

**Submission
No 72**

**INQUIRY INTO HIGH LEVEL OF FIRST NATIONS
PEOPLE IN CUSTODY AND OVERSIGHT AND REVIEW OF
DEATHS IN CUSTODY**

Organisation: Kath McFarlane Consulting

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Executive Summary

This submission addresses particular aspects of the Terms of Reference of the NSW Parliament's Legislative Council Select Committee *Inquiry into the high level of First Nations people in custody and oversight and review of deaths in custody*, namely:

- the unacceptably high level of First Nations people in custody in New South Wales;
- the oversight functions performed by various State bodies in relation to reviewing all deaths in custody, any overlaps in the functions and the funding of those bodies.

In considering the above issues the Committee is urged to keep at the centre of its deliberations the impact of the **Out-Of-Home-Care (OOHC)**¹ system on the many First Nations (hereafter referred to as 'Indigenous') people in the NSW criminal justice system. As the Australian Law Reform Commission has concluded, 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'.²

The intersection between the OOHC and criminal justice systems is of particular relevance to this Committee's inquiry, for of the 99 people whose deaths in State custody were investigated by the 1991 *Royal Commission into Aboriginal Deaths in Custody*, 43 had 'experienced childhood separation from their natural families through intervention by State authorities, missions or other institutions'.³ As noted by former Labor Commonwealth Minister for Aboriginal Affairs, Robert Tickner, 'If that doesn't tell the story, nothing else will.'⁴

¹ OOHC describes alternate or substitute care arrangements made for children who are unable to live with their own families, for whatever reason, either temporarily or until the child is 18 years of age.

² The Australian Law Reform Commission (ALRC) (2018) *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* at 485.

³ The *Royal Commission into Aboriginal Deaths in Custody* (RCIADIC) (1991) *National Report*. <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/index.html> at 1.2.17.

⁴ Tickner, recorded in Katona and Mackinolty (1994), cited in Windschuttle, K. (2009) *The Fabrication of Aboriginal History: The stolen generations 1881-2008 Vol 3*. Macleay Press. Australia

The authors would be pleased to discuss any aspect of this submission with the Committee. This submission is informed not only by academic research on the care-crime intersection and professional experience as advisors to the government and various non-government agencies on the OOHC system, sentencing, the Children's Court and prisons, but by our experience as family members of children in the OOHC and criminal justice systems.

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The link between OOHC and involvement in the criminal justice system

There have been more than 25 highly critical inquiries into child protection and OOHC systems undertaken in Australia since 2014.⁵ Many of these inquiries have recommended reforms to reduce the ‘care-criminalisation’⁶ process by which children in OOHC enter the justice system at a younger age, are more deeply enmeshed and continue offending for longer than children with no care experience.^{7 8 9}

The Committee’s attention is directed to recent examinations of this issue undertaken by the NSW Legal Aid Commission¹⁰; the Victorian Legal Aid Commission¹¹; the Victorian Sentencing Advisory Council¹²; the South Australian Guardian for Children and Young People¹³; the Queensland Family and Child Commission¹⁴; the Royal Commission into the Protection and Detention of Children in the Northern Territory¹⁵; the Australian Law Reform Commission¹⁶; and the 2019 NSW Independent *Family is Culture* Review.¹⁷

⁵ Australian Human Rights Commission (AHRC) (2018) ‘Children’s Rights Report 2017’, Australian Human Rights Commission, Canberra, ACT, Australia. p17. <https://www.humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2017>

⁶ McFarlane, K. (2015). *Care-criminalisation: The involvement of children in out of home care in the NSW criminal justice system*. (Doctor of Philosophy), University of New South Wales, Sydney. Retrieved from <https://researchoutput.csu.edu.au/ws/portalfiles/portal/9319354> .

