From ‘at risk’ to ‘a risk’: The criminalisation of young people with cognitive disability in residential care

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Abstract

There is a growing body of research in Australia and internationally focused on ‘care-criminalisation’: the criminal justice system involvement of young people in out-of-home care. Residential care – a model of out-of-home care where groups of children and young people live with paid staff – has been identified as a specific site of criminalisation for those who live there, in particular young people with cognitive disability and complex support needs. This raises significant human rights concerns and the need for greater systemic scrutiny. This article aims to make a contribution by focusing specifically on the institutional arrangements and characterisations that criminalise young people with cognitive disability in residential care through interrogating the official administrative records of two young people with cognitive disability who spent time in residential care and had contact with the criminal justice system as teenagers. Analysing case studies compiled from these records illustrates the ways that criminal justice intervention becomes justified and normalised for young people with cognitive disability in residential care. We critique the ways that institutional mechanisms and narratives serve to construct, coerce and constrain young people with cognitive disability in residential care. The specific forms of surveillance and control they are subjected to mean that their designation of ‘at risk’ almost routinely transmutes to ‘a risk’ to others, to themselves and to property and in the process their vulnerability and need for care and protection becomes instead a mechanism of criminalisation. Often disability becomes erased or at least overshadowed in administrative records, with care-specific and disability-related behaviour reinscribed as offending behaviour. Particularly stark in this analysis is the institutional and interpersonal violence that accompanies such criminalisation and the pervasive nature of this violence in the lives of young people with cognitive disability in residential care settings: violence they are subjected to by those responsible for their care and safety and...
violence as their response to the regulation of their circumstances – against property and staff and towards themselves.

**Keywords**
Cognitive disability, criminalisation, residential care, Australia

**Introduction**
Research internationally has established the association between involvement in the out-of-home care and criminal justice systems. Residential care settings have been identified as specific sites of criminalisation for the children and young people who live in them, many of whom come from backgrounds of great disadvantage and experience complex support needs including cognitive disability (Didi et al., 2018; Gerard et al., 2018; McFarlane, 2017). This study builds on past research that has taken a systemic analytic lens to the care-criminalisation dynamic. Rather than centring on individual risk factors or behaviour, the complex interaction between individual factors relating to impairment, abuse and trauma with systemic issues of disadvantage, discrimination and criminalisation is the critical focal point. It seeks to make a contribution by interrogating case studies compiled from a linked administrative dataset of formerly incarcerated people with cognitive disability who spent time in residential care as teenagers – ‘Natalie’ and ‘Jack’ – to better understand the institutional arrangements and characterisations that criminalise young people with cognitive disability in residential care. Key themes are identified around the specific policies, practices and processes that serve to justify and normalise criminal justice intervention for this group of vulnerable young people.

**Care-criminalisation research**
In Australia as in other countries, the majority of children and young people in out-of-home care do not have contact with the youth justice system; however, a disproportionate number of young people in the youth justice system have a history of out-of-home care (Australian Institute of Health and Welfare (AIHW), 2018b). Currently, each Australian jurisdiction has its own legislation relating to the care and protection of children and young people who are considered unable to live with their birth families, with 55,300 children and young people (10.0 per 1000) in temporary or permanent out-of-home care in Australia in 2017–2018 (AIHW, 2018a); 19,795 of those children and young people are living in New South Wales (NSW), and over a third of them are Aboriginal and/or Torres Strait Islander (AIHW, 2018a), despite Indigenous people making up only 3% of the Australian population (Australian Bureau of Statistics, 2017). The majority of children in out-of-home care live in kinship care arrangements with extended family (38%), while 6% who cannot be accommodated in family-based arrangements live in residential care settings (AIHW, 2018a: 49). Residential care settings usually accommodate a number of children and young people who are cared for by rostered staff. Children and young people in residential care are older on average than those in home-based care; 85% of children in residential care or family group homes are aged 10 and over, with a median age of 14 (AIHW, 2018a: 51). Children living in residential care have been shown to have poorer developmental outcomes than those living in home-based care (i.e. in a family setting with a carer) (AIHW, 2018a: 59; Cashmore, 2011). A lack of available disaggregated data means it is difficult to observe the
experiences of specific sub-groups of children and young people in out-of-home care, including those who are Aboriginal and Torres Strait Islander, girls and young women, or those with cognitive disability, mental health disorders and complex support needs, that is, those experiencing multiple and compounding disabilities and disadvantages.

