

# ‘Out of Place’: The Criminalisation of Black and Minority Ethnic Looked After Children in England and Wales

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## Introduction

In the last decade, the youth justice system in England and Wales has experienced a significant contraction, which has culminated in the child prison population falling by over 70 percent<sup>1</sup>. This decline is not the result of any deliberate, progressive agenda<sup>2</sup>, but has been attributed to the proliferation of diversionary schemes, as well as pragmatic considerations relating to austerity politics<sup>3</sup>. While absolute numbers have reduced, it has had the perverse effect of increasing the disproportionate representation of two particularly vulnerable groups; Black and Minority Ethnic (BME) children and looked after children.

This article draws upon findings from ESRC-funded PhD research that explores the over-representation of looked after children and BME children in the youth justice system in England and Wales<sup>4</sup>. The research utilised mixed-methods, including analyses of secondary official datasets and 27 in-depth interviews with youth justice and children’s services experts<sup>5</sup>. This article sets out the research context and methodology, before demonstrating that existing inequalities in relation to ethnicity and looked after status have intensified, and that BME looked after children experience a ‘double whammy’ of disadvantage. The article then considers two key drivers of such inequalities in the youth justice system in general, and the secure estate in particular. It explores the complex relationship between stability for BME children within the care system and difficult behaviour. It then moves on to outline the issue of criminalisation within care placements, which is especially likely to impact BME children. Finally, the article outlines that looked after children are accelerated through the youth justice system due to care system failings in much the same way that BME children are accelerated through the system as a result of racialisation. The article concludes that structural factors play a significant role in youth justice involvement of looked after children, particularly those who come from an ethnic minority background. It asserts that ultimately, this results in the institutionalised criminalisation of BME looked after children who must contend with both the stigma of their ethnicity and of being in care.

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<sup>1</sup>Youth Justice Board (2020) *Youth Justice Statistics 2018/2019: Supplementary Tables*. Available at: <https://www.gov.uk/government/statistics/youth-justice-statistics-2018-to-2019> (accessed 6 February 2021).

<sup>2</sup>Cunneen, C., Goldson, B. & Russell, S. (2018) ‘Human rights and youth justice reform in England and Wales: A systemic analysis’, *Criminology & Criminal Justice*, 18(4): 405-430.

<sup>3</sup> See for example, Bateman, T. (2012) ‘Who pulled the plug? Towards an explanation of the fall in child imprisonment in England and Wales’, *Youth Justice*, 12(1): 36-52.

<sup>4</sup> Hunter, K. (2019) *Institutionalised Criminalisation: Black and Minority Ethnic Children and Looked After Children in the Youth Justice System in England and Wales* (unpublished thesis). University of Liverpool.

<sup>5</sup> Interviewees included, among others, senior professionals working in youth justice, children’s services and non-governmental organisations, academics and Laming review team members (for a full list see Hunter, 2019: 290).

## Background

Currently, the government does not know precisely how many of its looked after children become involved with the youth justice system, or how many of those children reside in youth custody<sup>6</sup>. It does not know how many care-experienced individuals fall into criminal justice involvement and imprisonment<sup>7</sup>. Furthermore, there is no data that outlines the ethnicity of care-experienced individuals who become justice-involved<sup>8</sup>. The absence of quality youth justice data means that we are unable to determine the extent to which BME looked after children may be overrepresented in the youth justice system, and the juvenile secure estate<sup>9</sup>.

In England and Wales, BME children are disproportionately represented among both looked after children<sup>10</sup> and youth justice cohorts<sup>11</sup>. The Laming Review estimated that 44 percent of all looked after children in custody come from an ethnic minority background<sup>12</sup>. With the exception of the author's PhD research, much of the work that focuses on the intersections between ethnic identity, child-welfare and youth justice involvement comes from the USA and Australia. Studies utilising linked administrative data have indicated that African-American children in child-welfare systems have higher rates of youth justice involvement<sup>13</sup> and receive harsher sentences than their white peers<sup>14</sup>. Similar findings are apparent in the Australian research whereby indigenous children in child-welfare systems have greater youth justice involvement than their non-indigenous peers<sup>15</sup>.