⁷ Richards, K., & Renshaw, L. (2013) *Bail and remand for young people in Australia: A national research project*. Australian Institute of Criminology Research and Public Policy Series Report No: 125. Canberra Australia

⁸ Colvin, McFarlane, Gerard & McGrath (2018) ‘We Don’t do Measure and Quotes’: How Agency Responses Criminalise and Endanger the Safety of Children Missing in Care in New South Wales, Australia’ *The Howard Journal of Crime and Justice*, Vol 57, Issue 2, June 2018 Pages 231-249 <https://doi.org/10.1111/hojo.12253>

⁹ Baidawi, S. and Sheehan, R. (2019). ‘Cross-over kids’: Effective responses to children and young people in the youth justice and statutory Child Protection systems. Report to the Criminology Research Advisory Council. Canberra: Australian Institute of Criminology.

¹⁰ Gough, E. (2011) *The Drift from Care to Crime: a Legal Aid NSW issues paper*. NSW Legal Aid Commission. Sydney, NSW, Australia; Maher, D. (2012) NSW Legal Aid Commission. ‘Criminalisation of Children in Care’ in *Reducing Indigenous Youth Incarceration: Exploring Justice Reinvestment and Police Partnerships to break the cycle* conference, 26-27 September 2012. Sydney, NSW, Australia.

¹¹ Victoria Legal Aid (2016) *Care not Custody: A new approach to keep kids in residential care out of the criminal justice system*. Victoria Legal Aid. Melbourne, VIC, Australia; Victoria Legal Aid. (2018) *Media Release: Action needed to stop children in state care entering youth justice*. 26 September 2018. Victoria Legal Aid. Melbourne, VIC, Australia.

¹² Sentencing Advisory Council (2019) *Crossover Kids: Vulnerable Children in the Youth Justice System*. Sentencing Advisory Council. Melbourne, VIC, Australia;

¹³ Office of the South Australian Guardian for Children and Young People (2019) *A PERFECT STORM? Dual status children and young people in South Australia’s child protection and youth justice systems - Report 1*. South Australian Government: Adelaide, South Australia.

¹⁴ The State of Queensland (2018) (Queensland Family and Child Commission) *The criminalisation of children living in out-of-home care in Queensland*. Brisbane. Australia

¹⁵ Royal Commission into the Protection and Detention of Children in the Northern Territory (2017) *Final Report*.

¹⁶ The Australian Law Reform Commission (ALRC) (2018) *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples Recommendation 15.1*: ‘Acknowledging... 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’

<https://www.alrc.gov.au/news-media/media-release/pathways-justice-indigenous-incarceration>

¹⁷ Davis, M. (2019) *Independent Review of Aboriginal Children in OOHC: Family Is Culture*, Sydney, NSW pxvi

The harm done to generations of children by Australia's child welfare practices was acknowledged in the Australian Parliament's succession of national apologies: the 2008 *Apology to the Stolen Generations*¹⁸, the 2009 *Apology to the Forgotten Australians*¹⁹ and the 2018 *National Apology to Victims and Survivors of Institutional Child Abuse*²⁰ following the McClellan Royal Commission into Institutional Responses to Child Sexual Abuse.²¹

For many people, adverse childhood experiences in OOHC can have a long-lasting and devastating impact. For example, the series of inquiries conducted into OOHC by the Commonwealth's Community Affairs References Committee^{22 23 24 25 26} found that for many people, placement in OOHC exposed them to institutional abuse and neglect, criminalisation, the imposition of a criminal record, increased chances of poverty, unemployment and substance abuse, and increased likelihood of incarceration.

The link between OOHC and adult incarceration

The Committee's attention is also drawn to the series of inquiries that have identified the relationship between OOHC and the increased likelihood of involvement with the criminal justice system in adulthood.^{27 28 29 30} As the latest Justice Health and Forensic Mental Health

¹⁸ Apology to Australia's Indigenous Peoples (Commonwealth Parliamentary Debates 13 February 2008).

¹⁹ Apology to the Forgotten Australians (Commonwealth Parliamentary Debates, 16 November 2009).