Research internationally has established the association between child protection and criminal justice involvement (Fitzpatrick & Williams, 2017; Gerard et al., 2018; McFarlane, 2017, 2010; Shaw, 2017; Stanley, 2017; Staines, 2016). Children and young people who are removed from their families into out-of-home care are more likely to have contact with youth justice agencies than those who are known to child protection services but remain at home (Shaw, 2017), indicating that beyond the known risk factors for involvement in both the child protection and criminal justice systems, there are specific dynamics or impacts associated with out-of-home care settings. Research has identified residential care facilities as specific sites of criminalisation for those children and young people who live in them (Cashmore, 2011; Gerard et al., 2018), many of whom come from backgrounds of great disadvantage and experience complex support needs (Baidawi & Sheehan, 2019; Didi et al., 2018; Gerard et al., 2018; McFarlane, 2017). For certain groups, the association between involvement in child protection and criminal justice systems is particularly strong, including for Aboriginal children and young people in Australia (White & Gooda, 2017) and for girls and young women (McFarlane, 2010). As with the paucity of accurate diagnosis and data on the prevalence of intellectual or cognitive disability among children and young people in out-of-home care, prevalence research in youth justice systems are limited, but that which is available suggest very high rates of over-representation in both (AIHW, 2018b).

The overlap between children and young people in contact with both the care and protection and criminal justice systems is not a new phenomenon. In Australia in the 19th century, young people were commonly imprisoned for poverty and neglect, and in the 20th century, children were charged with neglect as a means to remove them into state care (Cunneen et al., 2015). This latter practice was part of an assemblage of laws, policies and practices that enabled the forcible removal of tens of thousands of Aboriginal and Torres Strait Islander children from their families, many of whom subsequently had sustained contact with the criminal justice system after such a charge and babies and toddlers ended up with criminal records (Australian Human Rights Commission, 1997).

Recent research has engaged more deeply with the specific mechanisms through which children and young people in out-of-home care are criminalised, in particular those in residential care settings. ‘Care-criminalisation’ is a term invoked to describe the processes in residential care settings by which staff without sufficient training or skills routinely call police to manage the behaviour of the children and young people in their care, leading to those young people being commonly charged in relation to situations and minor matters that ought not to have involved police (McFarlane, 2017). As noted above, many children and young people in residential care come from backgrounds of significant disadvantage, abuse and trauma. They are a group that have been found to progress quickly and inexorably into the criminal justice system when their peers do not, often for breach of bail conditions arising from over-scrutiny and policing of residential care homes as well as a lack of alternative diversionary or accommodation options (Richards & Renshaw, 2013; Victoria Legal Aid, 2017, in McFarlane, 2017). Studies on care-criminalisation in Australia have included investigation of the disproportionately high rate of Children’s Court appearances for children in out-of-home care compared to children not in care (McFarlane, 2017) and qualitative research with police officers, residential care service providers, lawyers and youth justice workers about their perceptions of the link between residential care and contact with the criminal justice system (Gerard et al., 2018).
This study builds on past research that has taken a systemic analytic lens to the care-criminalisation dynamic. Rather than a focus on individual risk factors or behaviour, it is the complex interaction between individual factors relating to impairment, abuse and trauma with systemic issues of disadvantage, discrimination and criminalisation that distinguishes this more critical approach. This is especially pertinent when looking at young people with cognitive disability, as prior research highlights the way that criminal justice ‘management’ becomes the default institutional response to people with cognitive disability and complex support needs (Baldry and Dowse, 2013), in particular Aboriginal and Torres Strait Islander people (Baldry et al., 2015). We bring a complementary methodology to previous research by drawing on linked administrative data to look in depth at the institutional pathways and experiences of two individuals with cognitive disability who have been in residential care and whose case notes and trajectories can be interrogated to build greater and more nuanced understanding of care-criminalisation.

Aims and method

This article focuses on individuals who have been accommodated in a model of out-of-home care that research has identified as a specific site of criminalisation (residential care) for a group over-represented in the criminal justice system (people with cognitive disability). It is informed by research that locates this over-representation as driven by systemic factors (Baldry et al., 2013, 2015; Steele, 2020), including earlier quantitative cohort analysis that found that having been in out-of-home care is associated with earlier and more regular police contact and greater likelihood of being incarcerated as a young person and adult (Baldry et al., 2013). Our analysis seeks to illuminate the interactions and dynamics shaping the specific institutional arrangements and characterisations of two young people with cognitive disability in residential care that contribute to this criminalisation. We draw on case studies compiled from a linked administrative dataset containing information from child protection, police, disability, human services and criminal justice agencies in NSW, the Australian jurisdiction with the greatest number of children and young people in out-of-home care and the criminal justice system. These institutional case studies are of real individuals with cognitive disability who had been in residential care and had contact with police and justice agencies, compiled from deidentified quantitative and qualitative administrative data recorded by multiple government agencies. Focusing on two specific case studies in detail allows for in-depth analysis of the processes and practices that criminalise at individual, organisational and systemic levels.

