

INQUIRY INTO JUVENILE OFFENDERS

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Subject:

Summary

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The Director
Select Committee on Juvenile Offenders
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Sir / Madam

SELECT COMMITTEE INQUIRY ON JUVENILE OFFENDERS

This submission is made in response to the letter dated 1 February 2005 from Reverend the Honourable Dr Gordon Moyes MLC in his role as Chairman of the Legislative Council Select Committee on Juvenile Offenders, which invited a submission in relation to the Select Committee inquiry's terms of reference.

The National Children's and Youth Law Centre (the "NCYLC")

The NCYLC was established in June 1993 and is Australia's only national community legal centre dedicated to addressing human rights issues for children and young people through legal change. The NCYLC promotes the rights and interests of children and young people through legal casework, advocacy and contributing to policy development at State and Federal levels. As such, an important role of the NCYLC is to review legislation, government policy and initiatives that will impact on children and young people.

Introduction

We are concerned with whether the amendments made to the *Children (Criminal Proceedings) Act 1987* (NSW), the *Children (Detention Centres) Act 1987* (NSW) and the *Crimes (Administration of Sentences) Act 1999* (NSW) (the "**Legislative Amendments**") will be effective in meeting the Department of Juvenile Justice's stated objectives in relation to rehabilitation and reduced recidivism.

As a national policy centre, we are also concerned with whether the legislative regime that has been implemented complies with Australia's international obligations.

The Reputation of Australia's Juvenile Justice System

The NCYLC is of the view that Australia currently has a reputation in the international community as an innovator and proponent of best practice in juvenile justice. This reputation is particularly held by developing countries in Australia's region, especially ASEAN nations, but also by many Western countries including the United Kingdom and member States of the European Union.

The foundation for this reputation is the work that Australian Governments, principally at State and Territory level, have undertaken to ensure that our youth justice system meets international standards. Generally, these justice systems reflect the primary objectives of juvenile justice, being rehabilitation and the diversion from the criminal justice system through reintegration into society. Our systems also demonstrate best practice to the extent that they protect against stigmatisation of juvenile offenders and so further facilitate reintegration into society.

In turn, New South Wales has a record of leadership among Australian states and territories as demonstrated by legislative schemes such as the pioneering *Young Offenders Act 1997* (NSW) which provides for the development and use of hierarchical penalties incorporating the use of cautions, conferencing and community based sentences.

The Department of Juvenile Justice (and accordingly also the New South Wales Government) has previously demonstrated that it is aware of the need to ensure that detention does not preclude opportunities for rehabilitation and reintegration into society. This means that there has been good work undertaken to ensure that problems faced by the juvenile justice system are addressed in a systemic fashion within a clear policy framework.

This policy framework is demonstrated by the structured reform agenda that has been adopted since the Ombudsman's *Inquiry into Juvenile Detention Centres* in 1996. However, it is our view that the Legislative Amendments are a shift away from this structured agenda. Rather we fear they will detract from the reputation of Australia and New South Wales as leaders in the field of juvenile justice.

Accordingly, the NCYLC calls upon the New South Wales Government to consider our concerns as outlined in relation to the terms of reference below and to provide a clearer explanation of the way in which the Legislative Amendments uphold the key objectives of juvenile justice. In the event that these processes demonstrate that the Legislative Amendments are not consistent with the principles of juvenile justice, the NCYLC calls upon the New South Wales Government to develop a more appropriate regime and to commit the necessary resources to its implementation.

Submissions in relation to the Select Committee's Terms of Reference

- a) *The reasons for, and the consequences of, the transfer of management responsibility for the Kariong Juvenile Justice Centre from the Department of Juvenile Justice to the Department of Corrective Services including the impact on staff at Kariong and Baxter detention centres.*

We do not seek to comment on the reasons for the transfer of management responsibility for the Kariong Juvenile Justice Centre from the Department of Juvenile Justice to the Department of Corrective Services.

We note that there is a widespread perception that this transfer was a 'knee-jerk' reaction to the management and operational problems previously encountered at Kariong.

Our understanding is that the transfer of management responsibility to the Department of Corrective Services will have, *inter alia*, the following consequences:

- juvenile offenders being managed by staff trained for the adult correctional system;
- juvenile offenders being detained with young adults;
- an expansion of the permitted powers of correctional officers to use dogs against juvenile offenders (as permitted by the *Crimes (Administration of Sentences) Act 1999* (NSW) s 78);
- juvenile offenders potentially being confined to their cells for up to seven days (as permitted by the *Crimes (Administration of Sentences) Act 1999* (NSW) s 53(1)(c));
- official visitors not having access to juvenile offenders. It is our understanding that the reforms will prohibit contact with independent advocates for juveniles who perform an important function in the juvenile justice system; and
- juvenile offenders not having the benefit of s 14 of the *Child (Detention Centres) Act 1987* (NSW) which provides for arrangements to maintain their physical, psychological and emotional well-being, and to promote their social, cultural and educational development.

