Submission

Royal Commission into Institutional Responses to Child Sexual Abuse

Issues Paper 3

Child Safe Institutions

18 October 2013

People with Disability Australia Incorporated

Contact details:
Jessica Cadwallader
Advocacy Projects Officer
People with Disability Australia Incorporated (PWDA)
PO Box 666 Strawberry Hills NSW 2012
Tel: 02 9370 3100
Fax: 02 9318 1372
jessc@pwd.org.au

Contents

PWDA's expertise in this matter

Thank you for the opportunity to contribute our views to the Royal Commission into Institutional Responses to Child Sexual Abuse Issues Paper 3. Our submission is based on extensive experience in working with children with disability, and through this work, our experience in working across a range of service systems.

People with Disability Australia Incorporated (PWDA) is a national disability rights and advocacy organisation. Our primary membership is made up of people with disability and organisations mainly constituted by people with disability. We have a cross-disability focus - we represent the interests of people with all kinds of disability. PWDA is a non-profit, non-government organisation. We exist within the international human rights framework and provide a number of activities, which include representation, individual, group and systemic advocacy, complaints handling, information, education and training.

PWDA has extensive experience in working with children with disability and their families and carers through our Individual and Group Advocacy service. Individual Advocates from this service deal on a daily basis with individual children and young people with disability and their families and carers. They assist by providing information, advice, referral and short-term, issue based, individual advocacy on a broad range of subject matters including in the areas of child protection and specialist disability services.

PWDA is also extensively involved on an ongoing basis in systemic advocacy. Our systemic advocacy role covers local, national and international issues. It includes issues that relate to children with disability in the care and protection and specialist disability accommodation systems, policies, programs, administrative arrangements affecting children and young people with disability and their families and unmet need for a range of generic and specialist social assistance. Our systemic advocacy role also encompasses representation on many government and non-government committees dealing with issues affecting the health and well-being of children and young people with disability and their families.

It is within this context that we submit the following issues to the Royal Commission into Institutional Responses to Child Sexual Abuse Issues Paper 3.

Introduction

Children with disability are often made vulnerable to sexual abuse because they are exposed to a range of institutions that children without disability are not, a point that is not explicitly recognised in the Commission's Terms of Reference.

These institutions function quite differently from mainstream institutions, and are frequently held to different standards (e.g. Disability Services Standards) which alter how these institutions deal with allegations of abuse, including sexual abuse. They often deal with cases of abuse as issues of staffing, policy and procedure. They also often function to segregate children with disability from the rest of the community to greater and lesser

degrees. They further entrench the barriers children with disability already face in accessing justice. These elements make children with disability especially vulnerable to sexual and other forms of abuse.

This submission recommends that the Commission adopt a rights-based framework to ensure that child protection measures are capable of transforming workplace cultures within institutions to be proactive, outcomes-oriented and specific to the needs of the children they house, educate or otherwise support.

This Submission thus addresses the following key issues:

- The definition of institution/organisation used by the Commission
- The vulnerability of children with disability to sexual abuse as a result of segregation
- The barriers children with disability face to reporting sexual abuse
- Our concerns with the Commission's compliance-oriented approach to making institutions Child Safe.

Recommendations

The italicised numbers following each recommendation demonstrate which of the Issues in Issues Paper 3 we understand this recommendation to speak to.

1. PWDA recommends that the Commission's Terms of Reference, including the Easy Read version, define 'institution' to include those institutions that house, educate or otherwise seek to provide support to children with disability. *(5)*

2. PWDA recommends that the sexual abuse of children with disability be countered through developing inclusive communities, supporting independent advocacy, building individual resilience and family supports and intervention. *(8)*

3. PWDA recommends that the Commission use a human rights framework to develop a multifaceted approach to produce proactive, child safeguarding workplace cultures, and avoid the culture of compliance associated with 'universal frameworks' and policy and procedure-based interventions. *(1, 2, 4, 6, 7, 8)*

4. PWDA recommends that the Commission ensure the voices of children, including children with disability, are central to consultation, and the processes of developing strategies, regulations and other measures towards Child Safe Institutions. *(1,5,8).*

5. PWDA recommends that Australia comply with the UN Convention on the Rights of Persons with Disabilities and the recommendations made by the Committee on the Rights of Persons with Disabilities to Australia in September 2013. The relevant recommendations emphasise:

    - closing all residential institutions for children with disability and facilitating their participation in the community and in mainstream organisations. *(2, 8)*

- closely monitoring this process to ensure that deinstitutionalisation actually occurs and that institutions and institutional practices are not reinstated through, for example, the redevelopment of newer 'contemporary' congregate care facilities. *(2, 8)*
- eliminating the use of restrictive practices. *(1, 8)*

6. PWDA recommends that Australia comply with the UN Conventions (CRPD, CROC, CEDAW) that it is a party to, and implement the recommendations of UN Treaty Bodies through the collection, analysis and dissemination of population-wide statistical data disaggregated by gender, age, disability, indigeneity, cultural background, place of residence and experience of abuse or violence. *(1, 2, 3, 8).*

7. PWDA recommends that ethical difficulties that arise in educational and care settings involve formal, open and transparent decision-making conducted on the basis of wide consultation, subject to monitoring and review by an independent body, and open to appeal and with the help of legal or other advocates. *(1,2,4,5,8)*

8. PWDA recommends that the barriers to the criminal justice system and mainstream agencies experienced by children with disability be removed, so that children with disability can successfully report and provide evidence in cases of sexual abuse. *(1,5,8).*

9. PWDA recommends that the Commission identify and address intersectional issues related to gender, age, disability, race, immigration status, institutionalisation, location etc both in relation to the experience of child sexual abuse and in the measures taken to ensure child safety. *(5).*

10. PWDA recommends that breaches of codes of conduct and standards on the part of staff in institutions which house, educate or provide services to children with disability be responded to in accordance with mainstream child protection frameworks and regulatory bodies. *(1, 4, 5, 8)*

11. PWDA recommends that the current gaps in the application of Working With Children checks in NSW be addressed through expanding mandatory reporting schemes, ensuring the education and independent oversight of those organisations and institutions involved, and through the prompt sharing of confidential information about staff regarding suspect behaviour. *(1, 3, 4, 5, 8).*