The Mental Health and Cognitive Disability in the Criminal Justice System (MHDCD) Databank is a longitudinal linked dataset containing administrative information from human service and criminal justice agencies for a cohort of 2731 persons who have been in prison in NSW and whose diagnoses of mental and cognitive disability are known (Baldry et al., 2012, 2013, 2015). Ethics approval was obtained from all relevant ethics bodies, including from the University of New South Wales Human Research Ethics Committee. Men make up 89% of the cohort and women 11%. A quarter of the total cohort identified as Aboriginal or Torres Strait Islander persons. The MHDCD Databank researchers collected and linked data relating to these individuals from NSW Police, Corrections, Justice Health, Courts, Juvenile Justice, Legal Aid, Disability, Housing, Health and Child Protection on each individual in the cohort from as far back as each agency’s electronic records allowed (generally from around the mid-1980s) up to the date of data extraction between 2008 and 2012. Each individual in the cohort was matched in each agency and all matches
for each person for that agency were added to the dataset as an agency-specific subset. Once linked
and merged, individual identifying details were removed from the data. This enables deidentified
data to be extracted and analysed for research purposes, subject to strict ethics protocols to protect
the privacy of those in the cohort. It allows for the development of innovative deidentified life-
course pathway case study narratives by examining all interactions each individual had with
criminal justice and human services agencies including services or interventions such as police
incidents, health events and hospital attendance, court appearances and custodial episodes (Baldry
et al., 2012, 2013, 2015).

These case studies from the MHDCD Databank enable in-depth insights into the trajectories and
treatment of real individuals who have been in residential care as young people and who have expe-
rienced incarceration. It complements earlier quantitative analysis that highlighted that 12% of the
MHDCD cohort had been in ‘out-of-home-care’ as a child (in contrast to 1% of the general population
in NSW); 80% of those who had been in out-of-home-care had a cognitive disability and overall, the
out-of-home-care group had earlier police contact, twice as many police contacts, twice as many
custodial episodes and were three times as likely to have been incarcerated as a young person (Baldry
et al., 2012). Looking at two case studies from that cohort in depth is a means to interrogate and
illustrate the ways that institutional arrangements and narratives are applied to specific individuals.
While the thematic analysis in this article relates to the pathways and experiences of two individuals, it
also allows for further development of understanding around the criminalisation of young people with
cognitive disability in residential care building on existing qualitative and quantitative studies (Baldry
et al., 2013; Gerard et al., 2018). These are not personal accounts or perspectives and should not be
considered more authoritative or insightful than those of people with cognitive disability themselves.
Rather, they are institutional accounts of individuals in a system which inscribes them and others with
‘risk factors’, ‘diagnoses’ and ‘behaviour’ in specific and determining ways.

The case studies examined in this article are of non-Indigenous young people. As noted above,
Aboriginal and Torres Strait Islander children and young people are grossly over-represented in the
out-of-home care system, as they are in Australia’s youth justice system. This dynamic is inex-
tricably linked with colonising laws, policies and practices that continue to enable the removal of
Aboriginal and Torres Strait Islander children from their families and criminalise them and their
communities. The systemic criminalisation experienced by Aboriginal and Torres Strait Islander
people is disproportionate and distinct, and the subject of a significant body of research (see, e.g.
Aboriginal and Torres Strait Islander Social Justice Commissioner, 1995; Behrendt et al., 2009;
Cunneen, 2006; Cunneen and Porter, 2017) including of Indigenous people with cognitive disabil-
ity in the MHDCD Databank (Baldry et al., 2015; McCausland & Dowse, 2020). There are
Indigenous scholars investigating the specific factors and dynamics relating to the criminalisation
of Aboriginal and Torres Strait Islander young people in out-of-home care (see, e.g. Davis, 2019;
Krakoeur et al., 2018; Newton, 2020). In this article, we are focusing on the institutional
mechanisms and narratives associated with residential care that serve to construct, coerce and
constrain two non-Indigenous young people with cognitive disability and attempt to distinguish
these from the compounding dimensions of criminalisation experienced by Aboriginal and Torres
Strait Islander young people.

Case studies

This section provides summaries of the deidentified case studies of two individuals with cognitive
disability who spent time in residential care as children and/or young people, whose data
associated with interactions with government agencies have been drawn from the MHDCD Databank and compiled into a narrative.

‘Natalie’

Natalie is a young woman who has been diagnosed with Borderline Intellectual Disability, ADHD, and various mental health diagnoses including Dissocial Personality Disorder, Emotionally Unstable Personality Disorder, Histrionic Personality Disorder, and a Psychotic Disorder due to the harmful use of cannabinoids. She attended a special class but left school at 14.

Coinciding with her exit from the school system when she is 14, Natalie’s frequent contact with police as both a victim and as an offender commences. Natalie comes into contact with police multiple times as a ‘young person at risk’, predominately as a result of her inability to stay at her parents’ home due to the aggravated nature of her relationship with her adult brother who is reported to have a mental illness. Natalie spends large periods of time in out of home care including residential care and crisis accommodation in her teenage years. When she has contact with police over matters including truancy, theft, returning to a shopping centre from which she has been barred and breaching a violence order, Natalie makes full admissions when confronted by police, and is cautioned on a number of occasions. Natalie’s behaviour appears to the police to be seriously disturbed and they attempt at least four times to have her admitted to a psychiatric unit under the Mental Health Act but each time the psychiatric assessments indicates she does not have a mental health disorder and she is refused admission. On numerous occasions police note that she is homeless, and detail their frustration regarding unsuccessful attempts to find support and accommodation for Natalie particularly in their liaison with child protection services. Police note an admission by Natalie’s case worker of a lack of attention to her intellectual disability and ADHD.