These possible consequences are of concern because we believe each is likely to inhibit rehabilitation of young offenders and accordingly lead to increased recidivism.

These concerns are particularly pertinent for children between the ages of 16 and 18 who are, in the eyes of domestic and international law, and should be, from a intuitive moral viewpoint, entitled to increased protection reflecting their relative age, capabilities and experience and their consequent potential vulnerability.

Far from recognising this, the Legislative Amendments have the effect of incorporating young detainees into the adult correctional system, which constitutes a significant withdrawal from the principles of a separate juvenile justice system focusing on the specific needs of juvenile offenders. As such, the Legislative Amendments will increase the likelihood of these detainees becoming institutionalised and thereby detract from the stated objective of the Department of Juvenile Justice, being “turning young offenders away from a life of crime”.

b) Whether the transition of Kariong Juvenile Justice Centre into a juvenile correction centre operated by the Department of Corrective Services is the most effective method of addressing management problems at that centre.

The transition of Kariong Juvenile Justice Centre into a juvenile correction centre operated by the Department of Corrective Services appears to be a ‘knee-jerk’ reaction to management and operational problems previous encountered at Kariong. The Legislative Amendments appear simply to reconfigure the problems as opposed to the New South Wales Government taking responsibility for instituting effective management systems within the Department of Juvenile Justice. Accordingly, this transition is likely to be ineffective and leave in place a legislative regime that inhibits the stated objectives of the Department of Juvenile Justice.

The defining principle of the modern juvenile justice system is an emphasis upon rehabilitation and reintegration of the juvenile offender into society. We question how

the Department of Juvenile Justice can ensure that its stated objective of “striving to break the juvenile crime cycle” will be furthered when the operations of Kariong are no longer under its control.

Similarly, we question whether these objectives are likely to be achieved by responsibility being transferred to a Department whose record, as demonstrated in more depth below, is inadequate. As such, we doubt that the transition of Kariong Juvenile Justice Centre into a juvenile correction centre and the transfer of its responsibility to the Department of Corrective Services will be an effective solution to the management and operational problems previous encountered at Kariong.

c) The issue of adult detainees sentenced as juvenile offenders at Kariong and elsewhere in the juvenile detention centre system.

We make no submission in relation to this term of reference.

d) The classification system and appropriateness of placement of detainees.

We are of the view that the potentially serious consequences of transfers under both s 28 of the *Children (Detention Centres) Act 1987* (NSW) and s 41C of the *Crimes (Administration of Sentences) Act 1999* (NSW) warrant tighter requirements to be satisfied prior to such transfers being permissible. Such transfers should only be permissible with the express consent of the Minister for Juvenile Justice and a formal review mechanism should be implemented providing for review of any such decisions by a court of law.

e) Alternatives to the establishment of a juvenile correctional centre.

We believe that the best way forward would be to return Kariong to the status of a juvenile detention centre under the auspices of the Department of Juvenile Justice and for the previous management issues to be addressed within this framework of the initiatives recommended by the Ombudsman’s *Investigation into Kariong Juvenile Justice Centre* in 2000.

f) The wider social implications of incarcerating juveniles in juvenile correction centres run by the Department of Corrective Services.

As noted above, the primary objective of juvenile justice, being rehabilitation and reintegration into society, is unlikely to be furthered by transferring responsibility for incarcerated juveniles to the Department of Corrective Services.

A consideration of the statistics that have been provided to us in relation to issues that are the responsibility of this department is instructive and sobering.

- In 2002-3, New South Wales recorded the highest rate of return to prison across Australia, with a recidivism rate 22% above the national average.
- Prison overcrowding remains a critical issue in New South Wales with the utilisation rate 7.7% above the national average.
- The per day out of cell hours in New South Wales is lower than the national average.

- In 2002-3, assault rates in New South Wales prisons were the highest in Australia and were 59% above the national average.

These statistics seem to indicate departmental operations in need of an overhaul. To entrust this department with the care and control of society's most vulnerable detainees belies the notion that providing these people with alternatives to offending is a priority of the New South Wales Government.

Accordingly, we believe that the social implications of incarcerating juveniles in juvenile justice centres under the auspices of the Department of Corrective Services are an increased risk of institutionalisation of juvenile offenders and a concomitant increase in recidivism.

g) Management of staff assault issues in the juvenile justice system.

We make no submission in relation to this term of reference.

h) Whether incarcerating juveniles in juvenile correction centres achieves reduced recidivism, rehabilitation and compliance with human rights obligations.

Rehabilitation and Recidivism

As discussed in relation to term of reference a) above, the possible implications of juvenile offenders being incorporated into the adult correctional system is institutionalisation inhibiting the likelihood of successful rehabilitation. We are of the view that to incarcerate juveniles in juvenile correction centres under the control of the Department of Corrective Services runs counter to fundamental principles of juvenile justice and actively inhibits the ability of the New South Wales Government to ensure that the stated objectives of the Department of Juvenile Justice are realised.

