

‘CROSSOVER CHILDREN IN THE CHILDREN’S COURT: WHO ARE THEY AND WHAT CAN BE DONE?’

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I’d like to commence by acknowledging the traditional owners of the lands on which we meet. I acknowledge that the lands were never ceded. I am on Wurundjeri country. I pay my respects to the people of the Kulin Nation, to their Elders past and present and to all Aboriginal people here today. It is our fervent hope when sitting in the Children’s Koori Court that the children and young people appearing before the Court will connect or reconnect with their culture and that they will be proud and strong role models in community.

Thankyou for attending and for the opportunity to speak on this very important topic. As you have heard Ash will follow me. My primary focus will be to outline to you what we mean when we refer to cross-over children and to finish with some initiatives which we hope can attempt to improve the trajectories of these children’s lives.

I will commence by:

- telling you about ‘Josh’, a 16 year old who appeared before me in the Children’s Koori Court and who is a cross-over child;
- I’ll then briefly discuss what we mean by ‘crossover children’ and
- I will refer to the latest research regarding crossover children with a focus, on Aboriginal and Torres Strait islander children.
- Finally, I’d like to refer to some of the initiatives we have introduced here in Victoria – including Marram-Ngala Ganbu and de facto cross-over lists in our specialist Sex Offence List and in the Children’s Koori Court.

JOSHUA¹

I’ll commence by telling you about Joshua and I note this is not a compilation of a number of children. This is Josh’s life. As I stated he is currently 16 years of age. His mother passed away due to a heroin overdose when he was 12. His father and uncle passed away earlier last year. He has been in the care of child protection since he was 2.5 years of age. He has had multiple placements arranged by child protection. After an initial period of time with a family member, the majority of his life has been spent residing in residential care. He continually leaves his unit and multiple emergency care warrants have been issued for him. He left school when he was in grade 6 and he cannot read or write. He has been assessed as having an intellectual disability.

He commenced offending when he was 14 years of age. His offending primarily involves offending at his residential unit, including damaging property, robberies, weapons offences,

¹ A pseudonym.

thefts of staff vehicles, driving offences and offences such as assault police and resist arrest. He has substance abuse issues and much of his offending occurs under the influence of substances.

He successfully completed Diversion in respect of his initial charges but since the passing of his father and uncle earlier last year, his offending has escalated and he has had five separate periods on remand.

Sadly, Josh's story is all too typical of the children we see before the Children's Court.

So what do we mean by crossover children?

DEFINING CROSS-OVER CHILDREN

'Crossover children' are those children in the criminal justice system who have concurrent child protection proceedings. The definition could also include those children who have child protection involvement and are on an order but there may not be a current application, for example, to extend the order, listed before the Court. Many of us would prefer a different term to 'crossover children' but I will use that expression for the purposes of this presentation.

In relation to those children appearing before me in the Children's Koori Court in 2022 and this year – only 18% had not had any child protection involvement – so you can do the maths – 82% or the overwhelming majority had child protection involvement. Moreover, the young people were almost always residing in residential care with minimal or no contact with their families. As in the case of Josh, it was not unusual for offending to occur within the residential care unit.

RESEARCH REGARDING CROSS-OVER CHILDREN

There has been much research and many studies done in Victoria of more recent times in relation to these children. I will refer specifically to the Reports of the Victorian Sentencing Advisory Council in 2020 titled '*Crossover Kids – Vulnerable Children in the Youth Justice System – Report 2 – Children at the Intersection of Child Protection and Youth Justice Across Victoria*' and research conducted by Dr Susan Baidawi and Professor Rosemary Sheehan AM from Monash University in which they examined Children's Court of Victoria files in 2016/2017. Their report is titled – '*Crossover Kids – Effective responses to Children and Young people in the Youth Justice and Statutory Child Protection Systems*' and was published in 2019. By way of disclosure – I assisted in the facilitation of the research in his study and was described as a Partner investigator in the Report.²

The SAC undertook their research in respect of 5063 children sentenced or diverted in the Children's Court of Victoria over the period 2016/2017. 1938 children or 38% were subject to at least one child protection report; 892 of those had been on at least one child protection order.

² At page 6.