Aged 16, Natalie has contact with police on 28 separate occasions, most relating to verbal and physical altercations with family or fellow residents and staff in residential care and crisis accommodation where she is staying, and subsequent breaches of violence orders or bail conditions. Natalie has seven episodes in youth justice custody that year and whilst in custody she threatens self-harm and suicide.

When Natalie is 17, she is listed as a missing person by her residential care workers. Police note that she is on a coercive guardianship order. Concerns are held for her because she has little money and her care workers are concerned for her safety. She has reportedly gone missing before but always calls her care worker, however this time no-one has heard from her. Natalie later contacts a care worker by phone from interstate, where she says she is with her partner, Colin. A disability case manager who is contacted by police states that Natalie ‘is not under their care anymore and that they will not have anything further to do with her’. Natalie and Colin are later charged with various fraud-related offences relating to this time, with the implication that Colin is responsible for involving Natalie in these offences.

After Natalie turns 18, most of her contact with police is in connection with drug-related matters and arguments and violence between Natalie and Colin. Violence orders are occasionally taken out though police tend not to pursue charges as they note that ‘both parties have a mental illness and are known drug users’. Natalie has three children when she is aged 18, 20 and 22, all of whom are removed from her care.
‘Jack’

A young man ‘with diagnostic labels including Neurodevelopmental Disorder, Autism Spectrum Disorder, Attention Deficit Hyperactivity Disorder, Tourette’s Syndrome and Attachment Disorder, Jack first comes to the attention of police when he is 10 years old and comes to school with a black eye. This precipitates a police investigation which results in the uncovering of systemic violence and abuse in his home, where his father and his father’s de facto partner are identified as drug users and his father is diagnosed with schizophrenia. This begins a period of multiple short foster care placements.

Just before his 11th birthday, Jack is removed into care permanently and comes under the ‘parental responsibility of the Minister’. He is placed in a residential care setting with a group of young people who are all at least three years older than him. Police are regularly called to his school to ‘discipline’ him as a result of offences such as stealing and ringing the school bell and are also regularly called to his residential setting as a result of the behaviour of all four residents; Jack is reported to be damaging property and sometimes biting workers. During his time in this placement, Jack regularly absconds from the residence and is reported to police as a missing person. Police note that Jack has ‘issues managing his anger’ in the group home setting.

In both the school and residential setting, staff/house managers/school principal do not proceed with charges; instead, they all indicate to police that their goal is to escalate the issues they are experiencing to a higher authority in an effort to force more secure and appropriate accommodation for Jack. Jack is subsequently placed in a foster home and has no police contact for several years.

On breakdown of this placement at 14, Jack’s contact with the youth justice system begins with multiple motor vehicle theft and related offences, for which he is often bailed then placed on community orders which he breaches and which result in periods in youth custody. He is also identified in police records as being a drug user.

Jack is placed in a disability group home with 24-h support but, at age 20, two incidents involving other residents lead to apprehended domestic violence orders. He is then moved from the group home to a caravan park, where support workers visit twice weekly. After this move Jack becomes destructive, smashes up his caravan, overdoses on medication and is disruptive in public places, frequently coming to the attention of police. His adult records show subsequent serial incarceration for violence, theft and justice offences.

**Discussion: How young people with cognitive disability living in residential care become criminalised**

Residential care brings specific forms of institutional authority and control over the bodies, choices and interactions of young people in the ‘care’ of the state who cannot be accommodated in family settings for various reasons. Staff are often not appropriately trained or equipped to support the young people in residential care, many who come from backgrounds of significant disadvantage, abuse and trauma, and police are routinely called to intervene as a result. Through analysis of the language, characterisation and nature of the intervention relating to each case study, we have identified key themes that resonate with and extend the scholarship on care-criminalisation, illustrating the ways that criminalisation of young people with cognitive disability in residential care becomes justified and normalised.
From ‘at risk’ to ‘a risk’

Both young people are flagged in institutional records as a child or young person ‘at risk’. Jack is removed from his family home and into state care after experiencing violence and abuse by his father. Natalie is removed from her family home after living there becomes untenable. Once in state care, both Jack and Natalie experience multiple out-of-home care placements and are moved into residential care settings – in Jack’s case before he is even 11 years old, to live with a group of young people at least 3 years older than him. The cognitive impairment diagnosed early in life for each of them may have affected their capacity to learn and self-regulate in neurotypical ways and was then exacerbated by the abuse and trauma they were subjected to in their home environments. However, being moved into residential care does not provide the level of stability, support and care that Natalie and Jack need and instead serves to compound their disadvantage and criminalise their behaviour.