12. PWDA recommends that funded curriculum resources be developed to support extensive education of support workers, educators, teachers, prison workers, immigration detention centre workers, people with disability, children with disability, families, advocates and the community more generally, especially focussed on the building of: awareness of problematic institutional cultures; understanding of sex, sexuality, consent and appropriate relationships; advocacy skills; an understanding of

the responsibility to report criminal behaviours; and capacity to intervene in abusive situations (bystander intervention). *(1, 6, 7).*

13. PWDA recommends that the Australian government establish an independent, statutory, national protection mechanism, with capacity for local oversight and intervention, for children with disability with broad functions and powers to protect, investigate and enforce findings related to situations of exploitation, violence and abuse experienced by people with disability, and to address the complicated forms of violence and abuse that can arise due to the intersection of disability with other characteristics such as indigenous status, cultural status, or gender. *(1, 4, 5, 8).*

Terms, Definitions and Basic Data

Defining institution/organisation

The definition of 'institution' in the Commission's Terms of Reference and in the Easy Read version limits the definition of institutions. Children with disability come into contact with an enormous variety of institutions, many of which are not, in fact, of demonstrable benefit to children with disability, as the TOR claims. Indeed, they are frequently associated with trauma, abuse - including sexual abuse - and neglect.

This limitation in the definition of 'institution,' especially in the Easy Read version makes it less likely that people with disability who have experienced sexual abuse as children in other institutional settings will report this to the Commission. As mechanisms to address such crimes for children with disability are very limited, it is particularly important that the Commission make all efforts to gather the stories of children with disability who are frequently made especially vulnerable to sexual abuse.

Children with disability are likely to encounter, or spend extensive periods of time in, a range of institutions that children without disability have limited, if any, contact with. For those children with disability who do experience sexual abuse, this is most likely to occur in a location that the victim is in as a direct result of their impairment/disability, and perpetrators are almost always known to the victim.[1] These institutions include residential institutions, respite care services, disability services, hospitals, boarding houses, day care centres, mental health facilities, disability justice facilities and juvenile justice facilities. See Appendix for discussion of the specific attributes of these institutions.

Many of these institutions, in our experience, are poor stop-gap measures which deny access to basic rights, including rights under the Convention on the Rights of the Child (CRoC) and the CRPD, both of which have been ratified by Australia. In addition, many of

[1] Nicola Pilkinton, *People with Disabilities and Sexual Assault: A Review of the Literature* (Family Planning NSW, April 2008), pp. 41–45.

these institutions are associated with much higher rates of abuse, including sexual abuse, in addition to much reduced outcomes.

Children's rights instead of child protection

The Commission should approach its examination of institutional responses to the sexual abuse of children through a human rights framework. The UN Committee on the Rights of Persons with Disabilities recently expressed concern about the current situation of children with disability in Australia being understood in terms of child protection and recommended that they should, instead, be focussed on ensuring "the rights of children… be implemented, monitored and promoted."[2]

Abuse terminology

The use of the terms abuse, neglect and exploitation to describe conduct that amounts to violence, assault, theft, etc – i.e., crimes – " tends to minimise and detoxify these harms, and reflects the failure to recognise these harms for what they are"[3]. In acknowledgement of the focus of the Royal Commission, however, this submission uses the term 'sexual abuse.'

Rates of sexual abuse of children with disability

The prevalence of the sexual abuse of children with disability is extremely difficult to put an exact number on. Underreporting, the enormous variety of different institutions and reporting measures they are subject to, and the failure to disaggregate data on child sexual abuse by disability means that all data is likely an underestimation.[4]

The strongest prevalence studies estimate over three times the rate of sexual assault for children with disability, compared to their non-disabled peers, and some studies demonstrate that this rate may be up to 10 times. It is very unlikely that a person with disability who experiences sexual assault will only have one experience of this in their lifetime. Most people with disability will have repeated experiences of sexual assault by the time they are 18.[5]

---

[2] Committee on the Rights of Persons with Disabilities, *Concluding Observations: Australia* (10th sess. CRPD/C/AUS/CO/1, 4 October 2013).

[3] Daniel Sorensen, 'The Invisible Victims', *IMPACT*, 10 (1997), 4–7; Carolyn Frohmader, *Forgotten Sisters: A Global Review of Violence Against Women with Disabilities* (Women With Disability Australia, 2007); Richard Sobsey, *Violence and Abuse in the Lives of People with Disabilities: The End of Silent Acceptance?* (Baltimore: Paul H Brookes Publishing Co, 1994); Mark Sherry, *Don't Ask, Tell or Respond: Silent Acceptance of Disability Hate Crimes*, 2003 <http://www.farnorthernrc.org/mylifemychoice/Hate%20Crimes-Mark%20Sherry.pdf> [accessed 21 April 2008].

[4] Sally Robinson, *Enabling and Protecting: Proactive Approaches to Addressing the Abuse and Neglect of Children and Young People with Disability* (Children with Disability Australia, 2012) <http://works.bepress.com/cgi/viewcontent.cgi?article=1061&context=sally_robinson> [accessed 10 October 2013].

[5] Pilkinton, pp. 41–45.

There is some indication in the literature that children with intellectual disability are even more at risk than other children with disability. This is likely to be because their developmental and educational needs are poorly catered for, especially around reporting.[6]

Vulnerability to abuse

It is well recognised now that perpetrators frequently seek victims who cannot resist or report sexual abuse. This section focuses on impediments to *resisting* sexual abuse that children with disability face.

Segregation

Many of the institutions described in Appendix 1 may be understood as "total institutions," in the sense outlined by Erving Goffman. He argues that "the central feature of total institutions can be described as a breakdown of the barriers ordinarily separating [the] three spheres of life… sleep, play and work."[7] Those in total institutions are segregated from the rest of the community. Their human rights often go unrecognised, and they are deprived of ordinary and everyday forms of autonomy, such as how to spend their time, and who with. Total institutions tend to produce their own internal culture, with rules and hierarchies specific to them. These cultures are usually not subject to external oversight, may not accord with stated policies and procedures, and do not safeguard children.

