



Achieving justice for children in care and care-leavers

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Abstract

This paper considers some of the issues facing children who have been in care who come into contact with the criminal justice system. There is a particular focus on some of the system-level failures such as unnecessary criminalisation in care homes, and failures to identify and therefore adequately support those in prison custody who have previously been in care. A number of potential solutions to the persistent link between care and criminal careers are then highlighted. In light of the system failures that continue to exist in this area, this paper concludes by arguing that there are strong grounds for exploring whether criminal records obtained in care for minor offences could be wiped when young people leave the care system.

Introduction

Whilst the majority of children in care and care-leavers do not commit criminal offences, far too many continue to come into contact with the criminal justice system. This has long been the case. It is argued below that this is something that we need to challenge and question, rather than simply accept as given – almost as a criminological truth. The particular focus of this paper is on system-level failures (such as criminalisation), although it is recognised that other individual-level factors (such as early maltreatment) may also be influential in explaining the link between care experiences and criminal behaviour.

Whilst we frequently hear about the recent decreases in the number of first-time entrants to the youth justice system (Youth Justice Board/Ministry of Justice, 2013), it is noteworthy that children in care have not benefitted from this shift to the same extent as other children, and this has been recognised in a recent House of Commons Justice Committee report (2013). In their written evidence to the Committee, the Magistrates Association made the following assertion.

*We are disturbed by the treatment of looked-after children in the youth justice system and feel that the problems experienced by these most vulnerable children need to be actively addressed as a matter of urgency.
(The Magistrates Association, 2013: Ev 104)*

Particular concern was expressed about the fact that magistrates are seeing looked-after children in court for minor offences, such as breaking crockery, which would certainly not reach court if the children lived in conventional families. It seems reasonable to assume that a minimum requirement of a corporate parent is that it should impose no further harm on the children in its care, so why then are some children being unnecessarily criminalised? This becomes particularly difficult to answer when we consider how vulnerable many of these children are.

Vulnerability and Discrimination

Official statistics for England (Department for Education (DfE), 2012a) provide a breakdown of the reasons for children and young people being in care. Of the 67,050 children looked after in the year ending 31 March 2012, the main reason was because of abuse or neglect which accounted for 62 per cent of children. The second main reason is family dysfunction which accounted for 14 per cent of cases and this was followed by 'family in acute stress' which accounted for 9 per cent of those looked after (DfE, 2012a). Interestingly, a mere 2 per cent of children are in care principally because of their own 'socially unacceptable' behaviour. Such figures illustrate that looked after children have often been victims and are likely to be very vulnerable. They may be victims of a crime if they have been abused for example, or they may simply be victims of circumstance if they enter care because of parental illness or the death of a parent.

Despite this vulnerability, and the fact that the majority of children enter care through no fault of their own, a 2009 Ofsted report entitled *Care and Prejudice* found that nearly half of children in care are afraid of prejudice or bullying, or of being treated 'differently'

if people find out about their background. The report surveyed over 300 young people living away from home and revealed that almost half thought the public saw children in care as bad and uncontrollable. Worryingly, the report also found that the longer children spent in care, the more likely they were to report discrimination (Ofsted, 2009). Such evidence provides support for the view that what Lindsay (1998) has described as 'careism' continues to exist.

Of course discrimination against children in care often combines with negative public attitudes towards children in general, and the belief that children are inconsistent and untrustworthy for example. A blatant example of this occurred in the child abuse scandal in Rochdale, where it emerged that children as young as 10 were being groomed for sexual abuse. This was allowed to continue because, amongst other things, children, and particularly those from chaotic backgrounds, were not being listened to (BBC News, 2012). Similarly, the more recent sexual exploitation case in Oxford highlighted that abuse against girls in care was allowed to continue for many years (Laville, 2013).

This raises the crucial question of: Are children in care (and girls in particular) less likely to be believed when they are victims of crime? Or perhaps the question should be are they less likely to be perceived as genuine victims or deserving victims because of their care status? Whilst this is not the key focus of this paper, it does highlight another area where we clearly need to ensure that justice is achieved for those who have been in care. The remainder of this discussion focuses on how children in care are dealt with when they are perceived as *offenders*.

In the year ending March 2013, 6.2 per cent of looked after children were convicted or subject to a final warning or reprimand, compared to 1.5 per cent of children in the general population (DfE, 2013). Whilst the proportion of looked after children who offend has reduced (e.g. from 6.9% in 2012, (see DfE. 2012b)), the gap between looked after children and all other children has actually increased in the last year. According to these most recent official figures, the offending rates of looked after children in England are now four times that of all other children. In relation to moving the experiences of children in care closer to that of all other children, the above figures suggest that in the important area of offending rates, the situation has got worse.

For those who end up in prison, a recent study by Her Majesty's Inspectorate of Prisons (HMIP) found 27 per cent of young people in the Young Offender Institutions they surveyed had previously been in care (HMIP, 2011). When just females are looked at, this figure goes up to 45 per cent. When we consider that a mere 2 per cent of children enter care specifically because of their own behaviour (DfE, 2012a), these figures look very worrying, and raise the question of what exactly is going on?