The international research suggests that there is a complex relationship between ethnicity and involvement in systems of welfare and justice, which warrants further investigation. This article argues that BME looked after children experience compounded disadvantage in both systems of care and justice which must be urgently addressed.

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<sup>6</sup> See Hunter (2019) see n. 4

<sup>7</sup> See Fitzpatrick, C., Hunter, K., Shaw, J. and Staines, J. (2019) *Exploring the Pathways between Care and Custody for Girls and Women: A Literature Review*. Available at: <http://wp.lancs.ac.uk/carecustody/files/2019/10/CareCustodyLiteratureReview.pdf>

<sup>8</sup> See Hunter (2019) see n. 4

<sup>9</sup> The new MoJ/DfE linked administrative datasets (due for release in Autumn 2021) will make it possible to analyse the intersections between ethnicity, care experience, and criminal justice involvement.

<sup>10</sup> Department for Education (2020a) *Children Looked After Including Adoptions 2019/20*. Available at: <https://explore-education-statistics.service.gov.uk/find-statistics/children-looked-after-in-england-including-adoptions/2020> (accessed 1 May 2021).

<sup>11</sup> YJB (2020) see n. 1

<sup>12</sup> Prison Reform Trust (2016) *In Care, Out of Trouble: An independent review chaired by Lord Laming*. London: Prison Reform Trust. p. 65

<sup>13</sup> See for example, Goodkind, S., Shook, J.J., Kim, K.H., Pohlig, R.T., & Herring, D.J. (2012) 'From child welfare to juvenile justice: race, gender, and system experiences', *Youth Violence and Juvenile Justice*, 11(3): 249-272.

<sup>14</sup> Herz, D., Ryan, J.P. & Bilchik, S. (2010) 'Challenges facing crossover youth: An examination of juvenile-justice decision making and recidivism', *Family Court Review*, 48(2): 305-321.

<sup>15</sup> See for example, Doolan, I., Najman, J., Mills, R., Cherney, A. & Strathhearn, L. (2013) 'Does child abuse and neglect explain the overrepresentation of Aboriginal and Torres Strait Islander young people in youth detention? Findings from a Birth Cohort Study', *Child Abuse & Neglect: The International Journal*, 37(5): 303-309.

## Methodology

This article draws upon findings from ESRC-funded PhD research on the overrepresentation of looked after children and BME children in the youth justice system in general, and the secure estate in particular, in England and Wales. The research aimed to close conspicuous gaps in the knowledge base by providing a rigorous analysis of ethnicity, looked after status and youth justice involvement. It did so primarily by focusing on three key aims:

- I. To investigate the extent of the overrepresentation of BME children and looked after children in the youth justice system in general, and the secure estate in particular;
- II. To interrogate the potential drivers of the overrepresentation of BME children and looked after children in the youth justice system in general, and the secure estate in particular;
- III. To identify any issues that may specifically relate to BME looked after children in the youth justice system in general, and the secure estate in particular.

To address these aims, the research employed a mixed-methods approach that drew on the combined strengths of quantitative and qualitative methods<sup>16</sup>. It employed quantitative analysis of official and other supplementary data sets from the Office for National Statistics, Department for Education (DfE), Youth Justice Board (YJB), Home Office and Ministry of Justice (MoJ). The quantitative analysis was complimented and extended using semi-structured interviews with national youth justice and children's services professionals. The qualitative analysis breathed life into the statistical data by adding nuance, depth and understanding to the issues being explored<sup>17</sup>. The findings presented in this article represent just a fraction of the overall research.

