

*Sexual Assault of New South Wales Prisoners**

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Introduction

In late 1992 I was representing a young man of 18 years, for an armed robbery charge. Whilst he had been on bail pending the trial, he was now pleading guilty and it was clear that he would be sentenced to a period of custody in an adult prison. In the course of my plea for leniency, I referred to his age, his build and his looks, and expressed the view that he would be at substantial risk of sexual assault if incarcerated, and may not be safe even in protective custody.

The Judge stopped me and asked me for proof — “I have yet to see any evidence of sexual assault within our prisons, where is the proof?”. I asked him to take into account comments from the ex-Minister for Corrective Services, Michael Yabsley, that “rape is inevitable in prison”, and asked him to consider, by way of judicial notice, the vulnerability of this particular young man.

The Judge gave me 24 hours to locate some “real proof”, by “survey or other means” that could assist him in this case. I could find only 20 year old American figures, and nothing from Australia. Every criminal lawyer has their own horror story regarding young raped prisoners, but that evidence is neither available nor admissible.

The young man got three years and after serving eight months, wrote to me and described his life as the “friend” of a heavy in the system. He claimed to have been raped on “countless” occasions, until he met someone who looked after him in return for “favours”.

It is from this basis that I approached the Department of Corrective Services with a view to a joint research project with the Faculty of Law and Criminal Justice at Southern Cross University. Somewhat surprisingly, the Department were extremely cooperative-operative and made helpful comments regarding methodology, and suggested some changes to my draft questionnaire.

As the research has been conducted, the consequences have mushroomed and I am currently using the results of the survey for a larger work that includes the following headings:

- Sentencing Consequences
- Changes to Prison Administration
- Victimology
- Defences Relating to Escape

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- AIDS in Prisons, and
- Legal Liability of the State

For this paper, I will be concentrating on a discussion of the survey results and of their validity. As the most urgent areas for change are sentencing and prison policy, these will be touched on.

2. *Methodology*

A The Sample

One hundred and eighty-three prisoners aged 18 to 25 were surveyed. One hundred and eleven of the questionnaires were self-administered under the supervision of Welfare officers in nine prisons. The Welfare Officers first undertook a random selection process based on a pool of all prisoners within the target age group and then the questionnaire was self-administered under strict confidentiality guidelines.

The remaining questionnaires were administered through interviews, conducted with clients and other prisoners in the target age group, who came into contact with me through my criminal practice, mostly on the North Coast of New South Wales.

B The Questionnaire

The questionnaire instruction sheet indicated the purpose of the research, directions for completion, confidentiality safeguards, and the voluntary nature of participation. It then defined two key terms:

“assault” means unwanted physical contact such as a punch, hit, kick or stab

“sexual assault” means physical contact of a sexual kind, where involvement is forced upon you — such as unwanted anal sex, oral sex, wanking or fondling. The force may be by threat of, or actual, physical harm.

These definitions were the result of discussions with the Research Section of the Department of Corrective Services, the Faculty of Law and Criminal Justice, other Faculties at Southern Cross University, and the Law Foundation.

The questionnaire was in four sections:

Section 1 surveyed the age of the prisoner;

Section 2 addressed variables such as fear of sexual assault, threats of sexual assault and actual sexual assault while in custody. Participants were asked to respond “never, rarely, occasionally, weekly, or daily”. Participants were also asked if they had reported threats of or actual sexual assault;

Section 3 covered the same questions and responses but with respect to the more general “assault” definition;

Section 4 sought additional comment from the participants.

C Results for Male Prisoners Surveyed

Table 1
Reported Rates of Assault and Sexual Assault

	Sexual Assault		Assault	
	number	per cent	number	per cent
Rarely	11	6.0	34	18.6
Occasionally	17	9.3	38	20.8
Weekly	4	7.6	17	9.3
Daily	2	1.1	1	0.5
Sub Total	44	24	90	49.2
Never	139	76	93	50.8
Total	183	100	183	100

Of the 183 surveyed, 139 stated they had never been sexually assaulted, with 44 stating they have been sexually assaulted at some time (N = 11 rarely, 17 occasionally, 14 weekly and 2 daily). Only six had reported the incident.

Seventy-one respondents stated they had been threatened with sexual assault, more respondents being threatened occasionally (N = 28) than weekly (N = 7). Twelve stated they had been threatened daily.

One hundred and eleven respondents stated they were in fear of sexual assault, 30 of them daily.

Of the 183 surveyed, 90 stated they had been assaulted (other than sexually) mostly occasionally (N = 38). One hundred and fourteen stated that they were threatened with assault.