²⁰ National Apology to Victims and Survivors of Institutional Child Sexual Abuse (22nd October 2018). <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fvotes%2F24afa1ea-4171-4a9b-a806-ad388220b4b0%2F0010;query=Id%3A%22chamber%2Fvotes%2F24afa1ea-4171-4a9b-a806-ad388220b4b0%2F0000%22>

²¹ Commonwealth of Australia Royal Commission into Institutional Responses to Child Sexual Abuse (2017) *Final Report: Vol 12 Contemporary Out-Of-Home-Care*.

²² Commonwealth of Australia. Senate Community Affairs References Committee (2004) *Forgotten Australian: A report on Australians who experienced institutional or out-of-home care as children*. Canberra, ACT.

²³ Commonwealth of Australia. Senate Community Affairs References Committee (2005) *Protecting Vulnerable Children: A national challenge: Second Report on the inquiry into children in institutional or out-of-home care*. Canberra, ACT.

²⁴ Commonwealth of Australia. Senate Community Affairs References Committee (2009) *Lost Innocents and Forgotten Australian Revisited: report on progress with the implementation of the recommendations of the Lost Innocents and Forgotten Australian Reports*. Canberra, ACT.

²⁵ Commonwealth of Australia. Senate Community Affairs References Committee (2012) *Commonwealth Contribution to Former Forced Adoption Policies and Practices* Canberra, ACT, Australia

²⁶ Commonwealth of Australia. Senate Community Affairs References Committee (2015) *Inquiry into Out of Home Care* (2015). Canberra, ACT.

²⁷ The Australian Law Reform Commission and Human Rights and Equal Opportunity Commission (1997). *Seen and Heard: Priority for Children in the Legal Process: Report of the National Inquiry into Children and the Legal Process*, Report No 84. Sydney Australia.

²⁸ NSW Government. Women in Prison Task Force. Report: *Women in Prison* (1985). Sydney, NSW.

²⁹ NSW Government. NSW Parliament. Legislative Council Standing Committee on Law and Justice. *Crime Prevention through Social Support: Second Report* (2000);

³⁰ NSW Government. NSW Parliament. Legislative Council Select Committee Inquiry on the Increase in Prisoner Population (2001).

Network Patient Health Survey Report³¹ found, approximately 14% of NSW prisoners were placed into care before the age of 16 years, with significantly more women (23.9%) than men having this background.³²

The transgenerational nature of the care-to prison pipeline has been identified by people with lived experience of the child welfare and criminal justice systems:^{33 34 35}

‘Too often, a multi-generational, vicious cycle is well established...Women were in care as children...They were imprisoned in youth prisons...They progressed to adult prisons...Whilst in prison, their children were taken into care...These children have subsequently been criminalised’.³⁶

The Network Survey has confirmed this transgenerational pattern: 14% of respondents to the Survey said their parents had been placed in care themselves before the age of 16 years, and 18% of prisoners’ children have experience of the OOH system.³⁷ As the Senate Community Affairs References Committee (2004) *Inquiry Australians who experienced institutional or out-of-home care as children*³⁸ has commented:

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

³¹ The authors of this submission drafted the OOH questions which were adopted into the CorrectionsHealth 2001 *Inmate Health Survey* (as it was then known) and were the ‘childhood care advisors’ to the report <https://www.justicehealth.nsw.gov.au/publications/inmate-health-survey-2001.pdf>. We are currently working on a project analysing the Network Patient Health Survey results in relation to the OOH experience.

³² The Justice Health and Forensic Mental Health Network. (2017) *Network Patient Health Survey Report- Aboriginal People’s Health Report 2015*. Malabar (AUST): JH&FMHN.

³³ Flat Out (2015). Submission to the *Royal Commission into Family Violence*, Kensington: Flat Out Inc.

³⁴ Women in Prison Advocacy Network (2012). *The Long Road to Freedom: the Report, Women affected by domestic violence and the criminal justice system*. Sydney: WIPAN.

³⁵ Domestic Violence Research Group (1994). *The Women Behind the Walls*. Brisbane: Domestic Violence Research Group.