The Monash study involved a case file analysis of 300 children appearing before the Criminal Division of the Children's Court at Melbourne, Moorabbin and Latrobe Valley who also had current or historical statutory child protection involvement. It was a quantitative and qualitative analysis.

There was remarkable consistency between the findings of these bodies of research.

Each study found – [Slide 1](#)³

- 18% of the children were Aboriginal or Torres Strait Islander children – noting that at the time of this research only 1.6 % of Victorians aged 10 to 20 were Aboriginal or Torres Strait Islander peoples;
- Approximately 80% had experienced out of home care and
- more than half were in residential care.

For those of you who do not sit or have not practised in the jurisdiction – out of home care means that a child is residing with someone other than their parent or parents. It could be with a relative eg a maternal grandmother, paternal aunt, it could be with a foster carer, a permanent carer or ultimately residential care. Residential care involves sometimes four young people in the one home. There are paid staff 24 hours a day. It is a placement of last resort.

The major circumstances of disadvantage included: [Slide 2](#)

1. Parental separation or divorce;
2. Exposure to family violence;
3. Household substance abuse;
4. Neglect;
5. Childhood physical abuse;
6. Childhood emotional abuse;
7. Household mental health issues;
8. Household criminal justice involvement;
9. Childhood sexual abuse;
10. Parental death.

[Slide 2](#) also Most of the children (eg 90% in the Monash sample) had experienced at least 3 types of disadvantage just referred to;

- 68% had experienced at least 5 of those circumstances and
- 19% - so nearly 1 in 5 of the children had experienced at least 8 of the 10 of those circumstances of disadvantage.

The challenges faced by cross-over kids include – [Slide 3](#)

- 74% misuse drugs/alcohol;
- 61% diagnosed with a mental health disorder;
- 48% diagnosed with a neurological or neurodevelopmental disorder;

³ See slides attached at pages 11-12 of this presentation.

- 35% experienced self harm, suicidal ideation or suicide attempts;
- 12% had been subject to sexual exploitation or were at risk of sexual exploitation.

If anything, based upon my experience, I consider those statistics to be conservative.

In the SAC study –

- 5 in 10 of the children had experienced 5 or more out of home care placements. Just incredible.

It won't surprise you that those children in residential care were over represented –

- 58% in the SAC study and 69% in the Monash study were in residential care.

So – What came first – child protection involvement or offending?

Perhaps unsurprisingly as child protection becomes involved with some children from birth and the age of criminal responsibility is 10, the SAC Report confirms that 94% of the children in their study were subject to a child protection report before they committed their first sentenced or diverted offence.

The SAC research further confirmed **Slide 4** that for sentenced and diverted children who experienced out of home care,

74% - of the children first offended after being placed in out of home care;

24% - of the children committed their first offence or the diverted offence before their first out of home care placement but after their first child protection report;

Only 2% - offended before any contact with child protection.

Whilst statistics are important – of course behind each statistic is a child – just like Joshua.

Dr Baidawi and Ms Rubini Ball from Monash University published an article in 2021 titled 'Aboriginal crossover children's characteristics, service needs and service responses – the views of Australian key stakeholders.' The authors note that:

'In countries carrying historic legacies of settler-colonialism such as Australia, Canada and New Zealand, indigenous children are notably over represented in populations of cross-over children..'⁴

And

'Though not specific to crossover children, other research has raised the issue of cultural competence with Aboriginal children in child protection systems more broadly, emphasising the need for interventions which not only target physical and emotional needs, but that ensure Aboriginal children's connection with community, spirituality and cultural practices. Such studies highlight tensions between Western child welfare

⁴ Children and Youth Services Review 129 (2021) 106176 at page 2.

policies oriented around individualistic frameworks and the collectivist and community orientated nature of Aboriginal cultures.’⁵

Mendes et al in an article published in 2021 – ‘*Indigenous care leavers in Australia: A national scoping study*’ – stated the following:

‘Aboriginal children often leave care without housing, required mental health and disability support, an understanding of adult services (including substance use treatment) or a culturally appropriate transition plan, all of which are suggested to increase the potential for Aboriginal care leavers’ justice system involvement.’⁶

With regard to the service needs of Aboriginal and Torres Strait Islander crossover children, the findings of the Monash study indicated that in the view of service providers:

- As a result of growing up in families experiencing the effects of intergenerational trauma (inclusive of exposure to substance abuse, mental illness and household’s members’ involvement in criminal justice systems), there was a need for positive pro social role models and mentors;
- Complexity of decision-making with this group of children, particularly with regard to cultural factors, can lead to confusion, disagreement and bureaucracy across service system responses; and
- Non-Aboriginal practitioners often struggled to recognise the unique experiences and needs of Aboriginal and Torres Strait islander crossover children.

