

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

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Subject:

Summary



THE VOICE OF THE PROFESSION

Australian Medical Association (NSW) Limited

In reply please quote: AK/124/B/37/20

From the President's Office

Dr Andrew Keegan

MB BS (Hons), B Sc (Med), PhD, FRACP

26 July 2006

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27 JUL 2006

GPSC's

The Director
General Purpose Standing Committees
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Sir/Madam

Subject: Inquiry – Correctional Services Legislation Amendment Bill 2006 (NSW)

The Australian Medical Association of New South Wales (AMA (NSW)) welcomes the opportunity to make a submission to the inquiry into the *Correctional Services Legislation Amendment Bill 2006* (NSW) (the **Bill**). The AMA (NSW) is of the firm view that this Bill not only disregards the human rights of prisoners but places medical practitioners in an unacceptable ethical and legal quandary. We strongly oppose the Bill being passed in its current form and call for its abandonment on the basis it is unethical and discriminatory. Our submissions follow.

The Bill compromises the human rights of prisoners

The AMA (NSW) maintains that this Bill infringes prisoners' rights to access the same medical services which are currently readily available to other members of the community. Storing sperm or ovum is a standard procedure offered to any person undergoing chemotherapy or radiotherapy, as a known side-effect of such treatment can be a detrimental impact on fertility.

Denying prisoners undergoing cancer treatment what essentially amounts to an ordinary health care service is in conflict with the published positions of the Federal Australian Medical Association and Justice Health NSW. It is also in conflict with Australia's obligations under international law.

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1. The Australian Medical Association's *Position Statement on the Health Care of Prisoners and Detainees* (the **Statement**) provides:
 - Prisoners and detainees have the same right to access, equity and quality of health care as the rest of the population. Because prisoners will return to society after their imprisonment, their health is an issue of concern to the general population;
 - Medical practitioners should:
 - i. Act in the patient's best interest
 - ii. Not withhold appropriate medical care
 - iii. Base their medical judgments on the needs of the patients, irrespective of the reason for the patient's incarceration.

A copy of this Statement is **attached**.

2. A corporate goal of Justice Health is to "*provide high quality, clinically appropriate services, informed by best practice and applied research*". Justice Health is committed to ensuring "*equitable access and continuity of quality health care*".
3. Australia is a party to the International Convention on Civil and Political Rights, and the Convention on the Rights of the Child. The United Nations' Basic Principles for the Treatment of Prisoners follows on from these Conventions and states:

"Prisoners shall have access to the health services available in that country without discrimination on the grounds of their legal situation."

We are also concerned that this Bill may unfairly impact on prisoners who are later cleared of the conviction on appeal. This has the implication that innocent persons may be prevented from preserving their reproductive material before undergoing medical treatment.

The AMA (NSW) takes the view that storage of reproductive material is part of the health service provided to members of the community who are undergoing cancer treatment - it is necessary to counteract one of the possible side-effects of such treatment, namely sterility. As it is a service which is normally provided to such patients in the course of this type of health care, it is appropriate, indeed mandatory that it be offered to all such patients, including those who happen to be incarcerated. Prisoners ought not to be deprived of what constitutes an ordinary health service offered to other members of the community.

The Bill puts doctors in an invidious legal and ethical position

AMA (NSW) is also opposed to the Bill because of the vexed ethical and legal dilemma in which it puts doctors in relation to their treatment of such prisoners.

Doctors' clinical conduct is circumscribed by the strict NSW Medical Board Code of Professional Conduct (the **Code**) which in sum requires doctors to:

- Treat all patients equally according to clinical need;
- Put aside their own prejudices and personal views and treat patients in a manner consistent with best clinical practice;

- Respect patient autonomy and right to be fully involved in decisions about their treatment;
- Provide appropriate treatment, investigation or referral to patients and not to withhold such treatment unless the patient requests.

A copy of this Code is **attached**. The purpose of any medical ethics is to protect the doctor/patient relationship, so that factors external and immaterial to clinical treatment do not interfere with care.