Segregation makes it difficult for children to resist sexual abuse due to:

- hierarchies which are difficult to challenge, making it difficult for children with disability to challenge others' (especially staff members') behaviour;
- environments which are designed to manage or constrain children, making it difficult for them to escape violating encounters;
- environments in which restrictive practices such physical and chemical restraint are considered to be legitimate, making it difficult for children to escape violating encounters;
- heavily scheduled days which can mean that children's routines can be monitored for their most isolated moment by perpetrators; and
- internal cultures of obedience and silence maintained through punishment or withdrawal of privileges, making it risky for children to escape or resist perpetrators.

While some children with disability do experience such contexts, for example in residential institutions, there are many whose experience of institutions does not reflect the unified culture that defines "total institutions" for Goffman. They may live at home and spend their

[6] Philip French, Judith Dardel and Sonya Price-Kelly, *Rights Denied:Towards a National Policy Agenda About Abuse, Neglect and Exploittion of Persons with Cognitive Impairment* (People with Disability Australia, 2009).

[7] Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Doubleday, 1961), p. 17.

days in special schools or in day centres, or may live in a residential institution or boarding house and spend their days at a separate day centre. However, composite arrangements like this can still result in segregation from the community, and thus the fact that a child spends time in different locations does not necessarily mean that their vulnerability to abuse is reduced. For example, dedicated school buses are excluded from the Disability Standards for Accessible Public Transport 2002 (DSAPT), meaning that children with disability are often segregated from their classmates during their commute to and from school.

In addition, many of those who experienced sexual abuse as a child in care will still be living in care now, creating structural barriers and a context which can make disclosure risky. In other words, moving between institutions is inadequate to counter segregation.

Restrictive practices

Restrictive practices, which can include seclusion or isolation, or physical or chemical restraint, continue to be used in relation to people with disability in Australia.[8] Schools sometimes employ restrictive practices such as shutting children in cupboards, caging them or tying them up.[9] The use of restrictive practices is frequently a crime which is not recognised as such because they are directed towards people with disability. Restrictive practices reduce children's capacity to resist or escape perpetrators. They also produce a workplace culture that is too tolerant of abuse. Children who experience sexual abuse may thus be either unaware that abuse is not part of the legitimate use of restrictive practices, or fearful of their punitive use if they attempt to report.

Restrictive practices can be re-traumatising, as sexual abuse frequently takes place in contexts which children with disability cannot escape; they may also be restrained during an abuse episode.[10] Repeat experiences of the situation associated with trauma and abuse has also been associated with high levels of post-traumatic stress disorder (PTSD), depression and anxiety.[11] Restrictive practices thus exacerbate very poor outcomes for children with disability.[12]

---

[8] Haley Clark and Bianca Fileborn, *Responding to Women's Experiences of Sexual Assault in Institutional and Care Settings* (Australian Institute of Family Studies, 2011) <http://www.aifs.gov.au/acssa/pubs/wrap/wrap10/w10.pdf> [accessed 10 October 2013].

[9] Robinson, p. 13; Carolyn Frohmader, *Submission to the UN Analytical Study on Violence Against Women with Disabilities* (Women With Disabilities Australia, December 2011), pp. 17–18.

[10] See Clark and Fileborn, p. 13.

[11] Clark and Fileborn, p. 13.

[12] A. Mitchell and J. Clegg, 'Is Post-Traumatic Stress Disorder a Helpful Concept for Adults with Intellectual Disability?', *Journal of Intellectual Disability Research*, 49 (2005), 552–559 <doi:10.1111/j.1365-2788.2005.00705.x>.

Sexual education

The sexual awareness of children and young people with disability is often limited because of institutional and social segregation, meaning that they do not necessarily recognise abusive situations, limiting their capacity to resist. They do not participate in the ordinary social interactions through which the rest of the population learns – unconsciously – about sex, sexuality and consent. This "ignored curriculum," isn't formally recognised, but is nonetheless an essential component in the protection of children.[13] The absence of this "ignored curriculum" from the institutionalised lives of children with disability renders children with disability more vulnerable to abuse, including sexual abuse than children without disability. In addition, both within and outside of institutions, children with disability are often treated as especially 'innocent' or 'asexual,' and thus are frequently denied access to the formal sex education that other children receive.

Gender

The sexual abuse of children is highly gendered, as with the majority of sexual crimes. Women and girls with disability experience a higher prevalence of sexual assault than men and boys with disability.[14] The vast majority of perpetrators of sexual abuse against women and girls with disability living in institutions are male caregivers, a significant portion of whom are paid service providers who commit their crimes in disability service settings.[15] The very high rates of abuse, including sexual abuse, experienced by women and girls with disability in institutions in Australia is of profound and international concern.[16]

Girls with disability are situated at the intersections of sexism (discrimination against girls and women), ableism (discrimination against people with disability) and adultism (discrimination against children). Each of these often dismissed or not taken seriously. Intersections do not just compound disadvantage. For example, girls with disability are often treated as especially innocent or asexual, especially when they are non-verbal or have reduced mobility.[17] The supposed preservation of this innocence, for example through not educating girls with disability about sex, sexuality and abuse, also exacerbates their vulnerability to sexual abuse.

---

[13] Nathalie A. Gougeon, 'Sexuality Education for Students with Intellectual Disabilities, a Critical Pedagogical Approach: Outing the Ignored Curriculum', *Sex Education*, 9 (2009), 277–291 <doi:10.1080/14681810903059094>.

[14] Pilkinton; Frohmader, *Submission to the UN Analytical Study on Violence Against Women with Disabilities*.

[15] Pilkinton, p. 46.

[16] Committee on the Rights of Persons with Disabilities.

[17] Nancy Gibbs, 'Pillow Angel Ethics', *Time*, 7 January 2007 <http://content.time.com/time/nation/article/0,8599,1574851,00.html> [accessed 10 October 2013].

Aboriginal and Torres Strait Islander children with disability

Aboriginal and Torres Strait Islander peoples can be very reluctant and resistant to use institutions, because of a distrust of government and non-Aboriginal services as a result of the history of 'stolen generations,' the Northern Territory Emergency Response and ongoing discrimination.[18] Aboriginal and Torres Strait Islander children can be dismissed as 'making trouble' if they resist or report abuse, including sexual abuse.