As an anecdotal aside – every week in Victoria judicial officers issue emergency care warrants for children. The applicant is the Department of Families Fairness and Housing – that is, child protection. In 2019/2020 on average 162 warrants were issued in Victoria each week. Approximately 95% of those warrants were issued for children in the child protection system missing from care. A disproportionate number are for Aboriginal and Torres Strait Islander children – for eg – over the last 4 years when I have been on after hours – on average 21% have been issued for Aboriginal and Torres Strait islander children - and in some cases more than one warrant is issued in the one week for the same child. In many cases in relation to Aboriginal children who have left their residential unit, they are located at a parent or auntie’s home.

In addition to the Reports and articles to which I have referred, I also wanted to commend to you

- ‘*Our Youth Our Way*’ – a Report prepared by the Victorian Children’s Commissioner for Aboriginal Children and Young people published in June 2021 in which 92 Aboriginal children in the Youth Justice System were interviewed in order to understand their lived experiences;

⁵ Ibid; at page 3.

⁶ Mendes P; Standfield R; Saunders B; McCurdy S; Walsh J; Turnbull L & Armstrong E; Children and Youth Services Review; 121, 105848.

- *'Always Was Always Will Be Koori Children'* – a further Report prepared by the Office of the Children's Commissioner for Aboriginal Children and Young People' published in October 2016 regarding the experiences of Aboriginal children in out of home care.
- *'Ngaga Dji – Hear Me – Young Voices Creating Change For Justice'* – Koorie Youth Council.

INITIATIVES INTRODUCED IN VICTORIA

So the research is disturbingly very clear about these children. However – the question is what can be done?

CROSSOVER CHILDREN ADVISORY GROUP

As you can appreciate, there are many Government Departments involved in these children's lives. They include – Department of Families, Fairness and Housing – Child Protection and Housing, Disability Services, Education, Health and Mental Health and Justice. In an attempt to break down some of the silos and to continue to learn from and understand the research, in 2021 we established a Crossover Children Advisory Group, which I chair. The members of the Group come from different areas eg researchers from Monash, the Children's Court, Victoria Police, Victoria Legal Aid, Child Protection, Education and Training, Office of the Children's Commissioner for Aboriginal Children and Young people, the Sentencing Advisory Council, the Crimes Statistics Agency, the Education Justice Initiative and SOCIT Family Violence.

I believe this Group is very important from a collaborative point of view, including gaining a clear understanding of the most recent research. It has resulted in important conversations taking place, the exchange of ideas and connections being made. However, in addition to this Group, what else is being done?

MARRAM-NGALA GANBU

As I indicated, you will hear from Ash – the driving force behind Marram Ngala Ganbu. I think this is the most exciting initiative and I am confident will ultimately result in the sustained change which we would all like to see.

There was a very positive evaluation in 2019 of MNG – which has included the return of a number of Aboriginal children to their families. That is the strength of that Program.⁷ No doubt Ash will refer to quotes from family members in Marram-Ngala Ganbu who indicate that in MNG they felt they were heard and the constructive interactions which have followed. In my view, to start when the children are at this very young age has the real potential to make a tangible difference to these children's lives.

If we can re-unify the children with family when very young, as MNG seeks to do, then it is to be hoped that the children will never come before the criminal justice system.

DR NIROSHINI KENNEDY

⁷ *Evaluation of Marram-Ngala Ganbu – A Koori Hearing Day at the Children's Court of Victoria in Broadmeadows*, November 2019 at page 39.

I would also like to highlight the excellent advocacy of Dr Niroshini Kennedy, a paediatrician at the Wadja Aboriginal Family Place Clinic at the Royal Children's Hospital in Melbourne – a Clinic for Aboriginal and Torres Strait Islander children. She also works at the Victorian Aboriginal Health Service.