Some systems failures

Research in this area has identified a number of key potential turning points in the lives of looked after children, and the discussion below focuses on the two specific issues of residential care and prison. Frequently perceived as a placement of last-resort, many of the most troubled looked after children are placed in residential care homes, often after

other placements have failed and when challenging behaviour may already have become established. However, research has also consistently highlighted that some residential care environments can intensify, create and promote criminal behaviour (Taylor, 2003; 2006).

In relation to the system failures, and as mentioned earlier, the threshold for calling the police can be low in children's homes; therefore some young people enter the criminal justice system inappropriately (Nacro, 2012). One of the strategies for dealing with these issues has been the development of joint protocols in some homes between children's homes staff and the police outlining how staff should respond to disruptive behaviour and when it is (and is not) appropriate to involve the police. However, despite good practice in some areas, a report by Schofield and colleagues in 2012 has highlighted that the inappropriate criminalisation of looked after children remains a serious possibility, and that 'policy commitments and practice protocols to prevent this are not working well enough' (2012: 3). In short, some children in care remain at much greater risk of being drawn into the criminal justice system and getting a criminal record for minor offences that would never come to official attention if they were living at home with their parents.

Clearly decisions made at one point in the system can have a major impact on how young people are treated at a later date. By involving the police in trivial incidents in residential care, young people in care are far more likely than their peers to end up with a criminal record and may be treated more harshly because of their looked after status. For example, magistrates may be unwilling to bail a child back to a children's home (Hart, cited in House of Commons 2009: para 195). Yet we know that minor offending amongst teenagers in the general population is relatively normal and most young people will desist from law-breaking as they mature without any intervention being required (cf. Moffitt, 1993). However, the consequences of official intervention at an early stage are that desistance is far less likely (McAra & McVie, 2007). Young people may obtain further convictions which in turn may increase the likelihood of them being sent to prison in the future.

Yet prison is no place for vulnerable children (Goldson, 2001). A report by the Prisons and Probation Ombudsman (Shaw, 2009) into the death of a 15-year-old boy, who had been in care when he was younger and who hung himself from his prison cell in 2007, paints a harrowing picture of a 'macho' prison system totally unequipped to deal with the needs of vulnerable children. The report highlights a number of 'systemic failings' including a failure by social services and the Youth Offending Service to share crucial information about the boy's needs (Shaw, 2009). Unfortunately, the lack of information-sharing about individual needs and vulnerabilities is a particular problem for looked after children in custody, meaning that many fail to receive the support that they may desperately need.

A further problem relates to the anomaly in the law whereby looked after children accommodated by agreement under section 20 of the Children Act 1989 cease to be regarded as 'looked after' when they are sentenced to prison, thereby losing any

associated entitlement to social services support (Hart, 2006). The passing of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 has led to a policy change here, in that all children who are remanded into custody will now become 'looked after' children. Thus, those previously 'looked after' under section 20 of the Children Act 1989 will retain their looked after status if placed on remand. However, they will continue to lose their looked after status at the point of being sentenced to custody, which of course increases the likelihood that they may become lost in the system.

A thematic report by HMIP on looked after children in custody (2011) argued that little progress had been made in recent years. It was found that social work involvement was often dependent on committed individuals and there was a lack of clarity on who takes the lead in planning for release. Yet without access to appropriate local authority support, looked after children may simply be forgotten and left to languish in prison. Furthermore, without access to a placement in care and/or leaving care services upon release from prison, former looked after children without a family home to fall back on are at increased risk of following a pathway that leads them right back to the criminal justice system. As the House of Commons Justice Committee (2013: 47) outlined in their recent report,

some of the most disturbing evidence we heard concerned the effective abandonment of looked after children and care leavers in custody by children's and social services, with devastating implications for their outcomes on release.

At this point, it is worth highlighting another recent change of policy, as 'staying put' arrangements have recently been put in place under the Children and Families Act 2014 which extend the age at which some young people can remain with their foster parents from 18 up to 21 (Pemberton, 2013). This is undoubtedly to be welcomed, as young people in care have often experienced very compressed and accelerated transitions to independence (with minimal support) in comparison to other children. Unfortunately, the new policy has not been applied to young people leaving care from residential care homes and thus effectively creates a two-tier leaving care system, whereby one group of care leavers are effectively discriminated against because of unequal treatment. Furthermore it seems reasonable to assume that many care-leavers who leave custody will have previously been in residential care placements, and therefore the prospects for their 'effective abandonment' remain high.

So is it possible to imagine a world where a disproportionate number of those who have been in the care of the state are *not* reunited as adults in prisons up and down the country? In other words, how might justice be achieved?

