



creating a better life
for children and young
people in care

CREATE Foundation response to the Royal Commission into Institutional Responses to Child Sexual Abuse Consultation Paper: Criminal Justice

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About CREATE Foundation

CREATE Foundation is the national peak consumer body for children and young people with an out-of-home care experience. We represent the voices of over 43,000 children and young people currently in care, and those who have transitioned from care up to the age of 25. CREATE is unique in that it is one of only a handful of organisations in the world, and the only organisation of its kind in Australia, expressly established to advocate on behalf of children and young people in care.

Our vision is that all children and young people with a care experience reach their full potential.

Our mission is to create a better life for children and young people in care.

To do this we:

- **CONNECT** children and young people to each other, CREATE and their community to
- **EMPOWER** children and young people to build self-confidence, self-esteem, and skills that enable them to have a voice and be heard to
- **CHANGE** the care system, in consultation with children and young people, through advocacy to improve policies, practices, and services and increase community awareness.

We achieve our mission by facilitating a variety of programs and services for children and young people in care.



Introduction

CREATE Foundation welcomes the opportunity to provide this response to the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) Criminal Justice Consultation paper. CREATE acknowledges and commends the Royal Commission's efforts to highlight that sexual abuse of children in institutions has occurred in recent times, and to identify the necessary reforms to the criminal justice system. CREATE respects the commitment, courage, and generosity of the people who have come forward and continue to come forward to speak publicly and privately about the sexual abuse perpetrated on them as children and young people while in the "care" of institutions. It is in the sharing of these experiences that we are able to recognise, as a nation, we must do more to uphold and fulfil the rights of all children through improved systems, laws, policies, and practices.

Children and young people in out-of-home care including home-based care, residential, and other institutional statutory care, are part of overarching state and territory child protection systems. There are more than 43,000 children and young people living in out-of-home care across Australia. "Out-of-home care services are designed to provide a safe environment, contribute to improving developmental outcomes and assist in addressing issues that led to the out-of-home care placement" (Department of Families, Housing, Community Services and Indigenous Affairs [FaHCSIA], 2011, p. 3).

Children and young people are placed in care through no fault of their own, and are reliant on the systems and people who oversee the legislative, administrative, and judicial practices to keep them safe. Surprisingly, in this age emphasising record keeping and monitoring, there remains limited information pertaining to children and young people who are sexually abused while in the out-of-home care system(s) across Australia. However, research from the Netherlands suggests that children who are placed in out-of-home care, and in residential care in particular, are at increased risk of child sexual assault than children in the general population (Euser, Alink, Tharner, van Ijzendoorn, & Bakermans-Kranenburg, 2013). As a result of poor practice, insufficient regulations and policies, and monitoring at a national level, many children and young people in out-of-home care are denied the basic right of all children to receive protection, support, and loving care (FaHCSIA, 2011).

The principle "in the best interest of the child," as set out in the United Nation's *Convention on the Rights of the Child* (CRC) (1989) is especially important to be in the forefront of the minds of all adults who serve children in out-of-home care (Human Rights and Equal Opportunity Commission, 1999). The work of the Royal Commission underpins and strengthens the aims of the CRC in that it represents an opportunity to remedy abuses, and further protect, the rights of children in care of institutions in Australia.

CREATE believes that when state or territory governments intervene in the best interests of the child to provide guardianship as an alternative to parents, it is essential that children and young people's interests and rights are regularly reviewed and are open to independent oversight. CREATE upholds that the out-of-home care system(s) across Australia should adopt and promote culture(s) of seeking direct, continuous feedback from children and young people throughout their care experience. Developing and embedding strong complaints and monitoring processes into all systems involved in the care of children and young people is essential to safeguard their development and ensure corrective processes are promptly enacted when issues are reported.

To inform the CREATE Report Card 2013, CREATE spoke with 1,069 children and young people aged 8–17 years in out-of-home care across Australia (except WA) (McDowall, 2013). Additionally, in 2012 CREATE sought feedback from young people in residential care about their contact with police and the youth justice system (CREATE, 2012a). The feedback provided from both these consultations, relevant to the *Consultation Paper* indicated that young people:

- don't know how to complain if there is an issue with their care or an individual appointed to care for them;

- are scared they won't be believed; and
- are worried about the consequences for their family/or care if they do complain.