Some in Aboriginal and Torres Strait Islanders communities have experienced the Government's attempt to deal with child sexual abuse in the Northern Territory Emergency Intervention as reducing Aboriginal sovereignty, slandering Aboriginal men as paedophiles, and the means of introducing punitive and frequently unrelated measures such as the Basics Card. Few of the recommendations arising from community consultation were enacted, and this may result in heightened distrust of institutions and organisations providing services to children with disability.[19]

Children with disability from culturally and linguistically diverse backgrounds

Cultural and linguistic diversity may mean that children with disability do not recognise, or unable to resist abusive situations that are mixed in with a culture they are unfamiliar with. In addition, they may not be understood when attempting to report, especially if they are not given access to interpreters to do so. Additionally, their background may also reduce their credibility in the eyes of their carers.

Barriers to reporting

This section focusses on barriers to *reporting* that children with disability experience, which makes them vulnerable to targeting by perpetrators. Some of the elements discussed above also affect capacity to report, especially the lack of sex education.

Segregation and barriers to reporting

Segregation means children encounter barriers when they try to report:

- Not been believed when they have tried to report

---

[18] *Disability Rights Now: Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities* (Compiled by Disability Representative, Advocacy, Legal and Human Rights Organisations, August 2012), para. 126.

[19] Alastair Nicholson and others, *Will They Be Heard? A Response to the NTER Consultations June to August 2009* (Jumbunna Indigenous House of Learning, November 2009) <http://interventionwalkoff.files.wordpress.com/2009/11/091123_will-they-be-heard.pdf> [accessed 11 October 2013]; Michele Harris, 'Striking the Wrong Note: Sixth Anniversary of the Northern Territory Intervention', *Concerned Australians*, 2013 <http://concernedaustralians.com.au/media/Striking_the_Wrong_Note_6_year_NTER.pdf> [accessed 10 November 2013]; Bob Gosford, 'Alison Anderson HAS Finally Seen the Light, Gone Bush and Joined with the "anti-interventionistas"!! –', *Crikey!*, 2009 <http://blogs.crikey.com.au/northern/2009/08/28/alison-anderson-finally-sees-the-light-goes-bush-and-joins-the-anti-interventionistas/> [accessed 14 October 2013]; Lindsay Murdoch, 'Disputed Territory', *The Sydney Morning Herald*, 21 May 2011, Web edition <http://www.smh.com.au/national/disputed-territory-20110520-1ewrz.html> [accessed 14 October 2013].

- Encountered barriers from institutions and service providers when seeking to access justice or victims' supports
- Frequently been punished for speaking out
- Faced upheaval and removal from a situation while the perpetrator remains in place
- Lost the few individuals they feel connected to or affection for.[20]

In institutions, this can be exacerbated by:

- the prioritising of routine which often means that attempts to report are situated as disruptive;
- staff who may be one of few trusted carers in a child's life, meaning children may not want to report;
- children being made dependent on the institution (lacking other supports for fundamental needs such as housing, education and nutrition);
- children being made dependent upon an often very limited education in appropriate and inappropriate interactions around affection and sex which may limit the knowledge and language required to make a report;
- children being made dependent upon the institution for access to more formal means of complaint such as the Police; and
- children lacking a comparative basis by which to recognise where abusive, and sexually abusive behaviours, have become part of institutional cultures.[21]

Issues of abuse and neglect have frequently been understood as requiring modification to management styles, policies and procedures. This makes workplace cultures in segregated, specialist and care settings highly problematic:

> "rape, assault, false imprisonment, and theft have been described as abuse and treated as policy issues, staff development or training issues, or behaviour management issues. Locating this type of abuse in a service context can, and does, diminish its significance through a parallel focus on governance issues such as workplace health and safety and quality assurance." [22]

This means that safeguarding children from abuse requires challenging these cultures.

[20] Robinson, pp. 9–16.

[21] Partially based on Goffman, p. 17.

[22] Robinson, p. 16; See also French, Dardel and Price-Kelly.

Children with disability in immigration detention

Children with disability in immigration detention are rendered vulnerable to sexual in a similar fashion to those in other segregated settings.[23] The way that children are held in immigration detention contravenes article 37 (b) of the CROC.[24] Changes to internal policy in detention centres has ensured that any instances of child sexual abuse are now immediately reported to child protection agencies, rather than dealt with 'in-house,'[25] but there remain issues around reporting and oversight.

In relation to reporting, children may only feel able to report upon leaving immigration detention. This is especially problematic for children with disability, because they may never leave detention to join the Australian community.

This is because, under the current health test requirements for immigration to Australia, people with disability, including children, are frequently denied visas. These requirements are set under the Migration Act 1958 (Cth) and are exempt from the Disability Discrimination Act 1992 (Cth). Australia's current legislative position accords with their interpretative declaration on article 18 of the CRPD. Article 18 of the CRPD is designed to ensure that liberty of movement for people with disability is protected. The CRPD Committee recently recommended that Australia review and withdraw its declaration on article 18.[26] The current position also does not comply with article 2(1) of the CROC, which requires that there be no discrimination between children with and children without disability.[27]

There has been extensive research demonstrating that people, including children, are at risk of acquiring disability, especially psychosocial disability, as a result of their immigration detention. This may be exacerbated by abuse that occurs during their detention.[28]

---

[23] *A Last Resort? The National Inquiry into Children in Immigration Detention* (Australian Human Rights Commission, May 2004) <http://www.humanrights.gov.au/publications/last-resort> [accessed 11 October 2013].

[24] *A Last Resort? The National Inquiry into Children in Immigration Detention*.

[25] *A Last Resort? The National Inquiry into Children in Immigration Detention*, sec. 8.

[26] 'FECCA Calls on the Government to Meet Its Human Rights Obligations', *Federation of Ethnic Communities' Councils of Australia*, 2013 <http://www.fecca.org.au/news/mediareleases/item/457-fecca-calls-on-the-government-to-meet-its-human-rights-obligations-> [accessed 14 October 2013]; Committee on the Rights of Persons with Disabilities, para. 9.

[27] *A Last Resort? The National Inquiry into Children in Immigration Detention*, para. 11.1.