She is a Churchill Fellow who has called out the unacceptable situation that few of the Aboriginal children in care receive even the minimum standard of health care. She has made recommendations and advocated strongly for this unacceptable situation to be addressed by patient-centred models of Integrated Care and legislative reform, including mandated health assessments for every child in out of home care.

CROSSOVER LIST

Finally, in my capacity as a Churchill Fellow, I have been advocating for a Crossover List to be introduced into the Children's Court.

The structure of our legislation provides for separate Divisions in the Children's Court, that is, the Criminal Division and the Family Division or Child Protection side of the Court.

There were very good reasons historically to have separate Divisions including somewhat incredulously that prior to the separation, children who appeared before the Child Protection Division had their care and protection proceedings recorded as part of their criminal history and were placed with young people involved in the Criminal Division of the Court.

The Carney Report published in 1984 – *'Child Welfare Practice and Review'* recommended separate Divisions in the Children's Court. Generally children who appeared in Child Protection proceedings were there through no fault of their own – the protective concerns were in relation to their parents; however, the children's appearances before the Criminal Division were due to their alleged behaviour. The Carney report recommended the separate Divisions to distinguish between the children's needs and their deeds.

Whilst I appreciate that distinction – what about the children we have who are appearing before us in both Divisions?

My personal view is that the current situation is most unsatisfactory to say the least – from everyone's perspective but particularly from the perspective of the child. Almost invariably the children have different lawyers in each Division who never seem to communicate or know what is happening in the other proceedings – how disrespectful for the child. The children must wonder what is going on. They are required to tell their painful traumatic life stories a number of times to strangers, they don't have consistent legal representation or a consistent judicial officer and often the Court and the lawyers have not had access to reports prepared in the other Division.

In 2014 whilst I was on my Churchill Fellowship I was very fortunate to observe HH Judge Tony Fitzgerald preside over the Crossover List he introduced in Manukau, New Zealand. As a result of those observations, I recommended in my Fellowship Report that such a List be established in Victoria.

Wirkara Kulpa – Victoria’s First Aboriginal Youth Justice Strategy - was launched in February last year. It recommends exploring the establishment of a Crossover List for Aboriginal Young People in the Children’s Court.

When I observed the List in the Youth Court in New Zealand – the police prosecutor and senior representatives from Children Youth and Families sat at the bar table in Court. The significance of the representatives being senior is that they are decision-makers, so matters could progress without the need to adjourn or stand cases down for enquiries to be made with management. They also had access to the most up to date information regarding the child.

Judge Fitzgerald stated that the aim of the List is –

‘to ensure that, for all such young people, appropriate information regarding them is obtained from the Family Court to help inform decisions and plans made in the Youth Court and, that there is co-ordination of what is happening for them in both Courts. ..’

He summarised its benefits as follows:

‘The personal history and current circumstances of such young people will be very relevant in the Youth Court which is required to ensure that a young person’s needs are acknowledged and the underlying causes of their offending addressed. ..’

During my observations of the New Zealand Crossover List, I noted:

- the Children Youth and Families (CYF) representative could assist during a bail application regarding the stability of a particular address;
- the CYF representative could advise the Court of the proposed future planning regarding where the young person was going to reside;

and in one case

- an appeal had been lodged on behalf of one young person and it was before another Court. It was in relation to a guardianship issue. It was not in the young person’s best interests to finalise the criminal charges prior to the appeal being determined.

The legislative challenge in Victoria is the separation of Divisions which may become even more entrenched with Bills currently before Parliament proposing a separate Youth Justice Act and Child Protection Act.

One of the few positives to come out of COVID has been the ability for people to attend ‘online’. With the consent of the parties and the co-operation of the Department, I have effectively been conducting de facto Crossover Lists within our specialist criminal lists in the Sex Offence List and in the Children’s Koori Court.

SEX OFFENCE LIST

In Victoria, children and young people who engage in sexually abusive behaviour, can be placed on Therapeutic Treatment Orders by the Children's Court.⁸ These Orders are made in the Family Division but have a direct impact on any related criminal charges. We also have provision in the criminal division for young people charged with sexual offences to voluntarily engage in a therapeutic treatment program.⁹ In both cases, judicial monitoring can be ordered. My practice is to ensure that the judicial monitoring dates are the same for both the criminal and any family division proceedings and hear the matters with all parties present. It is incredibly helpful having all of the relevant parties and reports, including from treating practitioners, before the Court at the one time. It has also ensured there is accountability and coordination of services for the young person.

