

15. Child Protection and Adult Incarceration

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Summary

15.1 This chapter discusses the relationship between the child protection system, juvenile justice and adult incarceration. Research suggests that the links between these systems is so strong that child removal into out-of-home care and juvenile detention could be considered as key drivers of adult incarceration.

15.2 While child protection and juvenile detention fall outside the scope of this Inquiry, the ALRC considers that a national review of the child protection laws and processes that affect Aboriginal and Torres Strait Islander children is warranted.

A national review of out-of-home care

Recommendation 15–1 Acknowledging the high rate of removal of Aboriginal and Torres Strait Islander children into out-of-home care and the recognised links between out-of-home care, juvenile justice and adult incarceration, the Commonwealth Government should establish a national inquiry into child protection laws and processes affecting Aboriginal and Torres Strait Islander children.

15.3 The ALRC is aware of current, and recent inquiries that may encompass a review of child protection laws and processes for Aboriginal and Torres Strait Islander children, including the Royal Commission into the Protection and Detention of Children in the Northern Territory,¹ and the 2017 New South Wales Legislative

¹ The Royal Commission made 11 separate negative findings in respect of children in out-of-home care in the Northern Territory at ch 33 of its report, 10 separate recommendations in respect of child protection oversight at ch 37 and 7 separate recommendations in respect to changing the approach to child protection in the Northern Territory at ch 39. See Commonwealth, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations* (2017) rec 33.1–33.25.

Council Inquiry into Child Protection. The Royal Commission into Institutional Responses to Child Sexual Abuse has also recently reported on out-of-home care, which may include a national response focusing on the reduction of all abuse in that setting. State and territory governments have also developed out-of-home care strategies.² However, the ALRC notes that there has not been a national review of the laws and processes operating within the care and protection systems of the various states and territories. The Australian Human Rights Commission expressed support for such a review suggesting ‘it is timely for a national review of the laws and processes operating within the care and protection system of states and territories’.³

15.4 In terms of this Inquiry, it is the view of the ALRC that the incarceration rate of adult Aboriginal and Torres Strait Islander peoples cannot be fully and satisfactorily addressed without a national review of Aboriginal and Torres Strait Islander children in child protection, and the state and territory laws that see such children placed into out-of-home care.

Crossover out-of-home care into detention

15.5 The Terms of Reference for this Inquiry do not include an investigation into child protection, child removal or the juvenile justice system. However, given the link between out-of-home care, juvenile justice and adult incarceration, a link that has been shown in many studies and reports, the ALRC considers that the issue warrants further attention.⁴ In consultations, the ALRC was told many times of the normalisation of incarceration in many Aboriginal families, and in particular those where children have been removed, or have been in juvenile detention.

15.6 Juvenile detention is a key driver of adult incarceration. A 2005 study by Chen et al. into the likelihood of juveniles re-offending as adults, found that 90% of Aboriginal and Torres Strait Islander youths who appeared in a children’s court went on to appear in an adult court within eight years—with 36% of these receiving a prison sentence later in life.⁵

15.7 The Royal Commission into Aboriginal Deaths in Custody reported in 1991 that almost half of the 99 Aboriginal and Torres Strait Islander people whose deaths were reviewed by that Commission had previously been removed from their parents.⁶ The 1997 *Bringing them Home* Report further highlighted the relationship between out-of-

2 Including the ACT Community Services Directorate Strategy July 2015–June 2020, NSW FACS—Shaping a Better Child Protection System Discussion Paper October 2017.

3 Australian Human Rights Commission, *Submission 43*.

4 Australian Institute of Health and Welfare, *Young People in Child Protection and under Youth Justice Supervision 2014–15* (2016) 7–17; Australian Institute of Health and Welfare, *Children and Young People at Risk of Social Exclusion: Links Between Homelessness, Child Protection and Juvenile Justice* (2012) 25–9; Pia Salmelainen, ‘Child Neglect: Its Causes and Its Role in Delinquency’ (Contemporary Issues in Crime and Justice No 33, NSW Bureau of Crime Statistics and Research, December 1996) 3–4; Don Weatherburn and Bronwyn Lind, *Social and Economic Stress, Child Neglect and Juvenile Delinquency* (1997).

5 Senate Select Committee on Regional and Remote Indigenous Communities, Parliament of Australia, *Indigenous Australians, Incarceration and the Criminal Justice System—Discussion Paper* (2010) 32.