The specific forms of surveillance and control that Natalie and Jack are subjected to in residential care mean that their designation as ‘at risk’ appears to routinely transmute to being ‘a risk’ to others, to themselves and to property. In the process, their vulnerability and need for care and protection becomes instead a mechanism of criminalisation. The recorded references to ‘risk’ in the records of these young people highlight the ways that institutions characterise and calculate their responsibilities to intervene in the interests of ‘safety’. Initially, it is as children and young people who are flagged as in need of protection by the state. Once removed into state care, however, staff and property – and by inference, the broader population – are deemed in need of protection from those young people. They are also recorded as being in need of protection from themselves. There is a perverse irony in children and young people being removed from their birth families after being identified in police records as at risk, when police subsequently become the frontline of criminalising those young people once they are in care settings.

Police are routinely called to intervene in situations involving behaviour of young people in residential care that in family settings would not necessarily be considered criminal actions, with parents or carers providing an intermediary layer between what takes place in their home and punitive state intervention. Staff may call police out of concern for safety – their own or other residents. Or they may call police after being unable to ‘control’ the young people in their care including where they ‘abscond’ or damage property. Or staff may call police in the absence of other policies or response escalation mechanisms within their own service that might be expected to be available in a care system which is ostensibly responsible for supporting traumatised young people. In one recorded instance in Jack’s case, staff indicate they do not wish to proceed with charges but are invoking the involvement with police to escalate the issues they are experiencing to a higher authority in an effort to force more secure and appropriate accommodation for him. In Natalie’s case, staff appear insufficiently trained or resourced to provide the support needed for her increasingly complex support needs, leading to regular placement breakdowns, instability, homelessness and in turn, escalating police contact. These emerge through analysis of administrative records as system level rather than individual staff failings.

Interrogation of the institutional narratives and trajectories of Natalie and Jack show that while the first contact with police for young people with cognitive disability in out-of-home care may be as a victim of crime or neglect – and that this is often an ongoing experience – their victimisation becomes overshadowed by the ascription of the status as ‘offender’. These and other case studies drawn from the MHDCD Databank (see, e.g. in Baldry et al., 2012, 2015; Dowse, 2017) highlight that despite police noting their frustration in case notes that these are young people needing support
and housing rather than police intervention, there is a ‘reluctance or inability of educational, disability, health and child protection services to act holistically, early, intensively and supportively’, and then a shift in police response once young people age into their early to mid-teens where their ascription by services transforms from ‘at risk to being a risk and to being targeted by police, arrested and charged’ (Baldry, 2014: 376). This process of shifting from being designated as the responsibility of child protection, disability and community services to that of being ‘managed’ by police and criminal justice agencies systematically occurs despite the significantly higher longer term economic cost to the state (Baldry et al., 2012; McCausland et al., 2013). It also echoes significant human rights concerns raised by practitioners and scholars around the broader failure of mainstream services to consistently accommodate or effectively respond to the needs of people with cognitive disability and complex support needs, many of whom experience overlapping and compounding forms of discrimination, abuse and vulnerability in their social and systemic interactions (Didi et al., 2018).

Turning a systemic lens on the ways institutional mechanisms and narratives serve to criminalise young people with cognitive disability in residential care highlights these as settings inextricably linked with coercion and control. As young people in the out-of-home and disability care systems, services are permitted – mandated, even – to intervene in their lives based on criteria associated with clinical, medico-legal and community-sanctioned models of intervention which require various agencies to take responsibility for control of the ‘behaviourally troubled’ (Dowse, 2017: 452). Yet in the institutional records relating to Natalie and Jack, such intervention appears to exacerbate and compound their increasingly complex support needs. The individualising of responsibility for behaviour in residential care that is a response or resistance by young people with cognitive disability to their circumstances and control by the state accompanies that behaviour being (re)frame as offending. The net result of this process appears to be that, over time, those individuals come to embody the ‘risk’ of the state failing to adequately protect or support them. Natalie and Jack acquire more and more diagnoses during their time in residential care via their increasingly intensive cycles of contact with police, emergency hospital admissions and custodial episodes. These diagnoses – particularly as can be observed with the various personality disorders that Natalie is diagnosed with while in custody – then serve to justify, escalate and normalise increasingly controlling and punitive state intervention.

**Erasure of cognitive disability, escalation of ‘offending behaviour’**

Both individuals whose case studies we have constructed through their administrative records were given diagnostic labels as children that we are including under the overarching term of ‘cognitive disability’: Natalie of Borderline Intellectual Disability and ADHD, Jack of Neurodevelopmental Disorder as well as Autism Spectrum Disorder, ADHD and Tourette’s Syndrome. Yet close examination of Natalie’s and Jack’s administrative records highlights the institutional mechanisms and narratives via which their cognitive disability becomes erased over time, and they are increasingly described as having issues managing anger, absconding and uncontrollable. Between the ages of 11 and 14, Natalie and Jack disengage from school and experience breakdown in their home environments and increased engagement with police. They also start to become multiply diagnosed with mental health disorders by various agencies, including while in custody – for Natalie, with personality disorders in particular, while not being considered eligible for admission to a psychiatric unit. References to mental health disorders and offending behaviour appear to replace cognitive disability-related labels in case notes, rather than being contextualised amid the
compounding and increasing complexity of their support needs. By the time they turn 18, even the
disability services they have been transitioned into characterise Natalie and Jack largely in terms of
offending behaviour rather than their disability in administrative records.