## Intensifying Overrepresentation and the 'Double Whammy' Effect

The available data suggests that in the last decade, the overrepresentation of BME children and looked after children in the youth justice system has intensified as overall numbers have fallen. Whilst there is no central record of the number of looked after children who come into contact with the youth justice system, there is clear evidence that looked after children are overrepresented among those who receive a caution and conviction<sup>18</sup>. Moreover, HMIP annual surveys show 54 percent of boys in the juvenile secure estate have been in local authority care<sup>19</sup> compared to 27 percent in 2011<sup>20</sup>. Several experts interviewed as part of this study expressed

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<sup>16</sup> Creswell, J.W., & Plano Clark, V.L. (2011) *Designing and Conducting Mixed Methods Research (2nd edition)*. London: Sage.

<sup>17</sup> Lincoln, Y.S. & Guba, E.G. (1985) *Naturalistic Inquiry*. California: Sage.

<sup>18</sup> Department for Education (2020a) see n. 10

<sup>19</sup> HMIP (2021) *Children in Custody 2019–20: An Analysis of 12–18-Year-Olds' Perceptions of Their Experiences in Secure Training Centres and Young Offender Institutions*. London: HMIP.

<sup>20</sup> Summerfield, A. (2011) *Children and Young People in Custody 2010–11: An analysis of the experiences of 15–18-year-olds in prison*. London: HMIP.

concerns about the increasing overrepresentation of looked after children in the youth justice system.

The official data regarding ethnicity of children in the youth justice system is clearer cut. BME children are disproportionately likely to come into contact with the youth justice system through stop and search<sup>21</sup>, with Black individuals nine times more likely to be stopped and searched than white individuals<sup>22</sup>. Ethnic minority children are also increasingly over-represented in arrest figures. For example, Black children (aged 10 to 17) comprise roughly 4.4 percent of the general population, yet accounted for 15.7 percent of arrests in 2018/19 (an increase of 7.6 percent since 2008/2009)<sup>23</sup>. A statistical analysis conducted for the Lammy Review found that ‘the system itself did add some degree of disproportionality at subsequent stages, however rarely at the levels seen in arrest differences’<sup>24</sup>. In this sense, policing can be seen as playing a key role in ‘recruiting’ BME children into the youth justice system<sup>25</sup>.

The experts interviewed for this research overwhelmingly felt that policing of Black children and communities was excessive; Academic 3 described it as ‘*vital*’ to understanding ethnic disproportionality. The majority of interviewees felt that excessive policing was driven by highly problematic, racialised assumptions<sup>26</sup> about the types of individuals who engage in criminal behaviour<sup>27</sup>. Indeed, within the police service, negative attitudes about ethnic minority groups have been well documented<sup>28</sup>.

The overrepresentation of BME children, and Black children in particular, is also replicated in sentencing. Official data suggests that there exists a ‘multiplier effect’<sup>29</sup> whereby ethnic disproportionality increases with the severity of the sentence<sup>30</sup>. In 2018/19, Black children were overrepresented in all sentence types, but their overrepresentation was greatest for custodial sentences<sup>31</sup>. The research literature suggests that BME individuals, particularly those who

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<sup>21</sup> All Party Parliamentary Group for Children (2014) *Inquiry into ‘Children and the Police’: Initial Analysis of Information Request to Police Forces*. London: National Children’s Bureau.

<sup>22</sup> Home Office (2020) Stop and search statistics data tables: police powers and procedures year ending 31 March 2020 second edition. Available at: <https://www.gov.uk/government/statistics/police-powers-and-procedures-england-and-wales-year-ending-31-march-2020> (accessed 1 March 2021).

<sup>23</sup> YJB (2020) see n. 1

<sup>24</sup> Uhrig, N. (2016) *Black, Asian and Minority Ethnic disproportionality in the Criminal Justice System in England and Wales*. London: Ministry of Justice. pp. 12

<sup>25</sup> Webster, C. (2006) ‘“Race”, youth crime and justice’. In B. Goldson and J. Muncie (eds) *Youth, Crime and Justice*. London: Sage. pp. 32

<sup>26</sup> For a discussion of racialisation see Phillips, C. (2011) ‘Institutional racism and ethnic inequalities: an expanded multilevel framework’, *Journal of Social Policy*, 40(1): 173-192.