6 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) 52.

home care and the increased likelihood of coming into contact with the criminal justice system.⁷ Having a criminal record—particularly as a juvenile or as a young adult—in turn increases the likelihood of unemployment, poverty and substance abuse, which again increases the likelihood of future incarceration.⁸

15.8 The seriousness of the issue of the removal of Aboriginal and Torres Strait Islander children into out-of-home care was highlighted in the Australia Human Rights Commission Social Justice and Native Title Report 2015:

The overrepresentation of Aboriginal and Torres Strait Islander children and young people in the child protection system is one of the most pressing human rights challenges facing Australia today.⁹

15.9 Young people placed in out-of-home care are 16 times more likely than the equivalent general population to be under youth justice supervision in the same year.¹⁰ In its 2010 Report, *Family Violence—A National Legal Response*, the ALRC noted:

There is a strong correlation between juvenile participation in crime and rates of reported neglect or abuse ... Research indicates that an offending child or young person is likely to have a history of abuse or neglect, and to have been in out-of-home care. In Victoria, a study of young people sentenced to imprisonment by the children's court over a period of eight months in 2001 found that 88% had been subject to an average of 4.6 notifications to the child protection agency. Almost one-third had been the subject of six or more notifications, and 86% had been in out-of-home care. Over half of these had had five or more care placements.¹¹

15.10 This risk increases when the child is Aboriginal or Torres Strait Islander.¹² In 2014–15, Aboriginal and Torres Strait Islander children represented 90% of all children on care and protection orders.¹³ At June 2015, Aboriginal and Torres Strait Islander children were placed into out-of-home care at 9.5 times the rate of non-Aboriginal children.¹⁴

15.11 In joint advice correspondence to the ALRC from Community Legal Centres NSW, Women's Legal Services NSW, Redfern Legal Centre, Kingsford Legal Centre, the Public Interest Advocacy Centre, Community Legal Centres NSW and the National

7 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) 164.

8 Don Weatherburn, *Arresting Incarceration—Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014) 86–7.

9 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2015* (Australian Human Rights Commission, 2015) 138.

10 Australian Institute of Health and Welfare, *Young People in Child Protection and under Youth Justice Supervision 2014–15* (2016).

11 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) [20.154].

12 Catia G Malvaso, Paul H Delfabbro and Andrew Day, 'The Child Protection and Juvenile Justice Nexus in Australia: A Longitudinal Examination of the Relationship between Maltreatment and Offending' (2017) 64 *Child Abuse & Neglect* 32; Australian Institute of Health and Welfare, above n 7, 8.

13 Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016—Report* (2016) 4.92.

14 Australian Institute of Health and Welfare, above n 7, 54.

Association of Community Legal Centres,¹⁵ attention was drawn to the links between out-of-home care, the criminal justice system and homelessness relying upon a 2012 study of the Australian Institute of Health and Wellbeing.¹⁶

15.12 The correspondence suggested that a review undertaken by Katherine McFarlane of some 111 NSW Children's Court criminal files¹⁷ found that 34% of young people appearing before the court were, or had been, in out-of-home care, and that children in care were 68 times more likely to appear in the Children's Court than other children. McFarlane also identified that many of these children and young people were charged with assault against staff or damage of their out-of-home care property. Further, 26% of the care cohort and overall sample was female and 60% of the female care cohort was Aboriginal or Torres Strait Islander females.¹⁸

15.13 Judge Johnstone, President of the Children's Court of New South Wales, noted that children who had been placed into out-of-home care were over-represented in the criminal justice system.¹⁹ Similarly, Mission Australia expressed alarm at the growing rate of Aboriginal and Torres Strait Islander children in out-of-home care that is now almost ten times that of other children, and the over-representation of these children in the juvenile justice system.²⁰ Mission Australia submitted that 'concerted efforts are required to address both of these concerning statistics through systems'.²¹ Community Legal Centres New South Wales suggested:

There is a clear connection between care and protection interventions of children and future offending, with complex social disadvantage and vulnerability impeding the ability of a significant majority of the young people accessing the Children's Court to meaningfully participate and engage in decisions that will have a long-lasting impact on their life course.²²

15.14 The Royal Commission into the Protection and Detention of Children in the Northern Territory also noted the crossover of children in out-of-home care into detention finding that the NT Government agency, 'Territory Families', and its

15 Advice correspondence to the ALRC from Community Legal Centres NSW, Women's Legal Services NSW, Redfern Legal Centre, Kingsford Legal Centre, the Public Interest Advocacy Centre, Community Legal Centres NSW and the National Association of Community Legal Centres provided to the Australian Law Reform Commission dated 24 April 2017.