³⁶ Kilroy, D. (2016). ‘Women in Prison in Australia. Paper presented at the *Current Issues in Sentencing Conference* Canberra, 6-7 February 2016.p6

³⁷ The Justice Health and Forensic Mental Health Network. (2017) *Network Patient Health Survey Report- Aboriginal People’s Health Report 2015*. Malabar (AUST): JH&FMHN.

³⁸ The Commonwealth of Australia. Senate Community Affairs References Committee (2004) *Forgotten Australians: A report on Australians who experienced institutional or out-of-home care as children*. Canberra, ACT. pg149-150

Indigenous people in particular have long borne the impact of transgenerational removal and trauma^{39 40} and now are living the consequences of inadequate and criminalising contemporary child welfare policies and practices.^{41 42} Offending by Indigenous people has increasingly been recognised as stemming from intergenerational and socioeconomic disadvantage, exacerbated by Australia's history of dispossession, colonisation and the forced removal of children from their communities.^{43 44} Limitations of the criminal justice system itself, such as poor cultural competence, racism and structural inequality, and the role these factors play in alienating Indigenous people while instilling in them a distrust of the legal system, have also been identified as risk factors leading to Indigenous people's over-representation in the criminal justice system.^{45 46 47} The practical consequences of the intergenerational effects of involvement with the criminal justice system has been recognised 'as one of the risk factors for offending by Aboriginal people'.⁴⁸

Australian research has also identified the long-term impacts of forced childhood removal for Aboriginal people. For example, the 1997 Human Rights and Equal Opportunity Commission's *Bringing Them Home* report viewed childhood removal as a significant cause of delinquency, 'both in distinctive horror and its capacity to breakdown resilience and render a victim perpetually vulnerable'.⁴⁹ Citing the Australian Bureau of Statistics, HREOC

³⁹ Commonwealth of Australia, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) 52.

⁴⁰ 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.

<http://www.aph.gov.au/binaries/house/committee/atsia/sentencing/hearings/28%20january%202011.pdf>

⁴¹ Commonwealth of Australia. House of Representatives. Standing Committee on Aboriginal and Torres Strait Islander Affairs. (2011) Inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system 'Doing Time - Time for Doing: Indigenous youth in the criminal justice system'.

https://www.aph.gov.au/parliamentary_business/committees/House_of_Representatives_Committees?url=atsia/sentencing/report/chapter2.htm

⁴² Davis, M (2019) *Independent Review of Aboriginal Children in OOHC: Family Is Culture*, Sydney, NSW

⁴³ The Human Rights and Equal Opportunity Commission (1997) *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families*. (The Wilson Inquiry). Australian Government Publishing Service. Sydney, NSW Australia.

⁴⁴ NSW Ombudsman (2011). *Addressing Aboriginal disadvantage: the need to do things differently*. NSW Ombudsman. Sydney, NSW, Australia

⁴⁵ The Law Council of Australia. (2018) *The Justice Project: Final Report Aboriginal and Torres Strait Islander People*. Canberra, ACT, Australia.

⁴⁶ Lawrie R. *Speak out speak strong: Researching the needs of Aboriginal women in custody*. Aust Indig Law Report. 2003; 8:81-4 - over 50% of the Indigenous women reported they were members of the Stolen Generations.

⁴⁷ Sullivan, E., Kendall, S., Chang, S., Baldry, E., Zeki, R., Gilles, M., Wilson, M., Butler, T., Levy, M., Wayland, S., Cullen, P., Jones, J., and Sherwood, J. (2019) 'Aboriginal mothers in prison in Australia: a study of social, emotional and physical wellbeing' *Australian and New Zealand Journal of Public Health*.

⁴⁸ The Parliament of the Commonwealth of Australia (2011). House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs *Doing Time - Time for Doing: Indigenous youth in the criminal justice system*. Australian Government Publishing Service. Canberra, ACT, Australia. p42.

