboriginal people leaving care.[[18]](#footnote-18)

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]](#footnote-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]](#footnote-20) Studies on young people in custody in the UK and US have shown similar results. [[21]](#footnote-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]](#footnote-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.

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]](#footnote-23) particularly where the maltreatment has occurred or extended into adolescence.[[24]](#footnote-24) In the case of indigenous 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]](#footnote-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]](#footnote-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]](#footnote-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, 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]](#footnote-28)

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]](#footnote-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]](#footnote-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]](#footnote-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.

# 3. 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]](#footnote-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.

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.

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]](#footnote-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]](#footnote-34)

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.

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]](#footnote-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.

**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]](#footnote-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.

**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]](#footnote-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.

# 4. 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]](#footnote-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 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 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.

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]](#footnote-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]](#footnote-40) Comparable programs and protocols have been implemented in Leeds, Surrey, Staffordshire, Gwent, Hertfordshire and Waltham Forest, London. [[41]](#footnote-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.

# 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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