Some potential solutions

A renewed commitment to alternative methods of resolving conflict in residential homes is crucial, and an emphasis on multi-agency partnership working is a key part of this. Joint protocols between residential care staff and the police outlining exactly what sort of behaviour warrants police intervention, and what sort of behaviour could be dealt with

informally within a care placement setting have been set up by some local authorities. They could certainly go some way to reducing the routine prosecution of minor offences in some care homes. Yet despite good policy intentions in some areas, recent evidence suggests that, in practice, such protocols are not working well enough (Schofield et al., 2012). Certainly there is a need to ensure that there is a commitment towards making such protocols work amongst all agencies involved in their delivery. For example, Hayden (2010) has highlighted the crucial role of the police, noting the need to avoid the default position of detection among some individual police officers.

A related strategy introduced into some children's homes is restorative justice. This has been used in a number of areas in an attempt to divert some young people from involvement in the formal criminal justice system, and findings have indicated varying levels of success (Hayden and Gough, 2010). An emphasis on diversion is certainly to be welcomed, but this so-called 'solution' needs to be viewed cautiously. For example, Goldson (2011) has emphasised the patchy and ambiguous nature of the evidence-base on restorative justice, further noting that, amongst other things, this approach tends to over-simplify conceptualisations of 'victim' and 'offender' when the reality is that these categories often overlap. A related concern is that there has been little attempt to consider how far restorative justice might be an effective response to working with offending girls in care. Yet is it always appropriate to encourage girls in conflict with the law to express shame and self-blame given that many will have come from very difficult backgrounds (cf. Sharpe, 2012)? Restorative strategies must be sensitive to issues of gender (as well as age).

In addition, there needs to be an increased awareness of the long-term consequences of a criminal history amongst all those involved in the care of children. There is also a pressing need to identify *all* looked after children and care-leavers involved in the criminal justice system (and particularly those in custody) in order to ensure that needs are met. Indeed, recent practice guidance published by the National Offender Management Service (NOMS) (2013) on working with care-leavers (aged 18–25) in custody and the community highlights 'identification' as an important issue. Whilst the publication of such a document indicates that these issues appear to be on the policy agenda, it is disappointing that the very first sentence notes that this guidance '*imposes no new requirements*' (2013:1, emphasis in the original) which is hardly a ringing endorsement for busy practitioners to sit down and read it. Failure to identify individuals who have been in care within the justice system has been such a persistent problem, that it may be that making identification a requirement is the only way to deal with this. The potential implications for those who slip through the gaps and are not supported is quite frankly disturbing. Related to this, extended support to care-leavers up to the age of 21 and beyond must be made available to all, regardless of the type of placement that they have lived in

In thinking about the broader picture, there is much we could learn from systems that attempt to address both the needs and the deeds of children in trouble – as with the Children's Hearings system in Scotland. Indeed a recent inquiry into girls in the penal system in England and Wales by the All Party Parliamentary Group (APPG) on Women

in the Penal System argued that 'children's welfare needs must be addressed by the courts and the focus should be on the child, not on the child's behaviour' (APPG, 2012: 6). One of the key recommendations coming out of the inquiry was that 'youth court magistrates must receive training on children's welfare and should have the power to refer cases to the family court if a child is identified as vulnerable' (APPG, 2012: 6). Such a clear focus on the child's welfare is of paramount importance and of course links to the need for more effective information sharing between all agencies involved in a child's life.

Similar concerns have been expressed in the USA; for example by Bilchik and Nash (2008) who refer to children involved in the child welfare and youth justice systems as 'crossover youths'. In arguing for cross-system collaboration, they suggest that judicial leadership is critical in promoting a collaborative court model for juvenile justice courts where the needs and deeds of crossover children are addressed (cf. Cashmore, 2011). As Buffington et al. (2010) have argued, 'To be most effective in achieving its mission, the juvenile court must both understand the role of traumatic exposure in the lives of children and engage resources and interventions that address child traumatic stress' (2010: 2).

How might such a shift of focus in England and Wales be encouraged? At a conceptual level, one way to start this process would be to ensure that our youth justice system is underpinned by the same principles as the child welfare system; focusing on permanence, welfare and safety rather than simply the prevention of offending. Guided by such principles, it would be far more difficult to justify sending some of the most vulnerable children in society into a potentially damaging and unsafe environment such as prison custody. At a system-wide level, raising the age of criminal responsibility to be more in line with European neighbours would not only be more consistent with the evidence on child development (Delmage, 2013) but would also help to immediately reduce the numbers of children who can be formally involved in the justice system.

On a more practical level, and at the other end of the process, there are things that can be done to promote desistance and resilience among those who have already moved between the care and criminal justice systems. Maruna (2011) has recently argued that re-entry into society should become a rite of passage for ex-offenders, and that one part of a reintegration ritual may be to remove or destroy previous tokens of punishment such as a criminal record. Given the evidence on the unnecessary criminalisation of some children in care (and their frequent abandonment once in the justice system), there are strong grounds for exploring whether criminal records for minor offences received in care could be wiped when young people leave the care system. Not only would this act as a recognition of the system failures that persist in this area, but it is also something that could form part of a useful leaving care package that genuinely contributes to facilitating a successful transition to independent living.

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