⁴⁹ The Human Rights and Equal Opportunity Commission (1997) *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families*. (The Wilson Inquiry). Australian Government Publishing Service. Sydney, NSW Australia at 11-114.

noted that forcibly removed people were twice as likely to have been arrested more than once in the past five years and that one in five removed people had had this experience. Indigenous people removed from their families have also been found to have almost double the imprisonment rate of people who were not removed.⁵⁰ Contemporary research has confirmed that compared to other Indigenous people, the Stolen Generations and their descendants have higher rates of involvement in the criminal justice system, whether measured by arrest, charges or incarceration.⁵¹

Poor physical and mental health among those with OOHC experience

International research has identified that people with care-experience have worse health and mortality outcomes than others. For example, the UK Office of National Statistics Longitudinal Study comprising data relating to over 350,000 people, identified that people with care experience had worse health than the general population up to 30 years later.⁵²

They were also more likely to have a higher mortality rate than people who had never been removed from their families⁵³ regardless of the choice of comparison group, type of care, or age. In other words, care-experienced people had a higher mortality rate when compared to either the whole population or to disadvantaged populations; and regardless of whether they had spent time in residential or non-residential care. This difference held regardless of the age of the groups at time of death.

There is some evidence that people with care-experience in prison are particularly impacted by poor health and face an increased risk of self-harm, and of dying in custody. In England for example, young adults who have been in OOHC are disproportionately represented in deaths in custody.⁵⁴ In Scotland, people in prison who grew up in care not only have significantly different offending rates, but different patterns of drug and alcohol use, poorer

⁵⁰ Submission 80, p.2 (Corrections Health Service) cited on p173 of the Community Affairs References Committee *Protecting vulnerable children: A national challenge Second report on the inquiry into children in institutional or out-of-home care* March 2005. Noting the HREOC *Bringing Them Home* report which identified that Indigenous children were removed for welfare reasons which in most jurisdictions were not subject to legal review, NSW Corrections Health (now the Justice Health and Forensic Mental Health Network) has previously expressed concern at the fact that 82% of the removed Indigenous prisoners were removed before the age of 10 years, suggesting that juvenile justice proceedings were not a primary reason for children to be placed in care.

⁵¹ Australian Institute of Health and Welfare (2018) *Aboriginal and Torres Strait Islander Stolen Generations and descendants: numbers, demographic characteristics and selected outcomes*. Cat. no. IHW 195. Canberra: AIHW.

⁵² Murray, E., Lacey, R., Maughan, B., Sacker, A. (2020) 'Non-parental care in childhood and health up to 30 years later: ONS Longitudinal Study 1971–2011' *European Journal of Public Health*, 1–7 doi:10.1093/eurpub/ckaa113

⁵³ Murray, E., Lacey, R., Maughan, B., Sacker, A. (2020) 'Association of childhood out-of-home care status with all-cause mortality up to 42-years later: Office of National Statistics Longitudinal Study' *BMC Public Health* (2020) 20:735 <https://doi.org/10.1186/s12889-020-08867-3>

⁵⁴ Coles, D., and Carmouche, A. (2015) *Stolen Lives and Missed Opportunities: The deaths of young adults and children in prison*. INQUEST / Transition to Adulthood Alliance. London England.

mental health, and a greater likelihood of pre and post-custodial homelessness⁵⁵ - all factors which are likely to contribute to an increased risk of poor health and possibly to an increased risk of death in custody.

The international findings are significant, for Australian research has also identified differences in the physical and mental health outcomes of people who have been removed from their families. For example, compared to other Indigenous people, the Stolen Generations and their descendants have significantly worse health and mental health outcomes.⁵⁶

Indigenous adults in prison who were removed from their families as children are more likely to have been jailed on multiple occasions. Importantly for the Committee's deliberations in relation to deaths in custody, they have also been found to experience significantly worse outcomes with regard to mental health and suicide history.⁵⁷ As the 1991 *Royal Commission into Aboriginal Deaths in Custody* found, almost half of the people whose deaths were examined had 'experienced childhood separation from their natural families through intervention by State authorities, missions or other institutions'.⁵⁸

Lack of data collection re OOHC

The Committee's attention is drawn to the recommendations of previous NSW parliamentary Committees and inquiries and in particular, the often-repeated need for people in OOHC and those with care-experience to be regarded as a distinct group in terms of data collection, policy development and research, especially as regards their 'cross-over' into the criminal justice system.⁵⁹

⁵⁵ Carnie, J., and Broderick, R. (2012) Prisoners who have been in Care as 'Looked After Children' *13th Survey Bulletin*. Scottish Prison Service Strategy Unit. Scotland.

