

**INQUIRY INTO CORRECTIONAL SERVICES
LEGISLATION AMENDMENT BILL 2006**

Organisation: Legal Aid New South Wales

Name: Mr Bill Grant

Position: Chief Executive Officer

Telephone:

Date Received: 31/07/2006

Subject:

Summary

26 JUL 2006

The Director
General Purpose Standing Committee No 3
Parliament House
Macquarie Street
Sydney NSW 2000

RECEIVED

31 JUL 2006

Email: gpscno3@parliament.nsw.gov.au

GPSC's

Dear Director,

Re: *Inquiry into the Correctional Services Legislation Amendment Bill 2006*

I refer to a letter from The Hon Amanda Fazio MLC, Committee Chairperson, dated 15 June 2006, in which the Legal Aid Commission of NSW (the Commission) was invited to make a submission in relation to the above bill.

The Commission notes that the bill was introduced into the Legislative Assembly by the Attorney-General on 23 May 2006, and reached the second reading stage in the Legislative Council on 7 June 2006.

In preparing its comments, the Commission considered the content of the draft bill and had regard to comments made by the Legislation Review Committee in its Report No 8 of 2006 (2 June 2006, pages 8-14).

What the Bill seeks to do

The bill purports to limit the personal rights of one class of person – inmates serving sentences for serious indictable offences – to access services providing for the storage of reproductive material. The objects of the bill are:

- To prohibit inmates who are serving sentences for serious indictable offences or who are waiting sentencing for such offences from providing their reproductive material for use, or storage, for reproductive purposes at hospitals and other places, and
- To require inmates who have had their reproductive material stored for reproductive purposes to pay charges for the storage during any period during which they are imprisoned.

This purpose would be implemented by the insertion of a new s.72B (set out in Schedule 1 of the bill) into the *Crimes (Administration of Sentences) Act 1999* (the Act). Subsection 72B(3) would create an offence where a serious

indictable offender provides reproductive material (whether in a correctional centre or elsewhere) for use, or for storage, for reproductive purposes at any hospital or other place.

Subsection 72B(4) provides that convicted inmates and serious indictable offenders must pay such charges as may be imposed in respect of the storage of such reproductive material during the period of his or her imprisonment, including for any reproductive material placed in storage before the commencement of the amendments to the Act.

Subsection 72B(5) makes clear that the requirement set out in subsection (4) apply to serious indictable offenders who placed their reproductive material in storage before the amendments to the Act commenced.

Legislation Review Committee consideration of the Bill

The Commission notes that the Legislation Review Committee made two important observations about the bill:

- The bill was introduced in response to "concerns voiced.... when a convicted gang rapist... had a sperm sample frozen before he began chemotherapy, which would leave him sterile" (page 8), and
- There "would appear to be no Australian precedent" for the provisions contained in this bill (page 10).

The Committee also made 17 comments, which are set out in an attachment. The Commission adopts the Committee's concerns and would emphasise and support, in particular, comments numbered 18-21, 23, 30-33 and 42-45.

The Commission's comments on the Bill

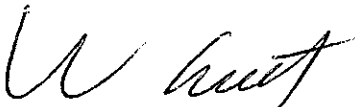
The Commission makes the following comments on the bill.

1. The Commission considers that the issue of whether a person should be able to store his or her reproductive material is one which should be handled by reference to the medical needs of the person, as assessed by competent medical authorities on a case by case basis. As a matter of principle, this issue is not one which should be answered by arbitrary responses to community voiced concerns about the propriety of making certain services available to certain classes of person.
2. The Commission submits that the principle of distributive justice must apply to decisions about the withholding of access to reproductive storage facilities. A just State deals with all of its citizens equally and fairly according to law. In this context there is a fundamental question to be asked about whether citizens generally have a right to store their reproductive material so that, in the event of suffering a medical condition leading to sterility, they can still have children. It is difficult to see how, if there were such a right, it can be accorded to some and denied to others.

3. In addition to being a question of distributive justice, it is also fundamentally about a human right to reproductive health. The Commission notes that, while there is no 'legal' right to health in Australia, Australia has ratified international human rights law instruments that enshrine the right to health and health-related rights. In particular, Australia is a party to the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR), reports on its fulfilment of its Covenant obligations, and has its performance reviewed by the Covenant Committee on Economic, Social and Cultural Rights. Non-discrimination, equal treatment and respect for a person's dignity are among the most critical components of the human right to health as understood in this context¹.
4. Like other signatories, Australia has an obligation to ensure that no international regulations or agreements adversely affect people's health, and to ensure that Australia's representatives in international meetings take the right to health into account. It is arguable that these obligations extend not just to the international law context but to the domestic law context as well.

Thank you for giving the Commission an opportunity to comment on the bill.

Yours sincerely



Bill Grant
Chief Executive Officer

¹ See Hunt P. Economic, social and cultural rights: the right of everyone to the enjoyment of the highest attainable standard of physical and mental health: Report of the Special Rapporteur. Geneva: UN Commission on Human Rights, 2003. (Document E/CN.4/2003/58.)

18. The Committee notes that the right to adequate medical care is an internationally-recognised human right.
19. The Committee also notes that this right is expressed in section 72A of the Crimes (Administration of Sentences) Act 1999.
20. The Committee notes that it is common medical practice for a post-pubertal male who has been diagnosed with cancer to be offered the option of having semen stored, in case the treatment renders that person sterile, thereby preserving the person's reproductive health as much as possible. The Committee also understands that the ongoing cost of storing sperm is usually a private expense.
21. The Committee considers that the provision in the Bill denying a "serious indictable offender" the right to have his or her reproductive material stored prior to treatment likely to render him or her infertile or when otherwise medically advised is a trespass on the right to adequate medical treatment.
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22. The Committee has written to the Minister to seek his advice as to the justification for this trespass.
23. The Committee refers to Parliament the question as to whether this constitutes an undue trespass on the personal rights of "serious indictable offenders".
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30. The Committee notes that respect for family life and the right to found a family are internationally-recognised human rights.
31. The Committee also notes that, in considering the application of the respect for family life to prisoners, the European Court of Human Rights has allowed Governments to limit its applicability on a case-by-case basis, having regard to the maintenance of public confidence in the penal system, and the welfare of any child conceived as a result of artificial insemination and, therefore, the general interests of society as a whole.
32. The Committee also notes that the European Court of Human Rights made it clear that there is no place in a system where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic forfeiture of rights by prisoners based purely on what might offend public opinion.
33. The Committee notes that the Bill provides for a blanket restriction on the access of a "serious indictable offender" to artificial insemination facilities, without any consideration of individual circumstances.
34. The Committee considers that this is a trespass on the individual rights of "serious indictable offenders".
35. The Committee has written to the Minister to seek his advice as to the justification for this trespass.
36. The Committee refers to Parliament the question as to whether this blanket restriction on reproductive rights constitutes an undue trespass on the individual rights of "serious indictable offenders".
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42. The Committee notes the importance of the double jeopardy rule within the common law tradition and as an internationally-recognised human right.
43. The Committee is strongly of the view that any weakening of the double jeopardy rule should only be allowed if overwhelmingly in the public interest.
44. The Committee notes that the Bill's blanket denial of reproductive rights could be considered as constituting a further punishment in addition to that which the "serious indictable offender" received on judicial sentencing.
45. The Committee refers to Parliament the question as to whether this exposure to a further penalty constitutes an undue trespass on the individual rights of "serious indictable offenders".