<sup>27</sup> See Hunter (2019) see n. 4

<sup>28</sup> See for example, Reiner, R. (1993) *The Politics of the Police (2nd edition)*. London: Harvester Wheatsheaf.

<sup>29</sup> Goldson, B. & Chigwada-Bailey, R. (1999) ‘(What) justice for black children and young people’ In B. Goldson (ed.) *Youth Justice: Contemporary Policy and Practice*. Aldershot: Ashgate.

<sup>30</sup> Data derived from YJB (2020) see n. 1

<sup>31</sup> YJB (2020) see n. 1

identify as Black, are likely to receive harsher sentences than white individuals<sup>32</sup> although more research is needed to determine the precise nature of court interactions<sup>33</sup>.

Analyses of official data indicate that Black children are more likely to be punished, and to be punished more severely at all stages of the youth justice process. This has intensified as the overall number of children being funnelled through the system has declined<sup>34</sup>. Figure 1 shows that the number of white children in the juvenile secure estate has fallen more sharply than the number of BME children. In 2018/19, almost half of children in youth custody identified as non-white<sup>35</sup>. Ethnic disproportionality is most severe for Black children who accounted for a third of all children in youth custody<sup>36</sup> compared to just 4.4 percent of the general population<sup>37</sup>. Clearly ethnic disproportionality is a longstanding feature of the youth justice system and shows no sign of abating.