⁵⁶ Australian Institute of Health and Welfare (2019) *Children living in households with members of the Stolen Generations*. Cat.no.IHW 214. Canberra: AIHW.

⁵⁷ Egger, S., and Butler, T. (2000) 'The long-term factors associated with removal from parents amongst Indigenous prisoners in NSW' *Australian and New Zealand Journal of Public Health*. Vol 24, No 4.

⁵⁸ The *Royal Commission into Aboriginal Deaths in Custody* (RCIADIC) (1991) *National Report*. <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/index.html> at 1.2.17.

⁵⁹ See for example: NSW Parliament. Standing Committee on Law and Justice (2000) *Crime Prevention Through Social Support: Second Report* Sydney, NSW, Australia. p86: Recommendation that research should be conducted into the over-representation and fast-tracking of State wards in juvenile justice into the criminal justice system, homelessness, social exclusion and prostitution; NSW Parliament. Select Committee on the Inquiry into the Increase in the Prison Population (2001) *Interim Report on Women*. Sydney, NSW, Australia. Recommendation 1: research should be conducted into the offending propensity; inter-generational offending and over-representation of State wards in the adult prison system; NSW Parliament. Standing Committee on Social Issues (2002). *Interim report on child protection services*. Sydney, NSW, Australia; NSW Parliament. Select Committee on Juvenile Offenders (2005) *Report on the Inquiry into Juvenile Offenders*. Sydney, NSW, Australia; New South Wales Parliament. Joint Committee on Children and Young People. (2009) *Children and Young People Aged 9-14 Years in NSW: The Missing Middle*. Sydney, NSW, Australia.

These previous inquiries were presented with a plethora of evidence that the accelerated pathways from OOHC to the criminal justice system requires programs, crime-prevention resources and recidivism tools that identify or provide for care as a distinct criminogenic risk factor or as a measure of vulnerability.⁶⁰ Despite this, little progress has been made. Importantly, bodies investigating deaths in custody do not routinely consider childhood removal from family, or placement in OOHC, as a factor, notwithstanding the international and national evidence relating to care-experience outlined earlier in this submission.

Moreover, other agencies for whom an understanding of OOHC status would provide much-needed insight into the lives of those with whom they commonly deal, have not undertaken this research. Police Forces do not record OOHC status at the time of arrest, and justice divisions have not conducted research or implemented crime prevention programs that specifically target the OOHC population and/or those who through age have become emancipated from the care system ('care experienced').

The Committee's attention is drawn to the fact that agencies have failed to comply with previous NSW Parliamentary Committee's recommendations that research be conducted into prisoners' experience of OOHC. For example, in 2001, the NSW Parliament's *Select Committee on the Increase in Prisoner Population* recommended that:

'the Department of Corrective Services undertake a research project to focus on the needs of former State wards⁶¹ and care leavers in the prison system. The research project should identify the numbers of former State wards and care leavers in the prison system.'⁶²

CSNSW policies state that families are 'an important source of support for inmates while in prison and a motivating force to desist from reoffending'.⁶³ Yet there is little practical evidence of the translation of this philosophical approach in practice. For example, while the NSW Corrective Services' *Family Matters Strategy 2018-2021* ('the Strategy')⁶⁴ sets out a

⁶⁰ McFarlane, K. (2017) 'Improving data collection to better support children in out-of-home-care at risk of offending, *Child Family Community Australia* <https://aifs.gov.au/cfca/2017/10/18/improving-data-collection-better-support-children-out-home-care-risk-offending>

⁶¹ 'State wards' was then the terminology in use. It equates to 'careleaver', 'care-experienced' or OOHC, as is more commonly used today.