16 Australian Institute of Health and Welfare, *Children and Young People at Risk of Social Exclusion: Links Between Homelessness, Child Protection and Juvenile Justice* (2012) vii.

17 McFarlane examined 111 Children's Court criminal matter files heard at Parramatta Children's Court on specific days, chosen at random, from a six-month period between June and December 2009.

18 Katherine McFarlane, 'From Care to Custody: Young Women in out-of-Home Care in the Criminal Justice System' (2010) 22(2) *Current Issues in Criminal Justice* 346.

19 Judge Peter Johnstone, 'Cross-Over Kids—The Drift of Children From the Child Protection System Into the Criminal Justice System' (Speech, Noah's on the Beach, Newcastle, 5 August 2016) 22.

20 Mission Australia, *Submission* 53.

21 *Ibid.*

22 Community Legal Centres NSW (CLCNSW) and the CLCNSW Aboriginal Advisory Group, *Submission* 95.

predecessors, had failed to provide the support required for some children in out-of-home care to avoid pathways likely to lead them into the youth justice system.²³

Removal

15.15 There has been significant criticism of the various state and territory child protection systems where there has been a nationwide increase in the number of Aboriginal and Torres Strait Islander children in out-of-home care. In their 2017 report, the Australian Institute of Health and Welfare found that, as at 30 June 2016, there were:

16,846 Aboriginal and Torres Strait Islander children in out-of-home care—a rate of 56.6 per 1,000 children. Across jurisdictions, rates ranged from 27.3 per 1,000 in Tasmania to 87.4 per 1,000 in Victoria ... Nationally, the rate of Indigenous children in out-of-home care was 10 times the rate for non-Indigenous children. In all jurisdictions, the rate of Indigenous children in out-of-home care was higher than that for non-Indigenous children, with rate ratios ranging from 3.4 in Tasmania to 17.5 in Western Australia.²⁴

15.16 The Australian Institute of Family Studies, commenting on these statistics, highlighted the stark disparity between Aboriginal and Torres Strait Islander child removal as compared to non-Indigenous child removal noting:

Australian Bureau of Statistics (ABS) population projection data for 30 June 2016 indicates that Aboriginal and Torres Strait Islander children would comprise 5.5% of all children aged 0-17 years in Australia; yet in 2015-16 they constituted 36.2% of all children placed in out-of-home care.²⁵

15.17 Grandmothers Against Removal, a national Aboriginal Elders group of grandmothers affected by the removal of Aboriginal children, stated:

The number of Aboriginal children in “out of home care,” is higher than ever and rising rapidly. Far more children are being taken today than during the Stolen Generations of the 20th Century. The numbers have increased 400 per cent since Kevin Rudd’s “apology” for the crimes of the past. The proportion of children being placed with their Aboriginal family is also steadily declining. Many end up in the juvenile detention system and Aboriginal children are 28 times more likely to be in prison than non-Aboriginal children.²⁶

15.18 Further, Adelaide Titterton suggests that the numbers of children being removed from their families and put into out-of-home care could create a new Stolen Generation of Aboriginal children:

[T]he disproportionately high levels of Indigenous children currently in out-of-home care calls into question what options Indigenous families have available to them to avoid their children being ‘taken away’. Many have suggested that the over-

23 Commonwealth, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Report* (2017) 3B.

24 Australian Institute of Health and Welfare, *Child Protection Australia 2015–16* (2017) 52.

25 Australian Institute of Health and Welfare, *Children in Care: Resource Sheet— October 2017* (2017).

26 Grandmothers Against Removals Sydney, *Home* <<http://stopstolengenerations.com.au/>>.

representation of Indigenous children in out-of-home care risks creating another 'Stolen Generation'.²⁷

15.19 Natalie Lewis raised significant alarm around the growth of Aboriginal and Torres Strait Islander children entering into out-of-home care suggesting:

If we continue to do what we are currently doing in child protection, the numbers of Aboriginal and Torres Strait Islander children in out-of-home care (OOHC) will at least treble in the next 20 years. The outlook is even worse than the data predicted last year. The rates of over-representation of Aboriginal and Torres Strait Islander children continue to increase across jurisdictions. Not only are we not closing the gap, we are failing to arrest the widening of the gap.²⁸