In this submission, we draw upon the views of children and young people collated in CREATE's reports, as well as previous responses to the Royal Commission. This submission addresses the proposed approach to criminal justice reforms. **It is critical that criminal justice reforms outline clear and transparent legislation, processes, and resources to keep children safe across all institutions, at all levels and that individuals and the institutions they are part of are held accountable for failure to protect young people and failure to disclose harm.**

Key Concerns and Responses to The Consultation Paper

- *Listening and responding to children and young people about their views and needs in out-of-home care systems is a cornerstone of best practice.*
- *CREATE considers the Best Interest of the Child principle must be upheld in the operation of the criminal justice system.*
- *Improved confidence in seeking and obtaining a criminal justice response to child sexual abuse for children and young people in out-of-home care requires participation, acknowledgement, and authorisation of children and young people's influence in decision-making processes and actions at all levels of the out-of-home care system(s) across Australia.*
- *A critical element of young people's contact and engagement with police and professionals involved in the criminal justice and child protection systems is their knowledge of their legal rights, and the supports and resources that are available to them to navigate the complex legal systems.*
- *There is a current need to provide improved resources for children and young people in out-of-home care regarding: their legal rights; information about all aspects of the complaints processes (including reporting to police, police investigations, prosecutions, giving evidence in court, sentencing, and appeals); and for providing ongoing support if they need to complain about their treatment and/or seek a criminal justice response.*
- *CREATE advocates for national co-ordination in the delivery of needed services to children and young people particularly to those who are already vulnerable, and supports the recommendations made in the Seen and Heard report under section 14 Children's evidence (Australian Law Reform Commission, 1997).*
- *CREATE believes that all police and prosecutors would benefit from training developed in conjunction with children and young people with an out-of-home care experience to help them respond to incidents involving children and young people in care.*
- *CREATE advocates that at all times, a trusted adult should support the child or young person and facilitate his/her interactions with the criminal justice system through every step of a complaints process.*
- *Independent advocacy services and support should be available in all jurisdictions across Australia.*
- *CREATE advocates for the removal of time limits or age cut-offs in seeking criminal justice responses.*
- *It is crucial that organisations have sound and open processes in place for children and young people who are/have been in their care to access records that may support complaints.*

The importance of a criminal justice response

CREATE Foundation believes listening and responding to children and young people about their views of, and needs in out-of-home care systems, is a cornerstone of best practice. Changes in current processes are necessary to remove barriers that restrict children and young people's views and needs being expressed in the out-of-home care system(s) at all levels across Australia including legislative, administrative, and judicial contexts. It is imperative that reforms seeking justice for children and young people involved in issues of institutional child sexual abuse are based on the best interests of the child being of paramount importance in every aspect of a criminal justice response.

Criminal justice for victims

The criminal justice system should operate and be accessible for all seeking justice including children and young people in out-of-home care. The work undertaken as part of the *Australian Child Rights Progress Report (CRC25)* (Australian Child Rights Taskforce, 2016) identified areas in which children's rights are not adequately protected in Australia, including the lack of a legislative enforcement in relation to the *Rights of the Child* and trends associated with children and young people in the criminal justice system. A number of recommendations in the CRC25 are relevant to the operation of the criminal justice system in the interests of seeking justice for society. Two recommendations, in particular, should be considered in relation to this response:

Familial neglect, abuse and violence: Recommendation 8

Undertake review of the Australian Law Reform Commission's *Seen and Heard* report including progress in implementation of its recommendations and giving particular attention to the report's call for widespread reform to Australia's child protection, education and legal systems to ensure children's participation in decision making. (p. 8)

Access to Justice for Children: Recommendation 2

Make a concerted effort to provide means by which children and others advocating on their behalf are supported to navigate complex legal systems, including funding culturally competent legal services delivered by Aboriginal and Torres Strait Islander community-controlled organisations. (p. 9)

Legislative enforcement of the *UN Rights of the Child* in Australia is a critical tool to reduce the problems and failures of legal processes for children and young people, and as a way of increasing institutions', governments', and the community's attentiveness to their responsibilities associated with seeking and obtaining a criminal justice response to any child sexual abuse in an institutional context. The eight different child protection systems in Australia has led to considerable variability in how children and young people who are victims of abuse and neglect are identified and supported (McDowall, 2009, 2013). Legislative enforcement of the *UN Rights of the Child* could substantially help drive improvements in the measurement, monitoring, and reporting of quality care as part of the National Standards for out-of-home care in Australia. As we noted in our submission to the Senate Committee Inquiry into out-of-home care (CREATE, 2014) inconsistency across jurisdictions relating to legislated powers to investigate individual complaints is a serious limitation (p. 9).