These cases are resonant of a distinct group of people with cognitive disability in contact with
the criminal justice system who Dowse (2020: 149) describes as ‘clustering around the edges of
mutable and inconsistent categories of impairment and disability in the context of significant social
disadvantage’. They are people for whom individualised impairment may manifest in challenging
behaviour and difficulties with communication, understanding, memory, attention, thinking or
judgement that is very often overshadowed or obscured by compounding and corrosive dis-
advantage (Dowse, 2020). Drawing on this analysis, what can be observed from interrogating
Natalie’s and Jack’s case studies is the complex interaction between individual factors relating to
impairment, abuse and trauma with structural issues of disadvantage, system failure, discrimina-
tion and criminalisation and the specific impact of being in residential care. The criminalisation
Natalie and Jack experience via the specific institutional arrangements and characterisations
associated with living in residential care come to define their subsequent engagement with the
state.

Natalie’s and Jack’s cognitive disability becomes erased or at least overshadowed in admin-
istrative records, with care-specific and disability-related behaviour becoming reinscribed as
offending behaviour. One example relates to leaving residential care settings without permission.
Records indicate that staff often notify police of the absence of Natalie or Jack after a certain period
of time, perhaps in keeping with organisational policy. To take action to follow this up, police
appear to then classify this situation as an event that requires their investigation: recording them as
having ‘absconded’ from their residence or as being a missing person. In Jack’s case, care
workers are clear that they don’t want him to be charged but are notifying police to escalate his
case and ensure more secure accommodation for Jack. While both care workers and police may
be following internal policies, this process is a trigger for increased criminal justice system
involvement in the lives of young people with cognitive disability in residential care at a criti-
cally vulnerable point. Whatever the intentions, the actions of residential care staff, police and
hospital emergency staff all appear to escalate rather than de-escalate situations in which Natalie
and Jack are displaying significant turmoil and distress. Leaving a house without carer or parent
permission or punching a bedroom wall would not necessarily be considered criminal actions for
young people living in a stable family environment, and yet this particularly vulnerable group are
not afforded the same understanding or layer of protection from criminalisation due to being in
this form of state care.

Institutional mechanisms, diagnostic processes and professional narratives turn cognitive dis-
ability and distress into ‘challenging behaviour’, serving to erase disability and characterise the
experiences and trajectories of young people like Natalie and Jack as individual, ahistorical and
asocial (Dowse, 2017). Without a cohesive or embedded disability-informed policy response to
young people like Natalie and Jack, an individualised response that focuses on managing beha-
viour can all too routinely become a criminal justice response. Some administrative records reflect
a belief that these are young people who must ‘learn’ from their ‘mistakes’ and invoke coercive or
punitive responses to behaviour that could alternatively be viewed as a response to unmet needs
and resistance to unsupportive home environments.

As they age, Jack and Natalie are transitioned from the child protection residential care system to
disability settings – at 17, Natalie is recorded as being under a coercive guardianship order and a
client of disability services, while Jack is placed in a disability group home after turning 18. Yet the
mechanisms of control and labels that proliferated during their time in residential care settings follow their move into the disability system, and the same kinds of punitive and criminalising responses are seen. So while their disability may be recognised through their placement in disability services, this shift does not appear to do anything to re-address, rectify or reverse the processes of criminalisation in which they became entrenched via their earlier experiences in the residential care system. This can be seen in relation to the coercive guardianship order in place for Natalie, which can be invoked by police to forcibly return to her residence but which does not necessarily bring responsibility for disability services to continue to support her if they choose not to.

Natalie and Jack are not recorded as having access to diversionary options specifically oriented to people with cognitive disability in contact with the criminal justice system. However, even if such mechanisms and programs had been in place, diversionary programs have been critiqued as problematic and not necessarily leading to better outcomes, given the way they often serve to net-widen and entrench criminal justice engagement for people with cognitive disability rather than create genuine pathways into thriving in the community (McCausland and Baldry, 2017; Steele, 2020). Even if on the surface it appears that there is systemic recognition of the factors that may lead to the over-representation of people with cognitive disability in the criminal justice system, the criminal records and labelling associated with time spent in residential care for young people like Natalie and Jack have lifelong determining implications.

**Enforced and harmful transitions**

Young people’s lives are characterised by transitions associated with changes in role, relationships, activities, identities, environments and living arrangements, conventionally conceptualised in terms of transitions between life phases (childhood to adulthood) or between institutions (e.g. school to work) (Ellem et al., 2020). Our recent research has begun to problematise this conventional and linear conceptualisation of transition for young people with cognitive disability who have complex needs including those in the out-of-home care and youth justice systems such as Natalie and Jack, where transitions are understood to be less linear and less effectively supported than for other young people. Family and positive social networks that are seen as a natural source of support and safety net associated with normative transitions are often unavailable to this group. Our work with young people with complex support needs (Ellem et al., 2020) indicates there is a significant disconnect between how those young people understand transition and the types of transition that are currently recognised in the service sector: for example, spatial transitions between geographical places (often the driving focus of service intervention) or life transitions such as leaving school, while young people identified two further types of transitions: ‘relational’ and ‘embodied’ which are seldom recognised by the service or support system.