Everyone is on the same page and it reduces the number of times matters are listed before the Court. I am satisfied it is in the best interests of the crossover children for their matters to be conducted in this way.

CHILDREN'S KOORI COURT

The Children's Koori Court provides an opportunity for those appearing before the Court to connect with Elders and Respected Persons, to benefit from the wisdom and strength of their Elders and Respected Persons, to be introduced or reintroduced to their culture and connection to land and to be linked with culturally appropriate services. I referred earlier to the research indicating that a culturally appropriate response is required to redress the overrepresentation of Aboriginal children. In my view, Koori Court is one such initiative - providing a culturally safe place for those appearing.

In case any of you are not familiar with the Children's Koori Court - it is a sentencing Court. Sitting at the specially designed Koori Court table, are the Elders, myself, the young person, their lawyer, a family member or another support person, if they have one - sadly for most of the children they do not have any support person with them, the prosecutor and a representative from youth justice.

Since the onset of COVID Child Protection and other members of the child's care team have now been attending Koori Court, either online or in person. The child protection matters are not listed before the Court. However, their participation and engagement means a fulsome discussion can take place regarding what support can be provided to the child, for example targeted Care Packages, NDIS packages, whether they will be supported once they turn 18, their housing situation etc.

In the vast majority of cases the Secretary has parental responsibility. It is expected that a good parent would attend Court. A crossover list would formalise the requirement for their attendance and participation.

⁸ s. 249 *Children Youth and Families Act 2005*.

⁹ s. 354A *Children Youth and Families Act 2005*. If the matter is adjourned for the young person to engage in therapeutic treatment, this may impact on any child protection proceedings.

CONCLUSION

In conclusion, I just wanted to read to you a quote from a psychiatrist Dr Dickon Bevington from Cambridge who I met during my time away on my Churchill Fellowship. In relation to the most vulnerable children with whom he works and this resonates with the crossover children appearing before us in the Children's Court and who sadly may graduate into the adult criminal jurisdiction he stated:

*'Nearly all have terrible histories of trauma, abuse, neglect, bereavement, maybe major anxiety, emerging psychotic illnesses. The problem for these kids if they had one of those, for example, we know how to treat trauma, bereavement, drugs – but the cumulative burden of all of that rubble pushes the flight path down – so it will inevitably hit the trees at the end of the runway. These children very often struggle the most to make helpful relationships, they least know how to say 'help me' and they don't have an expectation they will receive treatment.'*¹⁰

The statistics confirm that there is clearly a long way to go to really support and assist these most vulnerable children – like Josh - but it behoves all of us to do whatever we can to enable these children to be supported / and hopefully with a lot of goodwill and commitment - over time; change can be effected.

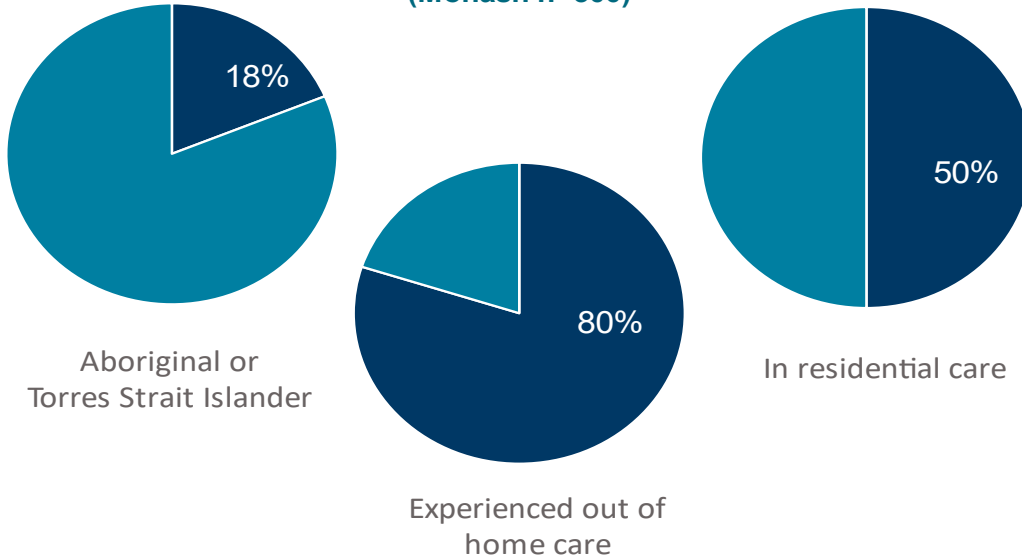
Jennifer Bowles - 28 March 2023.