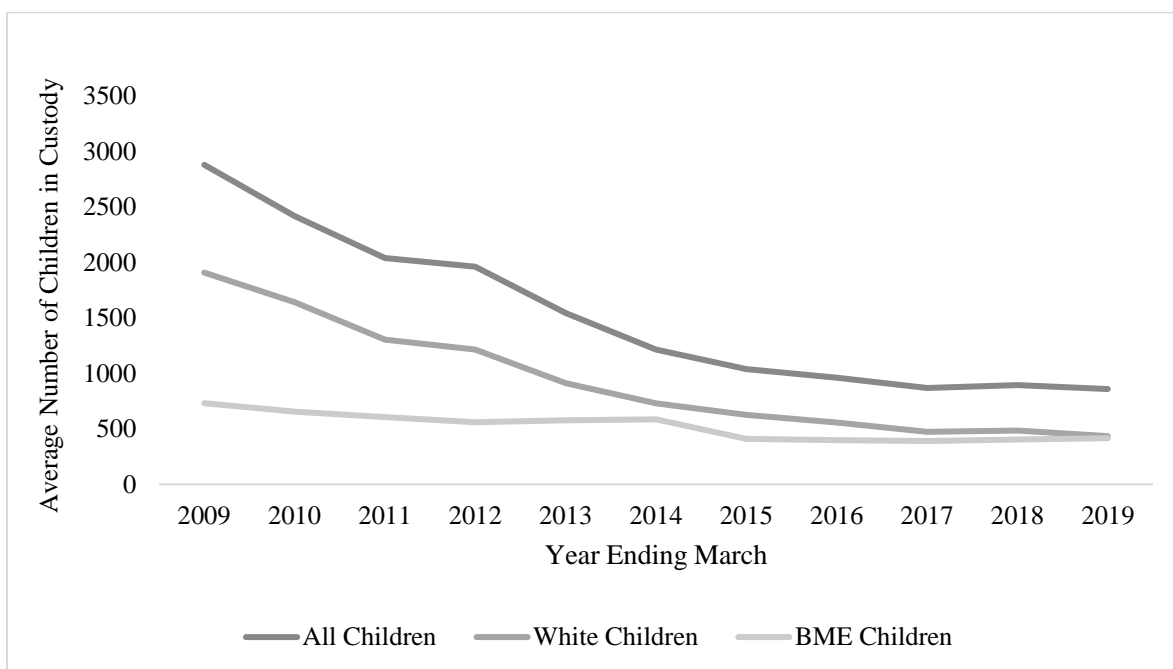


Figure 1: Average number of children in youth custody by ethnicity

As highlighted by the Laming Review<sup>38</sup>, there is considerable overlap between looked after children and BME children in youth custody. When we combine identifying as a BME child with being looked after this can lead to a ‘double whammy’ effect. Youth Justice Consultant 1 suggested that looked after status and ethnicity can ‘exacerbate’ one another. The majority of interviewees felt that ‘racism’ and/or ‘discriminatory’ practices contributed to ethnic disproportionality in the youth justice system. In their view, BME children, particularly those

<sup>32</sup> See for example Uhrig (2016) see n. 24

<sup>33</sup> Hunter (2019) see n. 4

<sup>34</sup> See Hunter (2019) n. 4 for a full discussion.

<sup>35</sup> YJB (2020) see n. 1

<sup>36</sup> YJB (2020) see n. 1

<sup>37</sup> Data extracted from 2011 Census.

<sup>38</sup> PRT (2016) see n. 12

who are Black, must contend with racialised assumptions that arguably penetrate all aspects of the system<sup>39</sup>. Similarly, looked after children routinely face stigma<sup>40</sup>, including the perception that they are ‘naughty’ (Senior Police Officer) due to a lack of understanding about reasons for entering care<sup>41</sup>.

In tracing the increasing overrepresentation of both groups of children, it is clear that BME looked after children are particularly vulnerable to youth justice involvement. This vulnerability is arguably driven by two key processes: placement instability and criminalisation in care settings, which will now be addressed.

### **‘Sticking Out Like a Sore Thumb’: Placing BME Children in Care**

The research evidence suggests that stable and supportive placements can protect children against youth justice contact<sup>42</sup>. However, many looked after children experience significant disruption and instability in care<sup>43</sup>. Official data indicates that children who experience multiple placements are most likely to receive a caution or conviction.<sup>44</sup> Furthermore, evidence suggests that many care-experienced children in youth justice systems have experienced repeat placement breakdowns<sup>45</sup>. Placement instability can leave children feeling alienated and disempowered, and their coping strategies, such as refusing to engage, can further increase their risk of criminalisation<sup>46</sup>. The issue of placement stability is exacerbated for BME looked after children for whom there is a shortage of placements with ethnic minority foster carers<sup>47</sup>. While it is not essential that children be matched with carers by ethnicity, such placements can mean that children are better supported to explore their identity<sup>48</sup>, which in turn reduces the risk of placement breakdown.

The lack of ethnic minority carers means that BME children tend to be housed in residential placements, where they are more likely to receive a formal youth justice sanction than in other placement types<sup>49</sup>. Interviewees were concerned that children’s homes have a ‘last resort’ status among local authorities, with one former magistrate describing them as a ‘dumping

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<sup>39</sup> See Hunter (2019) see n. 4

<sup>40</sup> Coram Voice (2015) *Children and Young People’s Views on Being in Care: A Literature Review*. Bristol: Hadley Centre for Adoption and Foster Care Studies; Children’s Rights Director for England (2009) *Care and Prejudice*. Manchester: Ofsted.

<sup>41</sup> Taylor, C. (2006) *Young People in Care and Criminal Behaviour*. London: Jessica Kingsley.

<sup>42</sup> Schofield, J., Biggart, L., Ward, E., Scaife, V., Dodsworth, J., Haynes, A. & Larsson, B. (2014) *Looked After Children: Reducing Risk and Promoting Resilience*. London: BAAF.

<sup>43</sup> Children’s Commissioner (2020) *Stability Index 2020*. London: Office for the Children’s Commissioner.