⁶² NSW Parliament, *Select Committee on the Increase in Prisoner Population* (2001) Recommendation 1: at pxviii. See too p25-26

⁶³ NSW Corrective Services Draft *Family Strategy* (2018).

⁶⁴ It is premised on the idea that pro-social, supportive and supported family connections can assist prisoners to lead law-abiding lives in custody, and after release. It notes that almost half of the prison population is a parent/carer of at least one child, recognises that some prisoners may have limited or no pro-social or family support and seeks to prioritise a research agenda that examines the: Factors leading to children of incarcerated parents being disproportionately represented in prisons; Impact on children of offender resettlement into family

number of research priorities focused on families of prisoners and commits to 'examin(ing) further the impact and incidence of out of home care placement on inmates and their children'⁶⁵ the authors are unaware of any specific initiatives, data collection, or procedural/policy changes that CSNSW has undertaken or commissioned in response to this issue.⁶⁶

The apparent lack of agency interest in the issues affecting prisoners with OOHC experience is particularly concerning given successive governments' stated commitment to reducing recidivism and the factors that lead to offending behaviour. In 1989, the *Human Rights Commission (Burdekin Inquiry)* reported:

What is of deep concern is the connection between those children who are brought in because they are in need of care and protection in the traditional sense and who commit offences. In 1981 a departmental report found that a great majority of those children were likely to offend more than once. **In that time there was a 160% higher probability that children who had been committed to the care of the department would reoffend than those who had not.**⁶⁷

It could be assumed that this statistic would engender some interest amongst corrections and youth justice departments. It has not. There remain no specific programs or plans targeting the OOHC cohort in prison, notwithstanding the international research which has identified that people with OOHC experience have different needs and risks compared to non-OOHC prisoners and research that has established that a history of being raised outside the family unit is a key predictor of anti-social behaviour across someone's lifespan.⁶⁸

Despite an increasing recognition that the accelerated pathways from care to the criminal justice system requires further investigation, research and action therefore, there remains a

settings; Community attitudes to resettling inmates into the community; and Effectiveness of mentoring and other support mechanisms on desistance for offenders with no or limited pro-social network support.

⁶⁵ State of New South Wales. Department of Justice. (2018) *Family Matters Strategy (2018-2021)* <https://www.correctiveservices.justice.nsw.gov.au/Documents/families-strategy.pdf> at p13

⁶⁶ Dr McFarlane reviewed the draft *Strategy* at the request of CSNSW, and recommended that greater attention be paid to three separate but connected cohorts: prisoners with direct childhood experience of OOHC; prisoners with familial/intergenerational experience of OOHC; and prisoners whose own child/ren have experience of OOHC. In 2018 she was invited to present to the CSNSW Family & Community Committee on the importance to the correctional system of identifying and understanding both the OOHC background of prisoners, and the consequences of children of incarcerated parents' OOHC experience. At the conclusion of the presentation she was informed that NSWCS was not intending to take any further action regarding the OOHC cohort until the results of the authors' pre-existing, unfunded research project examining the OOHC experience through NSWCS-held data, was complete.

⁶⁷ The Human Rights Commission. *Report of the National Inquiry into Youth Homelessness (The Burdekin Inquiry)* (1989) see Chapter 10 'Children in the care of the State' at 10.16 p112

⁶⁸ Jaffee, Moffitt, Caspi and Taylor (2003) *Child Development*, 74(1), 109-126

lack of programs, crime-prevention resources and recidivism tools that identify or provide for care as a distinct criminogenic risk factor or as a measure of vulnerability.⁶⁹

This Inquiry presents an opportunity for the Committee to recommend that the government agencies and departments:

- collect information on the OOHC status of people involved in the criminal justice system, from the issuing of a caution to incarceration in correctional facilities;
- conduct research to aid in better understanding the needs of the cohort; and
- tailor appropriately designed and effective programs to strengthen family and community ties in custody and to reduce recidivism.