One hundred and thirty-four stated they were fearful of assault, 36 daily, with the largest number occasionally (N = 49).

SPSS analysis of the data will yield results as to risk factors relating to age, location and numbers of prisoners who say they have been both sexually and non-sexually assaulted.

(i) Reporting

Very few respondents reported sexual (N = 6) or other (N = 1) assaults to the authorities. Threats of sexual assaults were reported, even less frequently, (N = 5) although threats of other assaults were reported more often (N = 8).

(ii) Female Prisoners Surveyed at Mulawa Prison

Ten women prisoners at Mulawa prison were surveyed by self-administered method, supervised by the Welfare Officer. Surprisingly, three respondents reported occasional actual sexual assault, and five reported occasional general assault. This is surprising, as it has previously been considered that sexual assault in women's prisons is rare. The Welfare Officer conducting the survey stated that: "I have not received any information on inmate to inmate sexual assault, but women have complained about sexual assaults by both Police and Prison Officers ..."

The three women who did report sexual assault each commented on their experiences as follows:

- There is a lot going on in the Gaol that you don't realise. Please get it all investigated. Thank you.
- I was assaulted in my cell by 1 person and another watching and one person outside my cell door watching the officers didn't walk in on them. I was scared, this is why I didn't say anything about the incident.
- If a girl has a "drop" (pills) she keeps it up her vagina. If she's stupid enough to let people know and unlikely enough to tell the wrong person, well, she's robbed. Some arsewipe, fucked-up pill head will reach up and get it ...

Eight out of 10 prisoners surveyed made additional comments alleging assaults, mostly by Prison Officers.

Clearly, there is a need for greater research in this area, preferably carried out by women researchers and interviewers. Previous suppositions, for example, by Heilpern and Egger¹ that in women's prisons "the prevalence of sexual assault is rare" needs to be re-evaluated.

D Discussion

The survey instrument is limited. Information is not collected on the time period prisoners had been in custody, or when the stated assaults took place. There was no assessment of issues, such as the race, sexual preference or build of the respondents. Race is particularly important in that the US studies consistently report that young white prisoners are at great risk from black older prisoners²

That is not to suggest that in Australian prisons, Aboriginal prisoners are more likely to be perpetrators than victims — the reverse may be true. More research is needed on this aspect.

The survey failed to analyse whether the assaults complained of were perpetrated by prisoners or by prison officers — some additional comments from respondents have indicated who the perpetrators were, alleging that it is mostly prisoners who were the assailants.

The truthfulness of responses to the questions put may be at issue. This is particularly so when the respondents are prisoners who may be seen to have something to gain by making the system seem worse than it is. On the other hand sexual assault is traditionally under-reported and factors such as trauma, stress, pride, shame and fear could tend toward an under-reporting in a survey such as this. Further, future safety may be at risk by reporting incidents even in a confidential and anonymous survey.

E Comparisons with Other Surveys

There are genuine problems in comparing surveys based on different methodologies. However, the results of the present survey are largely consistent with recent studies in Canada and the United States.

1 Heilpern, H and Egger, S, *AIDS in Australian Prisons* (1989) Report for Department of Community Services and Health at 42.

2 See Nacci, P L and Kane, T R, "Inmate Sexual Aggression: Some Evolving Propositions, Empirical Findings, and Mitigating Counter-Forces" (1984) in Chaneles, S (ed), *Gender Issues, Sex Offences and Criminal Justice: Current Trials* at 3, Moss, S C, Hosford, R E and Anderson, W R, *Sexual Assault in a Prison* (1979) at 826 and Lockwood, D, "The Contribution of Sexual Harrassment to Stress and Coping in Confinement" (1982) in Parisi (ed), *Coping With Imprisonment* at 53.

Denis Cooley administered a victimisation survey to 117 Canadian Federal prisoners in 1991 and 1992. He surveyed prisoners of all ages, which makes direct comparison difficult.

Cooley's sample was skewed toward older prisoners, with those aged 18 to 25 under-represented. Nevertheless, there were 65 incidents involving assaults or threats of violence reported. Forty-one per cent of the 117 respondents reported at least one personal victimisation. The odds of victimisation were eight times higher for a twenty year old prisoner, who has served a comparatively short time in a maximum security prison. This study also compares these rates as indicated through the questionnaires with official statistics on assaults and shows a substantial underestimate in official records of the extent of victimisation.³

The US material is somewhat more difficult to analyse, with wildly different conclusions emerging from what seem to be opposing camps of radical criminologists and apologists for the prison service. Again, there are problems of comparison due to differing methodology.

