

## **Submission to the Australian Royal Commission into Institutional Responses to Child Sexual Abuse in response to the *Consultation Paper on Criminal Justice***

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1. This submission to the Australian Royal Commission into Institutional Responses to Child Sexual Abuse ('the Commission') is written specifically in response to the Commission's *Consultation Paper on Criminal Justice* ('the Consultation Paper') and relates to the Commission's Term of Reference (d) on the impacts of child sexual abuse.

2. In its Interim Report (vol 1) the Commission notes that research suggests the complex and long term impacts of child sexual abuse include criminal offending and experiencing imprisonment.<sup>1</sup> The Commission subsequently notes in its *Redress and Civil Litigation* report that

*Survivors' accounts in private sessions support the research which shows that, when compared with the general population, survivors may have a higher risk of experiencing during their life:*

*lower levels of community participation*

*social isolation and homelessness*

*lower earnings and socio-economic status and difficulty maintaining employment*

*imprisonment.*<sup>2</sup>

3. The Commission's recognition of offending and imprisonment as impacts of child sexual abuse suggests there is a need for a deeper consideration of the complex legal, ethical, moral, political and social issues related to the criminalisation, punishment and incarceration of survivors.

4. The Consultation Paper focuses entirely on criminal justice issues pertaining to perpetrators of child sexual abuse. While these are clearly fundamental issues for the

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<sup>1</sup> Page 117.

<sup>2</sup> Page 179.

Commission to consider, this submission raises some additional criminal justice issues pertaining to survivors of child sexual abuse who are offenders. While it is not suggested that these two sets of issues be dealt with together and/or in the one report (because the issues pertaining to survivors are of a very different nature and grouping these two categories together might be distressing and offensive to survivors), these issues are being raised now in case there is no further opportunity to raise criminal justice issues with the Commission.

5. At the outset it must be noted that there is a lack of statistical information on the prevalence of institutional child sexual abuse in prison populations.<sup>3</sup> For example, writing in the specific context of female prisoners, Mary Stathopoulos et al state that: 'Relatively little research has been undertaken in Australia to measure the prevalence of child sexual abuse and other forms of victimisation specifically among female prisoners – and ... statistics may be problematic due to underreporting.'<sup>4</sup> The lack of data is problematic because, to borrow from Jessica Cadwallader et al, the failure to systemically 'count' this abuse suggests that it does not 'count' or matter in a social or political sense.<sup>5</sup> The lack of empirical data means that as a society and a legal system we can rationalise ignoring the injustices and harms done to survivors through their incarceration. Therefore, there is a need for (sensitive and respectful) data collection which can provide statistical information on the prevalence of child sexual abuse in prison populations and more specifically on child sexual abuse occurring in institutional settings.
6. Yet, even in the face of these data limitations, available statistics suggest a high prevalence of child sexual abuse in prisoner populations. Stathopoulos et al report that research on child sexual abuse of female prisoners 'indicates prevalence figures of between 57% and 90%'.<sup>6</sup> In the New South Wales context, the 2009 survey of detainees in juvenile justice custody reported that 60% of young people experienced at least one form of childhood abuse or neglect and that 9.9% of all respondents had

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<sup>3</sup> The same is also true of forensic mental health populations. Consideration by the Commission of the points raised in this submission should also extend to survivors detained in forensic mental health facilities.

<sup>4</sup> Mary Stathopoulos et al, 'Addressing Women's Victimisation Histories in Custodial Settings' (ACSSA Issues No 13, Australian Centre for the Study of Sexual Assault, December 2012).

<sup>5</sup> Jess Cadwallader, Anne Kavanagh and Sally Robinson, 'We Count What Matters, and Violence Against People with Disability Matters' *The Conversation*, 27 November 2015. Accessed 6 January 2016. <http://theconversation.com/we-count-what-matters-and-violence-against-people-with-disability-matters-51320>.

<sup>6</sup> Mary Stathopoulos et al, 'Addressing Women's Victimisation Histories in Custodial Settings' (ACSSA Issues No 13, Australian Centre for the Study of Sexual Assault, December 2012).

experienced sexual abuse.<sup>7</sup> In the 2001 NSW Inmate Health Survey<sup>8</sup> it is reported that: ‘Overall 85 (60%) women and 250 (37%) men had been sexually abused before the age of sixteen.’<sup>9</sup> Unfortunately the statistics do not indicate specific prevalence of sexual abuse which occurs in institutional settings.

7. To the extent that research establishes both that imprisonment can be a long term impact of child sexual abuse and that there is a significant proportion of prisoners who have experienced child sexual abuse, the incarceration of survivors and the related issues of their criminalisation, policing and punishment are *systemic* criminal justice issues which law and the state are complicit in and for this reason are issues that the Commission should consider. The remainder of this submission identifies some specific issues the Commission might wish to consider.
8. **The retraumatising and violent effects of incarceration:** In its Interim Report (vol 1) the Commission notes that ‘survivors are at increased risk of revictimisation, future perpetration and intergenerational trauma’<sup>10</sup>. The Commission might consider the role of incarceration in the revictimisation and traumatising of survivors, and the extent to which this is not merely accidental but is systemically characteristic of prison. These systemic effects of prison were depicted in the recent ABC Four Corners documentary on juvenile detention in the Northern Territory but, as Deb Kilroy of Sisters Inside stated in a press release following the announcement of a Royal Commission limited only to that jurisdiction,

*Similar brutality occurs across Australia in all our prisons for both young and older people. ...*

*Women on a regular basis are body shackled, have spit hoods attached to their heads, left in isolation for days, weeks and months.*

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<sup>7</sup> Devon Indig et al, *2009 NSW Young People in Custody Health Survey: Full Report* (Justice Health, 2011)158-159.