<sup>44</sup> See Hunter (2019 p. 71-72) see n. 4

<sup>45</sup> See Staines, J. (2016) *Risk, Adverse Influence and Criminalisation: Understanding the Over-Representation of Looked After Children in the Youth Justice System*. London: Prison Reform Trust.

<sup>46</sup> Day, A. (2017) ‘Hearing the voice of looked after children: challenging current assumptions and knowledge about pathways into offending’, *Safer Communities*, 16(3): 122-133.

<sup>47</sup> BBC (2020) ‘BME foster care shortage in two-thirds of English councils’, *BBC* [online], Available at: <https://www.bbc.co.uk/news/uk-england-leeds-51136569> (accessed 04 May 2021).

<sup>48</sup> See for example Barn, R. (2001) *Black Youth on the Margins: A Research Review*. York: Joseph Rowntree Foundation.

<sup>49</sup> Hunter (2019) n. 4 pp. 76

*ground*'. This diminishing status of residential care was strongly linked to the dominating presence of private providers<sup>50</sup>. The lack of provision in inner city areas, which typically have larger BME populations, more heavily impacts upon BME children in care since they tend to be placed further from home than their white counterparts<sup>51</sup>.

The key problem was that BME children often are 'out of place' and unsupported in the care system. Two interviewees described how Black children can '*stick out like a sore thumb*' when housed in largely white, working class areas, in which their ethnicity and care status intersect to produce the 'double whammy' outlined above. A Senior YOT Manager highlighted this process:

*We had one kid where we just knew that he was going to reoffend, he was a Black kid from London, and sure enough he did because he was having to fight with some of the kids in [small Northern town] and when the police arrived guess who got arrested? [...] all those stereotype images come into people's heads and wallop, it's the kid that suffers.*

Ethnic minority young people who had been in care raised similar concerns about compounded disadvantage during the Laming Review<sup>52</sup>. The above demonstrates that care system injustices experienced by BME looked after children can result in challenging behaviour and youth justice contact. Perhaps of greater concern, however, are the ways in which the care system *responds* to challenging behaviour.

## **The Intersections Between Criminalisation and Racialisation**

There is evidence to suggest that children in care are subjected to increased scrutiny and surveillance, which can result in their criminalisation<sup>53</sup>. Interviewees gave numerous examples of carers, particularly staff in private children's homes, calling the police for behaviour that would not usually result in youth justice intervention. They felt that staff were more likely to call the police for two key reasons: the pressure to follow profit-driven procedures (such as making insurance claims) and the lack of proper training. Previous research has suggested that staff in children's homes resort to police intervention as a way of asserting authority and maintaining control when they lack the necessary resources to do their job<sup>54</sup>. Director of NGO 2 argued that calling the police to help manage behaviour is damaging because it can put

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<sup>50</sup> Department for Education (2020b) National - Children looked after at 31 March by placement provider, placement type and locality. Available at: <https://explore-education-statistics.service.gov.uk/find-statistics/children-looked-after-in-england-including-adoptions/2020#releaseHeadlines-tables> (accessed 1 May 2021).

<sup>51</sup> Ofsted (2014) *From a Distance: Looked After Children Living Away From Their Home Area*. Manchester: Ofsted.

<sup>52</sup> Prison Reform Trust (2016) see n. 12

<sup>53</sup> See for example Prison Reform Trust (2016) see n. 12

<sup>54</sup> See for example, Shaw, J. (2014) *Residential Children's Homes and the Youth Justice System: Identity, Power and Perceptions*. Basingstoke: Palgrave Macmillan.

children on the ‘*police radar*’ which is a ‘*slippery slope*’ to formal youth justice sanctions. Youth justice contact can lead to labelling and stigmatisation, which can result in further criminalisation<sup>55</sup>. As established above, BME children already face stigma and so are particularly affected by such processes.