Davis estimated 2 000 of the 60 000 prisoners passing through the Philadelphia prison systems in a 26 month period were sexually assaulted.⁴

Again, all ages were considered. After an investigation of prisons with secure single cells, Lockwood estimated that 25 percent of all men had been targets of sexually victimising incidents at least once.⁵

Lockwood's later studies of prison populations of Attica and Cossackie reported that 65 per cent of youthful white inmates had been targets of approaches they perceived to be sexually aggressive.

It is submitted that these figures are comparable with the survey results reported in this paper, particularly when age characteristics are accounted for.

There are some other surveys, exclusively emanating from the US Bureau of Prisons, largely based on official reports. These studies identify extraordinarily low rates of sexual assault, less than one per cent.⁶

However, basing estimates of rates of sexual assaults on official reports by prisoners to authorities is ludicrous — the very nature of modern prison life, the risks associated with being an informer, and the lack of faith in the prison authorities and law enforcement agencies to act appropriately mean that the vast majority of assaults go unreported in such a setting.

The ideological assumptions behind the US Bureau of Prisons research are that consensual homosexual activity in prison is itself "dangerous, destructive and leads to violence", and that "normalisation should occur through ... abstinence from homosexual activity".⁷

The reports are self serving and complementary of the Federal Prison system. The findings are flawed, not only in methodology, but in ideological premise.

3 Cooley, D, "Criminal Victimisation in Male Federal Prisons", (1993) October, *Canadian Journal of Criminology* 489.

4 Davis, A J, "Report on Sexual Assaults in the Philadelphia Prison System and Sheriff's Vans" (1968) 6 *Trans-Action* 8-16.

5 Lockwood, D, above n2.

6 Nacci and Cane above n2.

7 Ibid.

F Anecdotal Support

Almost everyone in the prison service, from Ministers and Governors down, acknowledges that sexual assault takes place in prisons.

On returning the sealed questionnaires, welfare officers were invited to comment on the survey and on the issue of sexual assault in prisons. Six out of the seven welfare officers involved in the project identified sexual assault as a problem within prisons. Some comments from these officers include:

I could not guess at the rate for those assaulted." The two inmates who declined the survey said "[y]es of course it happens all the time, but I don't know anything about it.

Yes, some sexual assault does occur in prison. I would estimate the rate of sexual assault in those aged 18 to 25 years to be in the vicinity of 10 to 15 per cent.

Yes it is my experience that sexual assault takes place in prisons. Most reports that I have received have been from inmates in the young adult age group ... and that assault was usually perpetrated by a group of older inmates.

The handwritten descriptions by prisoners of the nature and repetition of the sexual and other assaults makes harrowing and convincing reading.

3. Sentencing Consequences

It has long been accepted that the youth of offenders, and the adversity of the conditions under which they are to be incarcerated, are factors to be considered in determining penalty.

Cases such as *GDP*⁸ and *Broad*⁹ show that in sentencing young people the principle of rehabilitation takes precedence over deterrence or retribution, and such an approach extends to the sentencing of young adults. However, there is no reference in authorities I have located to the added risks of assault for young offenders in custody.

Courts show no reluctance to reduce sentences for those who will have to serve their sentence on protection. Informers who are subsequently under threat from other prisoners for giving evidence for the Crown are entitled to leniency as "his imprisonment will be more distressing and arduous than if he were to be imprisoned in accordance with the ordinary manner of holding prisoners".¹⁰

It has been said that the discount to be applied is "substantial", and that the hardship to be experienced is not a "lesser" aspect of leniency than that to be applied for encouraging assistance to the Crown.¹¹

In *Cosgrove*, Street CJ indicated that an element of leniency was "the notoriously more burdensome nature of penal custody in the case of an ex-police officer".¹² In *Jones*, Street considered it a relevant factor in sentencing that "a period of imprisonment for a former member of the Police Force can at times be fraught with a considerable degree of harassment".¹³

In *Burchell*, the sentencing judge in the lower court referred to the fact that:

8 53 A Crim R 116.

9 Unreported, 30 March 1984.

10 (1986) 25 A Crim R 199.

11 (1989) A Crim R 225.

12 (1988) 34 A Crim R 307.