[28] E. Heptinstall, V. Sethna and E. Taylor, 'PTSD and Depression in Refugee Children', *European child & adolescent psychiatry*, 13 (2004), 373–380; D. Silove, I. Sinnerbrink, and others, 'Anxiety, Depression and PTSD in Asylum-seekers: Assocations with Pre-migration Trauma and Post-migration Stressors.', *The British Journal of Psychiatry*, 170 (1997), 351–357; D. Silove, P. Austin and Z. Steel, 'No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-affected Refugees Seeking Asylum in Australia', *Transcultural psychiatry*, 44 (2007), 359–393; D. Silove, Z. Steel, and others, 'The Impact of the Refugee Decision on the Trajectory of PTSD, Anxiety, and Depressive Symptoms Among Asylum Seekers: a Longitudinal Study.', *American journal of disaster medicine*, 2 (2007), 321.

Access to Justice

Children with disability face numerous barriers in seeking a criminal justice response to instances of sexual (and other) abuse, making them highly dependent on institutional responses.[29] This example demonstrates the barriers faced by children with disability having their abuse recognised in the context of the need for alternative communication techniques:

> "In 2011, charges of sexual abuse against a bus driver were dropped because the victims had communications difficulties and were seen as unreliable witnesses. The victims were seven children with intellectual disability who had little or no speech but could all communicate through other means, such as sign language. The prosecutors were concerned the victims could not adequately communicate what happened to them. The rules of evidence did not allow for an interpreter to help a person with disability in a court of law. The prosecutors tendered 'no evidence', meaning the case could not proceed and the charges were dropped."[30]

Police are frequently reluctant to investigate or prosecute when a case involves a child with disability in an institutional setting, and fail to act on allegations because of a belief that there is no alternative to the abusive situation or that the situation is best dealt with by the institution or that the child is not a credible witness.

Barriers to justice in institutions

Many of the barriers to justice extend beyond the formal justice system. Institutions, for example, may not support children to make a report, or may not believe children when they attempt to report. If there are policies and procedures in place to support children making reports, these are often not accessible for children with disability.

In addition, crimes within institutions are treated as issues with policy, staff development or training inadequacies or behaviour management issues.[31] Yet, without support, many children with disability in institutions simply will not be able to even contact the justice system, meaning that an instance child sexual abuse may never be recognised as a crime. Internal mechanisms for addressing sexual abuse in organisations providing services and support to children with disability must be robust enough to compensate for the barriers outlined above.

There are various legislative frameworks which regulate the responsibilities of institutions and other organisations towards children with disability, including the various state-based disability services acts, acts specific to child protection (such as the Children and Young Persons (Care and Protection) Act 1998 NSW), and acts regulating justice and detention

---

[29] Australian Human Rights Commission, *Access to Justice in the Criminal Justice System for People with Disability Issues Paper:* (Australian Human Rights Commission, April 2013), pp. 4–5.

[30] Australian Human Rights Commission, p. 10.

[31] Sally Robinson and Lesley Chenoweth, 'Preventing Abuse in Accommodation Services: From Procedural Response to Protective Cultures', *Journal of Intellectual Disabilities*, 15 (2011), 63–74 <doi:10.1177/1744629511403649>; Sobsey.

facilities. There are recommendations available about how to develop policies, or how to encourage the participation of children or young people, but the checks on these encourage compliance through developing procedures rather than focussing on the protection of children's rights. Many also focus on complaints-based systems which 'rely on articulate, assertive and empowered complainants'[32] which makes it very difficult for children with disability to access them, especially without advocates.

Barriers to justice undermine working with children regulations

Working with children checks occur in all states now, but each involves different levels of reliance on formal child sexual abuse charges and/or convictions. These records are likely to be inadequate because charges and convictions of perpetrators are difficult for children with disability to lodge, especially in the absence of proper supports.

In some cases, such as in NSW, these charge and/or conviction records are supplemented by reports from Child Protection reporting bodies that may be able to be more responsive to the needs of children with disability. However, while they are responsible for investigating and reporting a finding in cases of sexual misconduct, it is unclear how this sits alongside mandatory reporting requirements. Further, the processes involved in such investigations and findings can be obscure, limited, and not thoroughly subject to evaluation or external oversight, especially in cases of private organisations. Institutions may thus address allegations improperly, perhaps even self-protectively, for example by coming to a private arrangement with a staff member in exchange for not reporting further, meaning that a record may not become part of the records checked when working with children.

In addition, there are organisations and institutions which do not fall under these requirements. In NSW, for example, reporting bodies only include those which have undertaken service approval under Children (Education and Care Services) National Law (NSW). These can all undermine a broader reach for working with children checks.

From managerial responses to rights-based prevention

Current approaches to the prevention of abuse and neglect in Australia, "focus on compliance with a predetermined set of guidelines and regulations."[33] Whilst these are essential to ensuring the safety of children with disability within institutions, they feed a managerial workplace culture which undermines safeguarding:

> "When more weight is given to documenting the existence of policy and procedure than the process of using it and the outcomes of its use, monitoring systems do not support evaluation and the learning which can come from it. In the case of abuse and neglect, there are some very real risks that compliance and risk management approaches will fail to educate workers about the moral

[32] Robinson and Chenoweth, 'Preventing Abuse in Accommodation Services', p. 71.

[33] Robinson and Chenoweth, 'Preventing Abuse in Accommodation Services', p. 69.

components of their work, and their role in standing alongside, and sometimes for, people who are maltreated" [34].

In institutions, these cultures are also detached from the rest of the community, making them harder to change. The Commission needs to tackle this issue directly by avoiding a managerial approach, which feeds a culture which understands child sexual abuse as a problem with staffing, policies and procedures and so on, rather than as a violation of children's rights and as a crime. Rights-based forms of prevention should be adopted.

The *quality* and *effectiveness* of child protection policies and procedures in recognising and supporting outcomes in relation to children's rights, autonomy and protection is not currently assessed. With protective strategies still in development, we should be aiming for the evaluation of protective strategies rather than audit of compliance.[35] Evaluation of institutional strategies for safeguarding children should be focussed on their capacity for achieving outcomes, for supporting children who have been victimised, and for demonstrating a pro-active approach to the prevention of child sexual abuse. This will also ensure that institutions create strategies which are specific to their specific needs. This level of flexibility is important given that institutions and organisations vary so markedly, and children are situated intersectionally.