More specifically the Code exhorts doctors to:

- Make the care of the patient their paramount concern and recognise the fundamental role of the patient in decision-making about and treatment of the patient (**Standards 2 and 2.4**)
- Treat every patient politely and considerately (**Standard 2.3**)
- Respect the right of patients to be fully involved in decisions about their care (**Standard 2.4**)
- Ensure their personal beliefs about the patient's lifestyle, culture, beliefs, race, colour, gender, sexuality, age, religion, social, economic or insurance status do not prejudice their patients' care (**Standard 2.4**)
- Give patients full information about their condition and treatment, outlining the risks and benefits and prognosis (**Standard 2.4**)
- Give priority to the investigation and treatment of patients on the basis of clinical need (**Standard 2.4**)
- Ensure investigations or treatment provided or arranged is based on a clinical judgment of the patient's needs and the likely effectiveness (**Standard 2.4**)
- Not deliberately withhold appropriate investigation, treatment or referral which is in the patient's best interests (**Standard 2.8**)

This Code states that its provisions will be relevant considerations in determining what constitutes proper and ethical conduct by a doctor and in assessing whether a doctor is guilty of unsatisfactory professional conduct. A failure to adhere to the Code's precepts may well amount to a finding of unsatisfactory professional conduct on the part of the doctor.

Under **s.36 (1)** of the *Medical Practice Act 1992* (NSW) a doctor may be found guilty of unsatisfactory professional conduct where the knowledge, care or judgment possessed or skill exercised by the practitioner in the practice of medicine, is significantly below the standard reasonably expected of a practitioner of an equivalent level of training or experience. A doctor so found may have conditions placed on his/her registration, be suspended from practice, or be deregistered.

AMA (NSW) submits that the Bill, by requiring doctors not to assist patient prisoners to store their reproductive material when they undergo cancer treatment, brings doctors into sharp conflict with their legal duty of care to the patient and ethical obligations to the patient to do no harm, and to give paramount consideration to the interests of the patient as expounded in the Code. On the one hand, to provide these patients with usual treatment, consistent with best clinical practice, will constitute an offence under this legislation – on the other hand, not to provide patients with usual treatment consistent with best practice could result in deregistration and civil action.

Furthermore, whilst the proposed Bill does not create a statutory offence which expressly applies to medical practitioners or health service providers who arrange the treatment and or undertake the impugned procedures for the prisoner, such medical or health practitioners could be exposed to criminal prosecution.

At common law, the medical or health practitioner who so assists a prisoner in contravention of the Bill may be charged:

- as a principal of the offence; or
- as complicit in the prisoner's offence - that is for having:
 - aided and abetted by providing the prisoner with material assistance; or
 - counselled or procured the offence by encouraging or assisting the prisoner to retrieve and store his/her reproductive material.

If a doctor were convicted of an offence such as this, it could give rise also to a complaint or allegation that the doctor is guilty of unsatisfactory professional conduct, or potentially the more serious, professional misconduct and face serious disciplinary action.

It is untenable for doctors to be placed in such a conflicted position between their need to obey the law and their obligations to the patient.

Summary

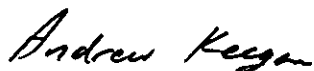
The AMA (NSW) respectfully submits the Bill is inhumane, unethical, unworkable and impractical.

A sentence handed down to a prisoner is considered punishment for the crime. The provisions of this Bill amount to an additional punishment – namely a denial of ordinary and appropriate health care to counteract the potentially harmful effects of the cancer treatment on a person's fertility. Ethical codes and statements on the human rights of prisoners have been adopted to prevent punishment additional to the custodial sentence.

Moreover, the Bill overrides the ethical and legal obligations of medical practitioners and places them at risk of not only professional disciplinary action but also of prosecution for providing appropriate and reasonable medical care, or failing to provide medical care.

The AMA (NSW) submits that the law should proceed no further and urges serious reconsideration of this Bill.

Yours sincerely,



DR ANDREW KEEGAN

President