<sup>8</sup> Unfortunately, the questions on child sexual abuse were removed from the 2009 NSW Inmate Health Survey: Devon Indig et al, *2009 NSW Inmate Health Survey: Key Findings Report* (Justice Health, 2010) 22-23.

<sup>9</sup> Tony Butler and Lucas Milner, *The 2001 New South Wales Inmate Health Survey* (NSW Corrections Health Survey, 2001) 135.

<sup>10</sup> Page 116.

*The reality is this abuse occurs in all our prisons in this country and everyone who goes into prison or works in them knows this.*<sup>11</sup>

The Commission's consideration of the victimising and traumatising effects of prison vis-à-vis child sexual abuse could extend to consideration of the extent to which sentencing law provides scope for acknowledging in the process of sentencing survivors both prison's systemically victimising and traumatising effects and child sexual abuse itself. The Commission might also consider the lower legal protections available to survivors in prison who do experience victimisation and trauma during their incarceration (e.g. in some jurisdictions the inapplicability of domestic violence legislation and reduced applicability of victims compensation and civil liability legislation).

9. **The interrelatedness of incarceration and social isolation:** As the Commission notes in its *Redress and Civil Litigation* report, incarceration is interrelated with other long term impacts of child sexual abuse such as social isolation. The Commission might not only consider the extent to which incarceration is retraumatising and violent for survivors, but also how it serves to further isolate, exclude and impoverish survivors thus exacerbating many of the other long term impacts of child sexual abuse. The Commission might consider alternatives to punishment and to institutionalisation which work through the community and serve to meaningfully welcome and include survivors into the community, foster the development by survivors of positive, meaningful and supportive personal relationships and enhance their long term personal wellbeing and life opportunities. Such alternatives might reduce survivors' chances of further incarceration and also reduce the chances of further traumatisation and victimisation both within and outside of prison. Mentoring (such as that which is provided in NSW by the Women in Prison Advocacy Network) is one example of a successful community-based approach for women prisoners, including women prisoners who are survivors of child sexual abuse.
10. **Punitive responses to mental distress and victimisation of survivor offenders:** Noting that other long term impacts of child sexual abuse identified by the Commission include (a) further experiences of violence and (b) ongoing trauma and mental health

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<sup>11</sup> Deb Kilroy, 'Call to Include all Youth Prisons in Prime Minister's Royal Commission', Media Release, 26 July 2016.

issues, some survivors who have been incarcerated and are known to police as offenders might also come into contact with police to report experiences of victimisation or under civil mental health legislation in the course of expressing mental distress in public.<sup>12</sup> The Commission might consider how criminal justice outcomes of survivor offenders as *victims* of crime might be affected by their contact with the criminal justice system as *offenders*. This is because the criminal justice system, the space through which individuals are criminalised, is also the space that offenders must be recognised as victims in order to have their complaints of victimisation processed and ultimately recognised as unlawful – possibly involving the very police stations and police officers.<sup>13</sup> Inappropriate stereotypes about offenders as deviant, dishonest, violent and even subhuman might limit the extent to which survivors are seen by police and the community as legitimate victims and as undeserving of their victimisation. When this is further compounded by contact with police under civil mental health legislation, notably in relation to recurrent instances of self-harm or attempted suicide, calls to emergency services, or failure of public mental health services to admit the individuals under civil mental health legislation, survivor offenders might be unjustly and incorrectly perceived by police as ‘attention seekers’ or ‘resource drains’ and their genuine but recurrent expressions of distress and reports of victimisation might be dismissed as illegitimate and, at worse, read as nuisance criminal conduct requiring charge and punishment.<sup>14</sup> Similarly, the Commission might consider how survivors in prison are criminalised, punished, isolated, restrained or forcibly medicated for expressions of mental distress, including through prison discipline, solitary confinement, ‘protective’ custody or forced mental health interventions.<sup>15</sup>

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<sup>12</sup> Some of these individuals might come under the public health and criminal justice category of ‘frequent presenter’: see, e.g., Gina Andrews and Eileen Baldry, ‘Mental Health Frequent Presenters: Key Concerns, Case Management Approaches, and Policy and Programme Considerations for Emergency Services’, in Duncan Chappell (ed.), *Policing and the Mentally Ill: International perspectives*, CRC Press Taylor and Francis Group, Boca Raton FL, 2013, pp. 197 - 218.

<sup>13</sup> See in relation to women offenders generally Kelly Hannah-Moffat, ‘Losing Ground: Gendered Knowledges, Parole Risk, and Responsibility’ (2004) 11(3) *Social Politics* 363, 372-376; Marie Segrave and Bree Carlton, ‘Women, Trauma, Criminalisation and Imprisonment ...’ (2010) 22 (2) *Current Issues in Criminal Justice* 287, 292.

<sup>14</sup> Linda Steele, ‘Policing Normalcy: Sexual Violence Against Women Offenders with Disability’ *Continuum* (accepted for publication in special issue: ‘Normalcy and Disability: Intersections Among Norms, Law, and Culture’, forthcoming 2017).

<sup>15</sup> For a contemporary example, see the Canadian case study of the death in custody of Ashley Smith: Kelly Hannah-Moffat and Amy Klassen, ‘Normalizing Exceptions: Solitary Confinement and the Micro-Politics of Risk/Need in Canada’ in K Reiter and A Koenig (eds), *Extreme Punishment: Comparative Studies in Detention, Incarceration and Solitary Confinement*, Palgrave Macmillan, Basingstoke and New York, 2015, pp. 135–155.