Recommended approaches

Between Protection and Autonomy

Responses to child sex abuse often struggle to balance protection and autonomy. More often than not, they come down on the side of protection, especially in relation to children, even when this can severely circumscribe autonomy and exacerbate segregation. This is despite the extensive literature[36] which demonstrates that primary prevention is best addressed through "having a range of relationships and control over the supports in your life,"[37] and

> "through the development of inclusive communities, advocacy, building individual resilience and family supports and intervention. This is not to say that governments, and funded non-government services, are not working towards these principles in their broader practice, but rather that there does not appear

[34] Robinson and Chenoweth, 'Preventing Abuse in Accommodation Services', p. 69.

[35] J. Clegg, 'Holding Services to Account', *Journal of Intellectual Disability Research*, 52 (2008), 581–587.

[36] Nancy M. Fitzsimons, *Combating Violence & Abuse of People with Disabilities: a Call to Action* (Paul H. Brookes Pub., 2009); Kelley Johnson and Rannveig Traustadottir, *Deinstitutionalization and People with Intellectual Disabilities: In and Out of Institutions* (Jessica Kingsley Publishers, 2005); Paul Ramcharan, K Nankervis and G Abdilla, 'What Does the Research Say About Achieving Housing and Support Outcomes?', in *Proceedings of the Second Annual Roundtable on Intellectual Disability Policy, La Trobe University*, ed. by C Bigby and C Fyffe (Bundoora: La Trobe University, 2007).

[37] Robinson and Chenoweth, 'Preventing Abuse in Accommodation Services', p. 68.

> to be a linkage to abuse prevention, protection or systemic education strategies."[38]

The Commission should begin to model such inclusive communities by including the voices of children and especially children with disability in this consultation in relation to the creation of Child Safe Institutions.

Independent oversight body

PWDA advocated for the creation of the National Children's Commissioner and are pleased that this role has been created. In addition, we recommend establishing

> "an independent, statutory, national protection mechanism for children with disability. It needs broad functions and powers to protect, investigate and enforce findings related to situations of exploitation, violence and abuse experienced by people with disability, and to address the complicated forms of violence and abuse that can arise due to the intersection of disability with other characteristics such as indigenous status, cultural status, or gender."[39]

This oversight should include those institutions and organisations which children with disability encounter. Such institutions should therefore be held to the child protection standards applicable to mainstream institutions and organisations, rather than disability standards, which can produce a 'two-tier' approach to child protection.[40]

We also recommend that this is enhanced at a local level, similar to UK approaches:

> "based on a multi-jurisdictional response to the occurrence of harm, coordinated at the local level through Local Safeguarding Children Boards… Practice guidelines developed by the Department of Children, Schools and Families are intended to provide a framework for Local Safeguarding Children Boards, agencies and professionals who work with children at local levels to develop detailed ways of working collaboratively to safeguard children with disability. They are addressed to workers in universal, targeted and specialist children's services health, education, schools, adult disability support services, police, and all other professionals who might work with children in statutory, voluntary and independent sectors. They are rights focused, and include practice guidance for professionals; research background on safeguarding; relevant legislation and policy; resources to facilitate safeguarding and promote welfare and wellbeing; and information about training and professional developments."[41]

---

[38] Sally Robinson and Lesley Chenoweth, 'Understanding Emotional and Psychological Harm of People with Intellectual Disability: An Evolving Framework', *Journal of Adult Protection, The*, 14 (2012), 110–121 (p. 66) <doi:10.1108/14668201211236313>; a description of S Page, P Lane and G Kempin, *Abuse Prevention Strategies in Specialist Disability Services* (Canberra: National Disability Administrators, 2002).

[39] Robinson, p. 29.

[40] Robinson, p. 23.

[41] Robinson, pp. 28–9.

Local Safeguarding Children Boards bring with them the benefit of *local* but multijurisdictional interventions.

The issue of jurisdiction is especially important in order to ensure that child protection mechanisms are not limited in their reach by a federated system. For example, the existence of the new National Children's Commissioner appears to have affected the power of the state-based Commissioner for Children and Young People to access detention facilities.[42]

Consultation with children with disability

Children and young people with disability are not provided with adequate opportunities or accessible information to assist them to express their views freely,[43] especially in relation to child sexual abuse.

Attitudes that assume that young people with disability do not have the same interests, issues and insights as other young people, and that they belong in a specialist disability sector create a significant barrier to their participation in consultations and decision-making forums, which can in turn affect the regulations and structures that shape institutions. Whilst the existing recommendations, such as those provided by the NSW Office of the Children's Guardian, regarding the participation of children in child-safe organisations are useful, expanding these in relation to the specific needs of children with disability is highly recommended.

A lack of communication aids and support from an early age is a key barrier that prevents young people and children with disability from participating in decision making processes. Children with disability need access to a range of educational resources to support them to be both protected and exercise autonomy. Supporting peer and self advocacy skill development is important as a counter to the tendency to silence children's voices. Self-advocacy is a concept that is highly developed in the context of disability, and may be useful in other contexts as well, for example for children.

Closure of residential institutions

Residential institutions which segregate children with disability from the rest of the community must be closed, and measures taken to ensure inclusion for children with disability in the community. The evidence demonstrates not only that institutions are associated with very poor outcomes for children with disability, but that moving into

[42] Henrietta Cook, 'Child Guardian Rebuff', *South Coast Register*, 15 October 2013, Web edition <http://www.southcoastregister.com.au/story/1841110/child-guardian-rebuff/> [accessed 15 October 2013].

[43] *Disability Rights Now: Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities*, p. 120.

inclusive settings dramatically increases positive outcomes.[44] The UN Committee on the Rights of Persons with Disabilities recently recommended such compliance.[45]

Data collection

In order to properly address the increased vulnerability of children with disability the following data should be disaggregated by disability and other key intersectional factors, such as gender and cultural background:

- data regarding child sexual abuse;
- data regarding sexual abuse in institutions; and
- data regarding child protection.