The nature of transitions for Natalie and Jack appears largely unplanned: often abrupt, precipitated by crisis and involving exposure to significant risks of harm, both as a precipitating factor (violence in the family home) and themselves resulting in harm (Natalie’s unstable placements and homelessness; Jack being moved into residential care at a young age with older teenagers). Planned transitions, often associated with normative movement through life phases such as child to adult services or school to post-school programs, appear uncommon for Natalie and Jack. In some situations, planned and unplanned transitions become intertwined: for example, the transition associated with ‘ageing out’ of care settings into independence upon turning 18, as for Jack when he is moved from residential care to a disability group home and then to a caravan park. Jack’s developmental transitions can be seen to be out of sync with his chronological age and he is poorly
equipped for the demands of ‘independence’. Key points of transition such as disengagement from school, removal into out-of-home care, movement between care placements and entry into the youth justice system are marked by conflict and crisis for both Natalie and Jack. Their experiences are characterised by transitions that are bound up with complex individual, situation and structural disadvantage and tumultuous change.

Examining the administrative records of Natalie and Jack highlights that their spatial and life transitions are largely enforced and unsupported by the government agencies that they have contact with – and there is no evidence of consideration of their relational or embodied transitions. The lack of recognition or anticipation of non-normative transitions within the service system means that the capacity to provide appropriate support during these times is limited, and as a result ‘emergency’ services such as police or youth refuges become the default sites of transition management. For Natalie and Jack, it is police who largely manage and determine the nature of their transitions, with system and service responses appearing ad hoc and uncoordinated, increasing the likelihood of further harm, trauma and criminalisation. Unsurprisingly, after experiencing multiple negative transitions and interventions at the hands of ill-equipped service systems, Natalie and Jack choose to disengage or ‘self-exclude’ from support services. They become viewed by services as ‘non-compliant’ and are then in all practicality excluded by and from the very services tasked with their support, as seen when Natalie’s disability case manager indicates to police that despite a guardianship order being in place and concerns for her safety, that they will not have anything further to do with her.

While there are multiple agencies and services involved in the lives of Natalie and Jack, there does not appear to be one specific agency with responsibility for coordinating or providing support for institutional transitions in the young person’s long-term best interests. For example, records indicate that Natalie is a client of and/or has regular contact with child protection, police, various crisis accommodation and youth services, hospital emergency departments and outreach services, youth justice, justice health, disability services and the guardianship board. She receives multiple diagnoses and has numerous case managers from the ages of 14 to 17, but there is no evidence of her receiving appropriate or consistent support at critical points in relation to her increasingly complex support needs. Her transition into motherhood at 18 is also marked by crisis and exposure to harm, for both Natalie and her three children removed from her care.

The pervasiveness of violence

The institutional records of Natalie and Jack explicate the ways that violence pervades the lives of young people with cognitive disability in residential care settings, both in terms of violence they are subjected to by those responsible for their care and safety and violence as their resistance and response to the regulation of their circumstances – against property and staff and towards themselves. Both Natalie and Jack first come into contact with police and other agencies as children or young people experiencing violence in their family homes, which precipitates their move into state care. The next phase of contact they both have with police also relates to violence: in Natalie’s case, verbal and physical altercations with family or fellow residents and staff in residential care or crisis accommodation and for Jack, damaging property and biting workers.

When Natalie and Jack respond to those around them with resistance and violence, they are dealt with using physical violence as a response. The justification and normalisation of violence as a response appears early in official records as ‘challenging’ or ‘uncontrollable’ behaviour. Jack is described by police as having ‘issues managing his anger’ in the residential care home he is living
in. Natalie constantly breaches violence orders. In the context of both physical and chemical restraint used in response to ‘challenging behaviour’ of people with cognitive disability, Dowse (2017) posits that while the focus is often on the immediate cessation of harm to self or others and to modify the person’s environment or circumstances so as to avoid recurrence of behaviour that challenges, for individuals in both disability and in criminal justice contexts, systemic markers of their vulnerability accrue from multiple preceding and often mundane interventions (p. 453). That vulnerability is then used to justify and normalise interventions and processes of medicalisation and criminalisation. When data records capture Natalie and Jack signalling their trauma and sense of powerlessness through self-harm – Natalie in custody, Jack through overdosing on medication – the response appears to be little other than further diagnosis and entrenchment in the criminal justice system.