15.20 Central Australian Aboriginal Congress submitted to this Inquiry that the Northern Territory Government needed to devise a comprehensive strategy to address out-of-home care for Aboriginal children in the Northern Territory.²⁹ Australians for Native Title and Reconciliation Queensland Inc also supported the proposal for a national review of out-of-home care stating:

Given the links between OOHC and incarceration AQ fully supports the Discussion Paper *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*' proposal that a national review of the laws and processes operating within the care and protection systems of the various states and territories be undertaken as a further essential response to address the over-representation of Aboriginal and Torres Strait Islander people within both the institutions of welfare and of justice.³⁰

15.21 The Taskforce 1000 investigation, *Always was, always will be Koori children: a systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria*, raised significant concerns about the care and protection system operating in Victoria. The Victorian Commissioner for Aboriginal Children and Young People, Andrew Jackomos, found that, while children were taken from home for their own safety, many went on to suffer physical, mental and cultural neglect across multiple agencies, including child protection, police, education, and health.³¹

15.22 Commenting at the time of the release of the Taskforce 1000 final report Commissioner Jackomos stated:

Many children did not know they were Aboriginal, were split from siblings, and left for years in residential care – isolated from family, culture and country – when they might have been in the loving care of grandparents or other relatives... We had child

27 Adelaide Titterton, 'Indigenous Access to Family Law and Caring for Indigenous Children' 40(1) *UNSW Law Journal* 146, 152.

28 Secretariat of National Aboriginal and Islander Child Care (SNAICC), University of Melbourne, Griffith University and Save the Children *Family Matters Report* (2017) 3.

29 Central Australian Aboriginal Congress, *Submission 37*.

30 Australians for Native Title and Reconciliation Queensland Inc, *Submission 49*.

31 Commission for Children and Young People, *Always Was, Always Will Be Koori Children—Investigation into the Circumstances of Aboriginal Children and Young People in out-of-Home Care in Victoria* (2016) 11–2.

protection officials tell us they had been unable to trace a child's Aboriginal family for years when we were able to track them down on Facebook within minutes.³²

15.23 The report found of 980 Aboriginal children and young people in out-of-home-care more than 86 per cent were case managed by a non-Indigenous agency, 60 per cent placed with a non-Indigenous carer, 42 per cent away from their extended family, and more than 40 per cent separated from brothers and sisters.³³ The report further found that, in Victoria, Aboriginal children are 12.9 times more likely than non-Indigenous children to be placed into out-of-home care and represent 17.6% of all children in state care despite Aboriginal peoples comprising less than 1% of the Victorian population.³⁴

Costs

15.24 The Australian Human Rights Commission Social Justice and Native Title Report 2015 found the costs of providing child protection and out-of-home care services are increasing. Nationally, approximately \$3.3 billion was spent in 2013–14, representing a \$77.8 million increase from the previous year and a total increase of \$543.4 million since 2009–10.³⁵

15.25 The Report set out the extremely high cost of child protection services across the various states and territories for the period 2013–2014 as being:

Cost per notification:

NSW: \$513, VIC: \$309, QLD: \$996, WA: \$1,178, SA: \$687, TAS: \$358,
ACT: NA, NT: \$549

Cost per notification investigated:

NSW: \$1,111, VIC: \$1,626, QLD: \$2,322, WA: \$1,843, SA: \$1,395,
TAS: \$2,080, ACT: \$1,461, NT: \$1,204

Cost per child commencing protective intervention who is on an order:

NSW: \$24,262, VIC: NA, QLD: \$16,328, WA: \$8,793, SA: \$9,108,
TAS: \$4,433, ACT: \$7,530, NT: \$17,087

Cost per placement night:

NSW: \$123, VIC: \$152, QLD: \$143, WA: \$174, SA: \$170, TAS: \$122,
ACT: \$146, NT: \$279.³⁶

32 Commissioner for Children and Young People, *Victoria's Child Protection Has Failed Aboriginal Children, a Landmark Report Has Found* Media release <<https://ccyp.vic.gov.au/news/always-was-always-will-be-koori-children-report/>>.

33 Commission for Children and Young People, *Always Was, Always Will Be Koori Children—Investigation into the Circumstances of Aboriginal Children and Young People in out-of-Home Care in Victoria* (2016) 10.

34 Ibid.

35 Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 6, 149.

36 Ibid.

15.26 The ALRC considers that a national review of the out-of-home care system would be able to address the question of whether a different approach modelled on Justice Reinvestment approaches could make more effective use of the resources that are currently being expended on the child removal.