CREATE supports the continuation of the National Framework and National Standards to deliver consistent outcomes for children and young people living in out-of-home care around Australia and to support children and young people seeking and obtaining a criminal justice response to any child sexual abuse. CREATE considers the Best Interest of the Child principle must be upheld in the operation of the criminal justice system through:

- An increased awareness and understanding of the issues of child sexual abuse, particularly in relation to children and young people in out-of-home care. For example:
 - understanding of the risk of child sexual assault for children and young people in out-of-home care;
 - increasing awareness of the ways that children and young people in out-of-home care may express their concerns;

- increasing advocacy services responsive to children and young people’s care experiences.
- Effective professional development of all police, judiciary staff, and other regulatory authorities, involved in complaints processes. Training should include:
 - ensuring age and culturally appropriate communication occurs with children and young people in out-of-home care;
 - developing an understanding of complex trauma,
 - explaining the complex needs of children and young people in out-of-home care;
 - emphasising the difficulties that children and young people in out-of-home care might experience in reporting their concerns.
- Facilitation of independent age and culturally appropriate processes in complaint and oversight mechanisms.
- Age and culturally appropriate resources for children and young people in out-of-home care to explain their legal rights, and provide information about complaints processes.
- Accurate, consistent, and transparent record keeping and reporting across jurisdictions in Australia.
- The removal of time limits or age cut-offs in seeking criminal justice responses.
- Improved case planning involving children and young people in out-of-home care including transparent communication of their care history.


Young people have told CREATE there is a current need to provide improved resources for children and young people in out-of-home care about their legal rights, and for providing information about all aspects of complaints processes (including reporting to police, police investigations, prosecutions, giving evidence in court, sentencing, and appeals), and ensuring ongoing support if they need to complain about their treatment and/or seek a criminal justice response. The CREATE Report Card 2013 highlighted the importance of child friendly, independent complaints processes where children and young people feel comfortable and are able to raise their concerns, without punitive or adversarial actions against them subsequent to making a complaint (McDowall, 2013).

Victims and survivors are supported in seeking criminal justice responses

In our response to *Issue Paper 10* (2016) for the Royal Commission, CREATE reported that, only 63% of children and young people claimed they’d been able to “have a say” on issues that concerned them at least “reasonably often” (McDowall, 2013). Young people with an out-of-home care experience have voiced to CREATE their concern about specific barriers that exist to making complaints in relation to their care including feeling they won’t be believed, and that the negative outcomes outweigh the potential benefits of following through on a complaint. Listening to the views and needs of children and young people in out-of-home care systems highlights the complexity and significance of factors at play to instill confidence in reporting criminal justice issues. These issues include creating a greater awareness and understanding on the part of adults of the importance of valuing what children have to say; an appreciation of the space children and young people need to feel safe; the divergent ways that children and young people in out-of-home care may express their views; and the uniqueness of their perspective.

If children and young people currently in out-of-home care do not know how to make a complaint, or feel their complaint won’t be believed, and/or are scared about making a complaint, the prospects of reporting child sexual abuse are considerably reduced. As such, CREATE advocates for national co-ordination in the delivery of needed services to children and young people particularly to those who are already vulnerable, and supports the recommendations made in the *Seen and Heard* report under section 14 *Children’s evidence* (Australian Law Reform Commission, 1997).

CREATE suggests more needs to be done to improve the participation of children and young people in decisions that affect them and to provide a range of opportunities in which they can to voice their concerns or raise complaints (McDowall, 2016). Young people have told CREATE about the lack of understanding by the community. Misconceptions about their behaviours or some people’s negative



preconceptions about children and young people who have a care background may put some children and young people at more risk of harm (CREATE, 2012a). Recent cases in various states and territories across Australia are testimony to this. For example, The Northern Territory Children's Commissioner's Annual Report for the 2014-2015 financial year revealed that, of the 95 substantiated cases of child abuse, neglect, and sexual exploitation which occurred in out-of-home care, twelve of these children were the subject of multiple reports of harm and exploitation (Office of the Children's Commissioner [Northern Territory], 2015).

Better information sharing and awareness raising in the community generally, and for police, judiciary staff, and other regulatory authorities in particular, on the effects of childhood abuse and neglect is needed to combat stigma and misconceptions. Children and young people should feel that concerns about their safety, wellbeing, and privacy would be addressed if issues arose. They need to be supported in voicing their concerns with people they can trust including, mentors, independent caseworkers, and agencies, through a range of opportunities, resources, and technologies. It is important that every disclosure is treated seriously and not merely rejected out of hand because of possibly problem behaviours of the child or young person who is making the disclosure.