Many interviewees also felt that looked after children were disadvantaged in the youth justice system because they are not perceived as having ‘*supportive*’ (Youth Justice Consultant 3) backgrounds. This perception is likely to reflect reality since many looked after children (and BME looked after children in particular) suffer because of instability in the care system. Interviewees suggested that such issues lead youth justice professionals to respond to offending with harsher sanctions, as they feel they must intervene.

For children to receive diversionary measures and alternatives to custody, sentencers must be confident that children have the necessary support to comply with their sentence<sup>56</sup>. Several interviewees were adamant that a lack of advocacy can result in looked after children receiving harsher sanctions, in particular custodial sentences. They believed that professionals perceive the lives of such children as ‘*chaotic*’ (Youth Justice Consultant 3) and so attempt to mediate that by imposing structure. Indeed, many looked after children are left to attend court alone or without someone who knows them well<sup>57</sup>.

Among the majority of interviewees, there was a sense that, looked after children receive differential treatment, whereby they are ‘*escalated*’ (Former Magistrate) through the justice system and are at a greater risk of receiving a custodial sentence. Here, the notion of escalation is a key one. It was outlined above that BME children experience a ‘*multiplier effect*’ in which they are treated progressively harsher at all stages of the youth justice system<sup>58</sup>. Criminalisation in care settings and the acceleration of looked after children through the youth justice system are likely to weigh more heavily on BME looked after children, who must also contend with differential treatment based on their ethnicity.

The above demonstrates that looked after children experience stigma that can influence their trajectories through the youth justice system. This is particularly concerning for BME looked after children who must also contend with racialisations that are embedded in the justice system. Such stigma expresses itself in at least two ways: through negative perceptions of looked after children as troublemakers, and through perceptions of looked after children as unsupported and in need of structure. The lack of advocacy for looked after children plays a key role here; the absence of supportive adults can influence sentencing and push children further into the system.

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<sup>55</sup> See for example, McAra, L. & McVie, S. (2010) ‘Youth crime and justice: key messages from the Edinburgh Study of Youth Transitions and Crime’, *Criminology and Criminal Justice*, 10(2): 179-209.

<sup>56</sup> Judicial College (2016) *Youth Court Bench Book*. London: Judicial College.

<sup>57</sup> PRT (2016) see n. 12

<sup>58</sup> Goldson & Chigwada-Bailey (1999) see n. 29



## **Conclusion**

To summarise, this article has established that existing inequalities in the youth justice system with regards to BME children and looked after children have intensified. BME looked after children are likely to bear the brunt of such inequalities. It has shown that BME children, particularly those who identify as Black, are subjected to progressively harsher treatment at all stages of the youth justice system. Such treatment is likely to produce a ‘double whammy’ effect for BME looked after children who are also disadvantaged as a result of their care status.

In outlining structural factors which influence children’s trajectories through the justice system, this article has diverted the focus from individual level explanations of overrepresentation. It has established that issues within the care system can impact upon children’s behaviour, lead to police involvement and ultimately, criminalisation. Wider issues with both the availability and quality of provision means that children are subjected to instability, which may impact BME looked after children in particular. Moreover, the use of police intervention as a method of discipline in some children’s homes constitutes the criminalisation of looked after children because they do not live in a family home and raises serious questions of the care system.

The article also explored the ways in which assumptions about both BME children and looked after children can determine their trajectories through the youth justice system. It seems that looked after children can be judged on their status, much in the same way that BME children can be judged based on their ethnicity. Such assumptions are particularly concerning for BME looked after children who also have to deal with racialisation. However, in order to further our understanding of the specific challenges faced by BME looked after children, more research is needed that draws upon the experiences of children directly.

Altogether, this article has highlighted significant issues that must be addressed in order to reduce the overrepresentation of BME looked after children in the youth justice system and the juvenile secure estate. It has established that both groups of children are subjected to increased scrutiny and surveillance, ultimately amounting to institutionalised criminalisation. The issues covered here represent a fraction of the disadvantages faced by BME looked after children who deserve better care and support to prevent them from getting into trouble.