The violence by Natalie and Jack documented in administrative records largely appears to be associated with their own powerlessness – lashing out in anger or frustration at those around them where they have few other options to exercise agency or control – family members, care workers, fellow residents – as well as property damage. Yet little other recourse is available to young people in residential care; if they leave their residence to self-exclude instead, the only systemic reading available to services is of ‘absconding’ which, driven by organisational policy, triggers a police response. This has the effect of enmeshing the individual from an early age in cycles of assault, charge and sanction, followed by an entrenchment of criminalisation as a result of inevitable breaches of bail conditions due to further assaults or unauthorised absence from the care setting. Absenting themselves after not feeling safe or supported in residential care also places young people with cognitive disability at further risk of violence and harm.

**Conclusion**

New conceptualisations of the dynamics of care-criminalisation are bringing increased scrutiny to the grossly disproportionate rates at which children and young people in the out-of-home care system are funnelled into youth and adult justice systems. With this study we sought to bring a complementary methodology to previous research that examined court data, case files and qualitative research with police officers, residential care service providers, lawyers and youth justice workers about their perceptions of the link between residential care and contact with the criminal justice system. The construction of Natalie’s and Jack’s backgrounds and trajectories through their institutional records provides evidence of the systemic reinscription as ‘offending’ of these two young people’s responses or resistance to their circumstances and control by the state. The accounts reveal that, in the escalation of issues in school and residential settings to police, in the dehumanising language used in administrative records, in the increasing erasure of references to disability, lie the everyday practices of criminalisation. These case studies demonstrate the ways in which this is an active and patterned process. Diagnoses of disability, rather than leading to a coordinated policy response and resourcing for holistic, non-punitive and therapeutic support, serve to justify, escalate and normalise increasingly controlling and punitive state intervention.

Administrative data records provide evidence of multi-agency culpability in the criminalisation of children and young people in residential care, but a systemic lack of responsibility by any one authority. Police and youth justice are the only agencies who cannot refuse to engage with this group as community-based service providers regularly do even in relation to those ostensibly under their ‘care’. Escalation and entrenchment in the criminal justice system attests to the failure of responsibility of other support agencies and as a result effectively serves to further criminalise.
Alongside the documentation of criminalisation in police records is evidence of children and young people’s ‘disappearance’ from care systems; a recent Australian study found that young people in out-of-home care made up 53% of all young people reported missing and were responsible for 77% of missing episodes, with almost 40% of children reported missing being just 12 years old (McFarlane, 2021). Children and young people ‘going missing’ from out-of-home care settings, along with being suspended, unsupported or disengaged from school and health, disability and welfare agencies, are manifestations of the systemic neglect, violence and disregard of the lives of significant numbers of children and young people who overwhelmingly come from backgrounds of great disadvantage.

The intergenerational dynamics of care-criminalisation also warrant further interrogation; for example, data are still not routinely collected nationally on the dependent children and care arrangements of incarcerated women and men, nor systematically on their own history of care. National linked administrative data studies could provide more detailed evidence of institutional failures and responsibility for the criminalisation of children and young people in out-of-home care and contribute much needed scrutiny and accountability for more effective care and support. The specific trajectories and treatment of Aboriginal and Torres Strait Islander children and young people and the perpetuation and exacerbation of their gross over-representation in the out-of-home care and youth justice systems could not be a more urgent or damning indictment of state culpability. And critically, the voices and perspectives of children and young people who have experienced care-criminalisation must be heard and centred in the recognition of the need for and formulation of systemic responses.

**Declaration of conflicting interests**

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

**Funding**

The author(s) disclosed receipt of the following financial support for the research, authorship, and/or publication of this article: This article was written with funding from Australian Research Council Linkage Grant (Project LP150100528), UNSW ‘Lost in Transition: Supporting Young People with Complex Support Needs’. Chief Investigators Leanne Dowse, Philip Mendes, Iva Stranská, Jung-Sook Lee, Therese Cumming, Pamela Snow, Louisa Smith and Kathy Ellem. Partner Organisations: Jesuit Social Services, Community Living Association Inc., NSW Dept of Family and Community Services, Ageing, Disability and Home Care, Berry Street Victoria, Life Without Barriers.

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**Notes**

1. Case study drawn from the longitudinal administrative linked dataset compiled from Australian Research Council (ARC) Linkage project, ‘People with Mental Health Disorders and Cognitive Disabilities in the Criminal Justice System (CJS) in NSW’, University of New South Wales (UNSW) – chief investigators E Baldry, L Dowse and I Webster, www.mhdcd.unsw.edu.au. Ethics approval was obtained from all of relevant ethics bodies, including from the University of New South Wales Human Research Ethics Committee.
2. This case study was compiled by Ruth McCausland, and this extract is quoted from Baldry et al. (2012).
3. This case study was compiled by Ruth McCausland and Leanne Dowse, and this extract is quoted from Dowse L. (2020).

4. ARC Linkage project (LP150100528), ‘Lost in Transition: Supporting Young People with Complex Support Needs’. UNSW – chief investigators L Dowse, P Mendes, I Strnadová, J-S Lee, T Cumming, P Snow, L Smith and K Ellem.

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