13 (1985) 20 A Crim R 142.

child molesters are subjected to severe physical assaults by the inmates of regular gaols and they usually are obliged to serve their sentences under heavy protective guard and often in isolation, even from those other inmates on protection.¹⁴

Hunt J, in the principal judgment of the Court of Criminal Appeal, found that:

In the end, it is for the Corrective Services Commission, and not for the courts, to ensure the safety of prisoners in custody ... The fact that a sentence will probably be served entirely on protection and generally in virtual isolation is a very important consideration to be taken into account in fixing the length of the sentence.¹⁵

Illness has also been found to be a factor tending toward leniency. In *Smith King* CJ found:

Generally speaking, ill health will be a factor tending to mitigate punishment, only when it appears that imprisonment will be a greater burden on the offender by reasons of his state of health or where there is a serious risk of imprisonment having a gravely adverse effect on the offenders health.¹⁶

Thus, blindness (*Todd*¹⁷) and other disabilities which would render imprisonment more burdensome are relevant factors in deterring sentence (*Sellin*¹⁸ and *Martin*¹⁹).

However, the reluctance of the courts to consider the respective roles of the Court of Criminal Appeal and the Corrective Services administration is evident in cases such as *Bailey*,²⁰ where the High Court declined to interfere with a Court of Criminal Appeal decision. *Bailey* was suffering from AIDS, the result of which was that he was detained in a special unit. This led to increased stress and this had an adverse effect on the development of AIDS symptoms. He appealed, and despite a strong dissent by Kirby P, leave to appeal was refused.

The courts must now recognise that a substantial proportion of 18 to 25 year old people who are sentenced to imprisonment will be assaulted during their time in custody. The courts should specifically take this into account as a factor of leniency when sentencing. Suggestions by the courts that it is the responsibility of other authorities to properly house prisoners in safety ring hollow.

If those in protection because they were informers or former police officers or child abusers or have disabilities are entitled to leniency as a result of hardship to be suffered then so should our young prisoners. Courts must not be blind to policies that have led to over crowding or to a massive expansion of the prison population without appropriate infrastructure or protection of these prisoners

It is hoped that this research will lead to judicial recognition of sexual and other assault on young people in custody when determining appropriate penalty. If rehabilitation is a primary goal for the prison, placing young people in such a vulnerable position seems counter-productive to such a goal.

14 (1987) 34 A Crim R 148.

15 Id at 151.

16 (1987) 44 SASR 5.87 at 589.

17 [1976] Qd R 21.

18 (1991) 57 A Crim R 313.

19 (1990) 47 A Crim R 168.

20 (1988) 34 A Crim R 154.

4. *Prison Administration*

Clearly an issue requiring most immediate attention by prison authorities in light of sexual assault in gaol is the supply of condoms. Certainly there are no guarantees that perpetrators will use them, however, victims may be able to trade condom use for compliance, and some lives may be saved. It is not unheard of for sexual offenders to wear condoms at the time of the offence, indicating that some perpetrators will use condoms for their own, if no-one else's, protection.

Parklea Prison in the west of Sydney, holds almost exclusively 18 to 25 year old prisoners. One would have hoped that this prison might therefore have lower rates of assault. Twenty prisoners from Parklea self-administered the survey. The results are in Table 2.

Table 2
Parklea Prison
Reported Rates of Assault and Sexual Assault

	Sexual Assault		Assault	
	number	per cent	number	per cent
Rarely	1	5	5	25
Occasionally	4	20	5	25
Weekly	3	15	2	10
Daily	0	0	0	0
Sub Total	8	40	12	60
Never	12	60	8	40
Total	20	100	20	100

Note that for sexual and other assaults the rates are higher than in Table 1. Despite the small sample, however, the results do not point to age segregation as a solution to sexual assault in prison. It is possible, of course, that these assaults took place at other prisons, prior to attendance at Parklea. However, I am informed that most prisoners at Parklea are sent there immediately upon entry to the prison system following conviction.

5. *Conclusion*

Reformist prison regimes, such as the Dutch system, and similar systems of other Northern European nations are characterised by single cell accommodation and conjugal visits — sometimes prostitutes. Young prisoners are housed in small groups of 12 to 14 with little contact with other prisoners. There are no studies of sexual assault rates in Dutch prisons. In 1992 I spent two months studying drug use in Dutch prisons, and not a single prisoner or prison officer I interviewed had seen or heard of a sexual assault in prison. Naturally, single cells, group management, and conjugal visits are only part of a much larger picture, however it is a place to start in New South Wales.

The rates of sexual and other assaults reported in this paper are alarming. They point to an unacceptable level of additional unauthorised punishment beyond a sentence of imprisonment. The grief, shock and trauma suffered by victims of sexual assault are exacerbated by the environment in which the assault takes place. Where people are totally trapped by the state in an environment where such assault is rife and unpoliced, immediate changes to sentencing and prison policy must urgently be implemented.