¹⁰ *What Can be Done? Residential therapeutic treatment options for young people suffering substance abuse/mental illness'* Winston Churchill Memorial Trust 2014, Jennifer Bowles at page 78.



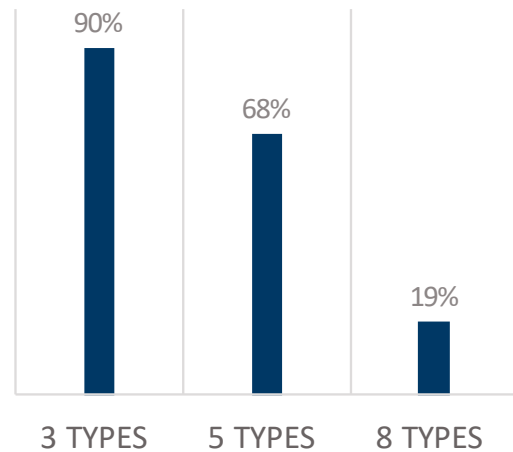
Crossover Children, percent who:

(Monash n=300)



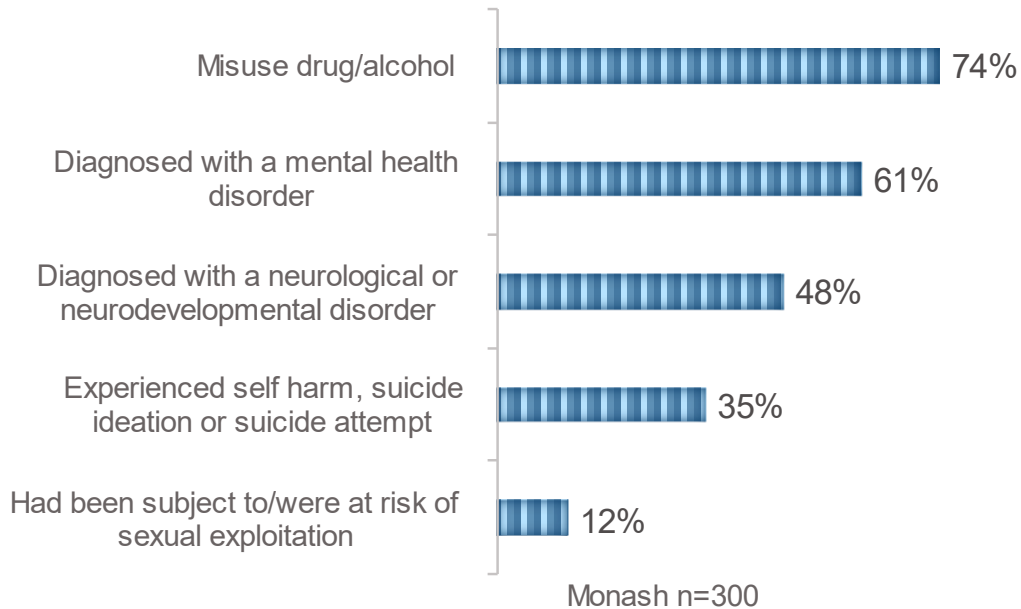
The major circumstances of disadvantage include:

1. Parental separation or divorce
2. Exposure to family violence
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4. Neglect
5. Childhood physical abuse
6. Childhood emotional abuse
7. Household mental health issues
8. Household criminal justice involvement
9. Childhood sexual abuse
10. Parental death



PERCENT OF CROSSOVER CHILDREN WHO HAD EXPERIENCED MULTIPLE TYPES OF CIRCUMSTANCES OF DISADVANTAGE, MONASH STUDY (N=300)

The challenges faced by crossover kids include:



When first offence occurred (SAC n=892)