We are of the view that the inadequacies of the Department of Corrective Services outlined above, together with the reduced protection afforded to juvenile offenders incarcerated in juvenile correction centres as opposed to detention centres, will inhibit rehabilitation and thereby lead to increased recidivism of juveniles because some of the additional protections that should be accorded to people of their relative age and vulnerability will no longer be provided.

Australia's International Human Rights Obligations

In addition to the consequences considered above, consideration should also be given to whether the Legislative Amendments implement a regime that complies with Australia's international law obligations.

Article 3.1 of the *Convention on the Rights of the Child* (the "CRC") requires that "[i]n all actions concerning children ... the best interests of the child shall be a primary consideration". It is difficult to see how the Legislative Amendments, which reduce the protection accorded to juvenile offenders, make the best interests of those offenders a primary consideration.

We also note the finding of the Legislative Review Committee published in the Legislative Review Digest dated 6 December 2004 that "s 41C of the *Crimes*

(Administration of Sentences) Act 1999 (NSW) allows children to be detained with adults on the recommendation of the Review Council on alternative grounds to the best interests of the child”.

Article 37(c) of the CRC requires that “[e]very child deprived of liberty shall be treated with respect for the inherent dignity of the human person, and *in a manner which takes into account the needs of persons of his or her age*” (our emphasis). Similarly, Rule 28 of the *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* (the “UN Rules”) states that “[t]he detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence”. By transferring responsibility for Kariong Juvenile Justice Centre to the Department of Corrective Services, the New South Wales Government is addressing juvenile offenders in a purely corrective services framework, rather than also considering the unique requirements of juvenile offenders. The effect of this is a failure to provide juvenile offenders treatment in accordance with the specific requirements of those offenders’ ages as required by the CRC and the UN Rules.

Article 37(c) of the CRC further provides that “[i]n particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so”. While it is acknowledged that Australia has noted a reservation to this aspect of the CRC, Australia has expressly accepted the general principles of article 37 and the reservation extends only to situations in which it is deemed by the responsible authorities not to be feasible, in light of Australia’s particular geography and demography, to separate children from adults, keeping in mind the obligation that children should be able to maintain contact with their families. The Legislative Amendments clearly do not contemplate such a situation, but rather impose a universal regime that offends Australia’s obligations under article 37(c) of the CRC.

Article 37(d) requires that “[e]very child deprived of his or her liberty have the right to prompt access to legal and other appropriate assistance”. As noted in relation to term of reference a) above, the transfer of responsibility to the Department of Corrective Service would have the effect of limiting access of official visitors. Although the Legislative Amendments allow contact for the purpose of provision of legal advice, our understanding is that they prohibit contact with other advocates for juveniles who are an important part of the juvenile justice system. As such, the Legislative Amendments also offends Australia’s international obligations arising out of article 37(d) of the CRC by prohibiting access to “other appropriate assistance”.

Article 40.1 requires a child “recognized as having infringed the penal law to be treated in a manner ... which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society”. By transferring responsibility for juvenile offenders to the Department of Corrective Services, the Legislative Amendments implement a regime that breaches this article of the CRC because it fails to properly take into account the offenders’ ages. Furthermore, as outlined in our submissions above, the Legislative Amendments reduce the likelihood of juvenile offenders being rehabilitated and assuming a constructive role in society.

Rule 67 of the UN Rules provides “[a]ll disciplinary measures constituting cruel, inhumane or degrading treatment shall be strictly prohibited, including ... close or solitary confinement”. That the new legislative regime means juvenile offenders are subject to s 53(1)(c) of the *Crimes (Administration of Sentences) Act 1999* (NSW) allowing them to potentially be confined to their cells for up to seven days constitutes a breach of this rule.

Recommendations

We believe that the best way forward would be to return Kariong to the status of a juvenile detention centre under the auspices of the Department of Juvenile Justice and the previous management issues to be addressed through the initiatives recommended by the Ombudsman in 2000.

At a minimum, the following steps should be undertaken so that the legislative regime better accords with the objectives of rehabilitation and reintegration into society and moves towards compliance with Australia’s international obligations.

- The definition of “older detainee” in the *Children (Detention Centres) Act 1987* (NSW) should be amended to mean “an inmate who is of or above the age of 18 years.
- Section 28(2)(d) of the *Children (Detention Centres) Act 1987* (NSW) should be amended to reduce the wide discretion that is currently afforded to the Director-General.
- The legislation should be amended to require that all transfers of juveniles, both from juvenile detention centres to juvenile correction centres under s 28 of the *Children (Detention Centres) Act 1987* (NSW) and from juvenile correction centres to adult correction centres under s 41C of the *Crimes (Administration of Sentences) Act 1999* (NSW), have the express consent of the Minister for Juvenile Justice.
- The legislation should be amended to incorporate provision for review of any such transfers.
- The legislation should be reconsidered in light of the international law principles outlined above.

We thank the Select Committee and the Legislative Council for the opportunity to make this submission.

Yours Faithfully,

James McDougall
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National Children's and Youth Law Centre