Disaggregated data has been understood by the UN Committee on the Rights of People with Disabilities and the UN Committee on the Rights of the Child to be a particular priority for Australia. [46] We recommend that Australia comply with these human rights mechanisms, and implement the collection, analysis and dissemination of data disaggregated by gender, age, disability, indigeneity, cultural background, place of residence.

A multifaceted program

A multifaceted program that addresses the multiple elements that make children with disability particularly vulnerable should be adopted. [47]

Abuse	Response needed
Ordinary crime in which the victim happens to be a vulnerable person.	Goal to facilitate access to criminal justice system and mainstream agencies and to ensure children and young people are treated as full rights holders. This also relates to engagement of the criminal justice system and

[44] Belinda Epstein-Frisch, *Deinstitutionalisation: A Review of Literature* (Family Advocacy Inc.); Bruce Barbour, *People with Disabilities and the Closure of Residential Centres: A Special Report to Parliament Under Section 31 of the Ombudsman Act 1974* (Sydney: NSW Ombudsman, August 2010); Nwakerendu Waboso, 'Deinstitutionalization and Its Effects on Social Inclusion, Choice-Making, Adaptive and Maladaptive Behavior for Individuals with Intellectual Disabilities: Case Studies Analysis', 2013 <http://dr.library.brocku.ca/xmlui/handle/10464/4306> [accessed 14 October 2013]; Louise Young and others, 'Deinstitutionalisation of Persons with Intellectual Disabilities: A Review of Australian Studies', *Journal of Intellectual and Developmental Disability*, 23 (1998), 155–170 <doi:10.1080/13668259800033661>; Monali Chowdhury and Betsey A. Benson, 'Deinstitutionalization and Quality of Life of Individuals With Intellectual Disability: A Review of the International Literature', *Journal of Policy and Practice in Intellectual Disabilities*, 8 (2011), 256–265 <doi:10.1111/j.1741-1130.2011.00325.x>; Johnson and Traustadottir.

[45] Committee on the Rights of Persons with Disabilities.

[46] Committee on the Rights of Persons with Disabilities. CRC Committee, para 46.

[47] Hilary Brown, 'A Rights-Based Approach to Abuse of Women with Learning Disabilities', *Tizard Learning Disability Review*, 9 (2004), 41–44; Robinson, p. 11.

	mainstream agencies when other forms of abuse and neglect reach criminal levels.
Abuses which arise out of inequitable access to health care, benefits, housing and other service provision as a result (but also a cause of) discrimination and social exclusion.	Requires monitoring through the collection of population wide statistics rather than documentation of individual complaints or incidents.
Abuses which arise out of challenging needs and ethical dilemmas.	Require formal, open and transparent decision-making, conducted on the basis of wide consultation, open to appeal and with the help of legal or citizen advocates. If these abuses reach a criminal level, access to the criminal justice system and mainstream agencies also needs to be facilitated.
Abuses which arise out of professional or service relationships in which unequal power, institutional dynamics, poor training and low expectations conspire to produce rigid, depersonalising environments and callous or ignorant individual responses.	These breaches of conduct and standards require action within the regulatory framework and by professional bodies.
Deliberate and predatory abuse in which vulnerable people are groomed and targeted (for example by serial sexual offenders or in order to abuse financially), requiring concerted action not only on behalf of a current victim but also on behalf of future potential victims.	These crimes are particularly morally abhorrent and justify prompt sharing of otherwise confidential information and interventions to screen the workforce.
Non-criminal abuse by peers, with and without disability (bullying and victimisation).	Policy responses which support the development of education and inclusive practice, accompanied by legal sanctions for vilification or victimisation.
Abuse which does not reach current 'notifiable' benchmarks, either in criminal justice or policy terms, but which has significant impact on the person ('low' grade emotional abuse, for example).	Educative responses, building of capacity across individual, organisational and community levels to increase personal safety and support bystander action.

Staff training

Many researchers and disability organisations, including PWDA, call for enhanced training to be provided to staff. This should focus less on compliance and more on an understanding of

how abuse is situated by other cultural factors such as the pervasive exclusion of children with disability from social, political and public spaces. We recommend that funded curriculum resources be developed to support extensive education of support workers, people with disability, their families, and advocates.[48] This is key to successfully modifying institutionalised practices and cultures to prevent sexual abuse of children, including children with disability, before it happens.

Bystander education

Bystander education is designed to alter group norms, encouraging new forms of community which are protective of those who might be rendered vulnerable (such as women, children, people with disability, and so on). This can also provide an excellent way of ensuring that information regarding appropriate forms of contact between children and adults are encouraged and policed by *all* within a given community. Broad-based bystander education, suitably altered for children and people with disability where required, should be used to help change institutional and community attitudes to children with disability and their heightened vulnerability to sexual abuse.

[48] Robinson and Chenoweth, 'Preventing Abuse in Accommodation Services', p. 70.

Appendix 1: Institutions

Residential institutions

Residential institutions are highly problematic, a fact which has been extensively recognised by the Australian and NSW governments. They have been consistently associated with very high rates of neglect and abuse, including sexual abuse, predominantly because they are frequently associated with high levels of segregation from the rest of the community. Residential institutions may be government run, or run with government funding, or privately owned.

In the case of private ownership, reputation connects directly to profit, meaning that reporting can be limited. In the case of those run by government or with government funding, there may be other pressures to downplay sexual abuse, especially given an increasing awareness of the problems associated with residential institutions and the drive towards deinstitutionalisation. They may also approach child sexual abuse as an issue with staffing or policy, rather than the crime and violation of rights that it is.

One aspect that shapes the response of residential institutions to child sexual abuse is that it is well known that such institutions are frequently sites of abuse and neglect. This means that cases of abuse and neglect, when reported or publicised, often become political matters, with the institution's ongoing existence at stake. This can shape employees' decision-making in ways which do not prioritise the well-being of children with disability.

Respite care services

Respite care services are places that children with disability may go for short or extended periods of time, away from their usual community. Respite care can also be used as 'a last ditch' measure when families are experiencing severe stress, which places children housed in respite facilities in an extremely vulnerable position, with few other places that they can go. This can affect how respite care services, as well as external agencies such as the police, negotiate with allegations of abuse.