It is vitally important that programs are not launched without understanding the specific factors impacting on people with OOHC-experience and their families. While generic programs may work, there is also a high risk of iatrogenic outcomes and, without a baseline understanding, the ability to comprehend why programs either succeed or fail, is limited.⁷⁰

The collection of information on OOHC status could also be required at key entry points that could identify opportunities to understand how vulnerable children in need become offenders. For example, while the Australian Government has focused attention on child protection and OOHC policy through the *National Framework for Protecting Australia's Children (2009–2020)*⁷¹ and the *National Standards for Out of Home Care*⁷¹ to 'deliver consistency and drive improvements in the quality of care' provided to children in OOHC, there is scope for greater analysis of the intersection between OOHC and crime.

Collection of OOHC status, in turn, would allow for strategies and programs to be put in place to break the care-crime nexus. Accurate and wide-sweeping demographic data is important in order to determine the criminogenic risks posed to children by OOHC systems designed to protect and provide for them. For example, the collection and collation of jurisdictional custodial data would permit national analysis that would, with the input of the Australian Bureau of Statistics and the Australian Institute of Criminology, inform national standards, policies and programs.

Data collection should also include information regarding those involved in the OOHC and child protection system in order to inform program development and policy, to alert

⁶⁹ McFarlane, K. (2017) 'Improving data collection to better support children in out-of-home-care at risk of offending, *Child Family Community Australia* <https://aifs.gov.au/cfca/2017/10/18/improving-data-collection-better-support-children-out-home-care-risk-offending>

⁷⁰ McCord, J. (2003) 'Cures That Harm: Unanticipated Outcomes of Crime Prevention Programs' in *The Annals of the American Academy of Political and Social Sciences* 587(1); 16-30.

⁷¹ Department of Families, Housing, Community Services and Indigenous Affairs. (2011). *National Standards for Out-of-home Care: A Priority Project under the National Framework for Protecting Australia's Children 2009 – 2020*.

authorities to their over-representation, and to understand their particular needs in custody.

Of crucial importance is the collection and analysis of information relating to OOHC status and care history in understanding the factors that are associated with, and may contribute to an increased risk that an individual may die in custody.

Comprehending the factors that lead to children in OOHC and care-experienced adults becoming involved in the justice system will assist agencies to adapt their practices to respond to people's needs. A better understanding of their experiences of arrest, bail and sentencing will assist to identify effective programs, build community support, reduce waste and inefficiencies and ensure children's and communities' safety.

Recommendation 1:

That government agencies and departments:

- collect information on the OOHC status of people involved in the criminal justice system prisoners – from cautions through to incarceration in correctional facilities;
- conduct research to aid in better understanding the needs of the OOHC and care-experienced cohorts, and
- tailor appropriately designed and effective programs to strengthen family and community ties in custody and to reduce recidivism.

Recommendation 2:

- That legislation be drafted to establish a Deaths in Custody Register.
- That an agency be responsible for creating and maintaining the Register, and be charged with reporting to the Parliament every year;
- That the Register to include all deaths in custody back at least as far as the 1991 Royal Commission into Aboriginal Deaths in Custody;
- That the Register include the following fields:
 - Name;
 - Date of Birth;
 - Place of birth;
 - Nationality;
 - Prior child welfare care status
 - Indigenous status;
 - Age of entry to OOHC;
 - Type of care;

- Type of care order;
 - Age of exit from OOHC;
 - Nature of exit from OOHC (ageing out, reunification, adoption, transfer to guardianship order etc);
 - Location of death;
 - Age at death;
 - Coroner's report and case number; and
 - Manner in which the body was disposed of.
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- That all agencies tasked with examining deaths in custody (Coroner, NSW Corrections, JusticeHealth etc) be required to pay special consideration to the deceased's status as an Indigenous person, or a person formerly in the care of the state or associated agency as a child; and to ascertain how their care status may have contributed to the death.