For children and young people in out-of-home care to have improved confidence in seeking and obtaining a criminal justice response to child sexual abuse, their participation, should be acknowledged in decision making process and actions at all levels of the out-of-home care system(s) across Australia. CREATE believes that participation in decision-making helps children and young people build the skills needed for their own individual advocacy, upon which systemic advocacy can be built, and the "best interests" of the child sustained. As such, CREATE calls for dedicated resources, and improved processes that recognise the difficulties for children and young people in the out-of-home care system(s), and support them to speak up.


Particular issues in criminal justice responses

Training of professionals involved in the criminal justice and child protection systems

In CREATE's response to *Issues Paper 8* (2015) we drew the Royal Commission's attention to the requisite need for training of professionals involved in the criminal justice and child protection systems. We believe professional training would improve response to allegations of child sexual abuse and help provide a context for children and young people to be safe and ensure they are active participants in decisions that affect their lives. This includes all police being trained in complex trauma to embed understanding of and empathy for the complexities at play for children and young people in out-of-home care. It is important to acknowledge that children and young people in out-of-home care could already have had involvement with police and/or the courts through issues related to family violence and custodial sentencing. Young people in care, particularly if they live in residential care, are over-represented in juvenile justice systems and, therefore, highly likely to have experience with police (CREATE, 2012a; McFarlane, 2010). Furthermore, a study by the Australian Institute of Criminology found that victims of childhood sexual abuse were almost five times more likely than their peers to be charged with an offence. A higher proportion of charges against them resulted in a guilty verdict, more received a custodial sentence, and they continued offending to an older age (Ogloff et al., 2012).

Issues in police and prosecution responses

Professionals involved in the criminal justice and child protection systems must recognise that if children and young people have had negative experiences with police and courts in their past, it may be difficult for them to relax and cooperate with police and prosecution staff to ensure a thorough inquiry. Young people have told CREATE that police treat them in varying ways when called to residential care ranging from being "nice" or "professional," to being dismissive or not caring because they are seen as "departmental kids" (CREATE, 2012a). Drawing on the report *Reducing the criminalisation of young people in residential care* (2012a), CREATE acknowledges that a critical element of young people's contact with police is their knowledge of their legal rights and the supports that are available to them during, and after involvement with police.



It is essential that training is provided to all professionals involved in the criminal justice and child protection systems in all states and territories that addresses general communication with children and young people, but specifically communication with children and young people who are in the child protection system and who may have been abused by adults. It is preferable that all allegations are referred to specialist police as early as possible in the process, and that any police interacting with children and young people in care have training in, and knowledge of the issues for them. CREATE believes that police and prosecutors would benefit from training developed in conjunction with children and young people with an out-of-home care experience to help them respond appropriately to incidents involving children and young people in care.

Evidence of victims and survivors

In our response to *Issues Paper 8* (2015), we also highlighted the importance of practices that minimise the number of police and other professionals who conduct interviews with children and young people in care about allegations of sexual abuse. Evidence and best-practice frameworks should guide engagement with children and young people in this area, including limiting the number of times that children and young people need to repeat their story to professionals (Department of Human Services, 2012). As part of the research for the CREATE Report Card (McDowall, 2013), a young person told CREATE that the following was important:


Not going from one counsellor to another, keep in touch with my main counsellor; get to speak to someone higher up [with more power]; don't like to have to retell my case history over and over again; I don't know who to ring. (Male 10)

CREATE believes it is important, as much as possible, for the same police and prosecution staff to maintain regular communication throughout the criminal justice response process. CREATE advocates that at all times, a trusted adult should support and facilitate the child or young person's understanding of the criminal justice system through every step of a complaint process. It is important that they are informed and able to participate in legal proceedings, to the extent they feel appropriate to their needs. In the CREATE Submission to the *Queensland Child Protection Inquiry* (2012b), a young person highlighted the significance of young people being able to participate in legal proceedings. He wrote:

I think it's important for children and young people to be involved in the decision making process so that they can give their side of the story...I think all young people should have a lawyer because sometimes the department doesn't see the bigger picture or ask what I want. I think the courts have a job to ensure that young people know that they can have a lawyer and that they can go to court and speak to the judge. (Paul)

For some people, sharing their story and gaining recognition of their experience is a very important part of the process to seek redress. Involving children and young people in legal proceeding requires attentiveness to the vulnerability of children and young people and awareness of the time it may take to build trust, and lead to open and honest communication.