Disability services and day centres

Disability services include a wide range of organisations, including day centres. Disability Services Standards, which exist under disability services legislation in all States and Territories provide guiding principles for quality disability service provision. However, these Standards are adult focussed and do not address principles relating to the 'best interests of the child', the evolving capacity of children to make decisions or age-appropriate services and supports. Further, these services are usually private companies which provide services to children with disability.

One of the key difficulties faced in relation to the reporting of child sexual abuse in this context is that concerns about reputation and its effects on profit impede the proper response to allegations of abuse. These may be addressed instead as issues related to

staffing or policy or procedure, and thus not directed immediately to the proper authority, the Police. In addition, these services are usually provided in segregated environments, buildings separated from the rest of the community and usually well fenced. As will be discussed further, this segregation is a key vulnerability associated with institutions.

Hospitals

Although all children may visit a hospital at some point, children with disability may spend extended periods of time in hospital. Hospitals vary markedly in the environments in which children with disability may be housed and cared for, but it is worth noting that they are radically separated from the rest of the community. It is also worth noting that hospitals can be locations in which restrictive practices (such as seclusion, isolation and physical and chemical restraint are used). This exacerbates the vulnerability of children with disability both to sexual abuse, and to re-traumatisation, as discussed above.

Boarding houses

In NSW, the regulation of boarding houses was recently amended. Under the old regulations, persons under the age of 18 were not permitted to live in boarding houses. This reflected that boarding houses are often highly problematic residential situations, associated with high levels of abuse, including sexual abuse.[49] However, the age restriction on residents is not specified under current regulations.

Under the Children and Young Persons (Care and Protection) Act 1998 No. 157, children under the age of 16 living away from home without parental consent are under mandatory reporting provisions. However, for those under the age of 16 whose parents consent (for example by sharing a room or by permitting them to live away from home in a boarding house), or those over the age of 16 but under the age of 18, these changes mean that children are permitted to remain in a setting which is broadly acknowledged to risk serious abuse, including increasing the vulnerability of children to sexual abuse. In fact, the only mention of children and young people in the new regulations specifies only *how* the removal of children under the age of 18 may occur in cases where they have additionalneeds,which includes disability of various kinds.

Special schools, specialist classes and special school buses

The segregation of children with disability in relation to education is a continuing problem, and exacerbates their vulnerability to sexual abuse. This can be in special schools or in specialist classes or units housed within other schools. In addition, special schools may or may not be privately run institutions; when they are, they often have the same issues as other private and for-profit institutions in downplaying sexual abuse and impeding the reporting of abuse to the Police. In addition, dedicated school buses are excluded from the Disability Standards for Accessible Public Transport 2002 (DSAPT), meaning that children

[49] Bruce Barbour, *More Than Board and Lodging - the Need for Boarding House Reform* (NSW Ombudsman, 2011).

with disability are often segregated from their classmates during their commute to and from school.

Mental health facilities

Mental health facilities are infrequently designed to house children and young people. They are also sites where the use of restrictive practices is quite common, whether seclusion, or physical or chemical restraint. These practices, along with staff who may not be trained in supporting children with disability specifically increases their vulnerability to sexual abuse.

Juvenile justice facilities

The number of children with disability in juvenile justice facilities is difficult to ascertain. Studies such as *Juvenile Detention in Australia 2012* disaggregate the demographics of juvenile detention population solely by indigeneity.[50] However, in 2005, the UN Committee on the Rights of the Child expressed concern about the overrepresentation of children with disability in the juvenile justice system, and recommended alternative justice responses to juvenile criminal behaviour be given priority.[51] Further, as *Disability Rights Now* observes:

> "Available evidence from 2010 suggests that nearly "half the young people in New South Wales juvenile detention centres have an intellectual or 'borderline' intellectual disability". A higher proportion of Aboriginal and Torres Strait Islander young people were represented in this group — 39 percent compared to 26 percent. The majority of young people were found to have a 'psychological condition' (85 percent), with two thirds (73 percent) reporting two or more 'psychological conditions'. There were a significantly higher proportion of young women and Aboriginal and Torres Strait islander young people in this group. The study also found that 32 percent of young people in New South Wales juvenile detention centres had a traumatic brain injury or a head injury, and that this incidence had increased significantly for young women since the previous survey in 2003 (from 6 to 33 percent)."[52]

There is evidence to suggest that survivors of child sexual abuse are overrepresented amongst prison populations, including in juvenile justice facilities.[53] The risk of sexual assault

---

[50] 'Juvenile Detention Population in Australia 2012 (AIHW)' <http://www.aihw.gov.au/publication-detail/?id=60129542553> [accessed 2 October 2013].

[51] Committee on the Rights of the Child,, *Concluding Observations: Australia* (40th sess CRC/C/15/Add.268, 20 October 2005), p. 15.

[52] *Disability Rights Now: Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities*.

[53] Mary Stathopoulos and others, *Addressing Women's Victimisation Histories in Custodial Settings*, ACSSA Issues (Australian Centre for the Study of Sexual Assault, December 2012) <http://www.aifs.gov.au/acssa/pubs/issue/i13/i13b.html> [accessed 14 October 2013]; Mark Lynch, Julianne Buckman and Leigh Krenske, *Youth Justice: Criminal Trajectories*, Trends and Issues in Crime and Criminal Justice (Australian institute of criminology, September 2003); Anna Stewart, Susan Dennison and Elissa Waterson, *Pathways from Child Maltreatemnet to Juvenile Offending*, Trends and Issues in Crime and Criminal Justice (Australian institute of criminology, October 2002) <http://www.aic.gov.au/documents/D/1/6/%7BD1602135-B3C0-49B9-9C00-2B93D52BC40C%7Dti241.pdf> [accessed 11 October 2013]; J. Fleming and others, 'Childhood Sexual Abuse Among Australian Prisoners', *Venereology*, 14 (2001), 109.

and abuse in prisons is substantially higher than in the general community, although evidence specific to juvenile justice facilities is limited, and the risks of reporting can be heightened due to segregation.[54]

[54] Kim Shayo Buchanan, 'Impunity: Sexual Abuse in Women's Prisons', *Harv. CR-CLL Rev.*, 42 (2007), 45; Clark and Fileborn.