CREATE draws the Royal Commission's attention to our response to *Issues Paper 10* (2016) in which we recommended that independent advocacy services and support should be available in all jurisdictions across Australia. Currently the ability to investigate individual complaints varies between jurisdictions. The Productivity Commission's *Report on Government Services 2015*, identifies 13 "independent bodies" that have a role in monitoring, advocating, and advising on rights and complaints for children and young people in Australian out-of-home care systems (Steering Committee for the Review of Government Service Provision, 2015). Such complexity in the system can be complicated and often inaccessible to children and young people. Process are not necessarily child friendly, and often an identified person/s who can advocate and support a child or young person is not available. In many cases, information about how a complaint will be handled, and how feedback to the child or young person will be given, is not clearly explained. A system that is not independent, that has obscure



processes, and does not provide follow up or communication with children and young people, can compound the harmful effects of abuse.

In CREATE's response to *Institutional Responses to Child Sexual Abuse in Out-of-Home Care* (2016), we showed the importance of developing child-safe policies and processes, and consideration of not only the age-appropriateness of strategies but also the potential difficulties children and young people can experience in accessing information related to their complaints. The lack of information children and young people in out-of-home care have about their lives in care, in many instances not knowing why they were brought into care, may negatively impact on children and young people's capacity to provide evidence in criminal justice responses. Access to their files can be limited and often the amount of redacted material leaves children and young people with less of a sense of control over their own lives as they are denied information due to privacy policies of departments. In particular, young people who have left out-of-home care should be supported when accessing their case files, especially if there is documentation and records of abuse that occurred whilst in care.

Record keeping policies and access to information has implications for limitation periods on launching criminal prosecutions. CREATE advocates for the removal of time limits or age cut-offs in seeking criminal justice responses. In our response to *Issues Paper 4*, we noted it could be beneficial to consider retaining records beyond any minimum legal requirement in the event that people leaving care wish to access their records (CREATE, 2013). In relation to delayed reporting of abuse, it is crucial that organisations have sound and open processes in place for children and young people who are/have been in their care so that they can access records that may support complaints.

General

With a significant number of children and young people remaining in the out-of-home care system(s) in Australian until they are 18 years, it is necessary that reforms support an "open" system of care that is transparent and accountable and that is designed to minimise the risks to children and young people in out-of-home care. CREATE strongly advocates for an emphasis on hearing children and young people's experiences and views, and empowering them to speak up on issues and their concerns. This is vital for all reforms related to their care, including issues of institutional child sexual abuse. Young people and others attending the CREATE national conference in 2015, "Youth for Change", proposed several approaches for independent, child friendly complaints mechanisms that supports the Royal Commission's proposed approach to criminal justice reforms. These include:

- Designating one independent person for children and young people in out-of-home care to complain to, whom they can trust and build a relationship with. Confidentiality must be addressed.
- Promoting rights and knowledge of processes available.
- Ensuring language used is appropriate for the age of the child or young person who will be using the service.
- Ensuring that the dedicated person [or agency] is action oriented, i.e., they must do what they say they will do, follow up, and report back to the child or young person.
- Establishing honest and open processes that are clear about what will happen, what is happening, and what the possible solutions are – including when a child or young person should expect to hear back about the complaint.
- Recognising the skills needed to be able to respond to complaints and support children and young people through the process.
- Helping children and young people to understand the process and the possible consequences of complaining or of not complaining.
- Providing accessible contacts with a number of entry options – email, phone, Apps, in person, 24-hour hotline.



Conclusion

CREATE firmly believes that a continuing commitment to the National Framework for Protecting Australia's Children across government and non-government services is essential to reform systems for children and young people in out-of-home care across Australia. CREATE's Report Card 2013 identified that children and young people's knowledge of complaints processes was variable across jurisdictions (McDowall, 2013). Improvements in the laws, policies, and practices to protect children, and reforms to seeking criminal justice for children and young people involved in issues of institutional child sexual abuse must ensure the best interest of the child are paramount in every aspect. Listening to the voices of children and young people in out-of-home care is an important part of measuring how the system is working for children and young people and addressing areas for change.

CREATE thanks the children and young people who, through their responses to CREATE's initiatives, add their voices to effect improvement of the out-of-home care system in Australia. Promoting their voices and experiences remains CREATE's central aim.

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