

INQUIRY INTO JUVENILE OFFENDERS

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Subject:

Summary

**Submissions
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Inquiry into Juvenile Offenders

**Submission on behalf of
the Legal Aid Commission of New South Wales
to the
Select Committee on Juvenile Offenders**

The Legal Aid Commission of New South Wales (the Commission) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). The Commission provides legal services to socially and economically disadvantaged people.

The Commission has a particular interest in the Inquiry into Juvenile Offenders (the Inquiry) as the Commission provides legal representation for children in criminal matters in specialist Children's Courts through its specialist service, the Children's Legal Service (CLS). The CLS also provides a visiting legal service to juvenile justice centres in New South Wales. A solicitor from the CLS visits Kariong Juvenile Correctional Centre each week to provide legal advice to inmates.

Therefore, the Commission's experience in terms of relevancy to the Inquiry links to the legal service provided to the inmates of the Kariong Juvenile Correctional Centre.

For ease of reference, the Terms of Reference are repeated below, with the Commission providing its response to those terms, as applicable.

- 1. That the provisions of the Juvenile Offenders Legislation amendment Bill 2004, as passed by the House, be referred to a select committee for inquiry and report.**
- 2. That, notwithstanding the generality of paragraph 1, the committee examine in particular the following matters:**

(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 the staff at Kariong and Baxter detention centres

While the Commission is unable to comment on the reasons for the transfer, the consequence of the transfer of management responsibility for the Kariong Juvenile Justice Centre from the Department of Juvenile Justice to the Department of Corrective Services relates to the children who are detained at Kariong are now inmates in a juvenile correctional centre, rather than detainees in a juvenile justice centre. Juvenile justice centres are administered by the NSW Department of Juvenile Justice in accordance with the *Children (Detention Centres) Act 1987* (NSW) (the CDC Act). Juvenile correctional centres are administered by the New South Wales Department of Corrective Services in accordance with the *Crimes (Administration of Sentences) Act 1999* (NSW).

Regardless of whether Kariong is a juvenile justice centre or a juvenile correctional centre, Australia has responsibility to provide management of its centres in accordance with its international obligations regarding children.

The Convention on the Rights of the Child¹ (the CRC) was ratified by Australia on 17 December 1990² and entered into force on 16 January 1991. Article 3.1 of the CRC states:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 37(c) states:

Every child deprived of liberty shall be treated with humanity and 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. In 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 and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.

¹ Officer of the High Commission for Human Rights, *Convention on the Rights of the Child* : <http://www.unhchr.ch/html/menu3/b/k2crc.htm>

² The ratification was subject to a reservation. The reservation provides that "Australia accepts the general principles of article 37. In relation to the second sentence of paragraph (c), the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia. Australia, therefore, ratifies the Convention to the extent that it is unable to comply with the obligation imposed by article 37(c)."

By becoming a party to the CRC, Australia has voluntarily undertaken to comply with a number of minimum standards for the treatment of juvenile offenders. Article 40.1 of the CRC states:

States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner and consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and 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 this society.

In addition to the provisions of the CRC, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice³ 1985 (the Beijing Rules) provide guidance for the implementation of Article 37 of the CRC. Rule 5.1 provides:

The juvenile justice system shall emphasise the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.

The commentary to Rule 5.1 of the Beijing Rules states that:

The standard minimum Rules are deliberately formulated so as to be applicable within different legal systems and, at the same time, to set some minimum standards for the handling of juvenile offenders under any definition of a juvenile and under any system of dealing with juvenile offenders. The Rules are always to be applied impartially and without distinction of any kind.

Rule 1 sets out general principles. Rule 1.6 provides that:

Juvenile justice services shall be systematically developed and coordinated with a view to improving and sustaining the competence of personnel involved in the services, including their methods, approaches and attitudes.

Rule 3.3 requires that "[e]fforts shall also be made to extend the principles embodied in the Rules to young adult offenders".

Rule 13 provides for children in detention pending trial stating:

While in custody, juveniles shall receive care, protection and all necessary individual assistance - social, education vocational, psychological, medical and physical – that they may require in view of their age, sex and personality.

Rule 26 sets out the Objectives of institutional treatment.

26.1 The objective of training and treatment of juveniles placed in institutions is to provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society.

³ Officer of the High Commission for Human Rights, *Beijing Rules*:
http://www.unhchr.ch/html/menu3/b/h_comp48.htm

26.2 Juveniles in institutions shall receive care, protection and all necessary assistance-social, educational, vocational, psychological, medical and physical-that they may require because of their age, sex, and personality and in the interest of their wholesome development.

26.3 Juveniles in institutions shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults.

...

Although the Beijing Rules are not binding on Australia, the United Nations Committee on the Rights of the Child⁴ encourages States Parties to implement their international obligations in light of these guidelines.

A commitment to the principles of the CRC and the Beijing Rules is reflected in the CDC Act. Section 4 provides:

The objects of this Act are to ensure that:

- (a) persons on remand or subject to control take their places in the community as soon as possible as person who will observe the law,
- (b) in the administration of this Act, sufficient resources are available to enable the objects referred to in paragraph (a) to be achieved, and
- (c) satisfactory relationships are preserved or developed between persons on remand or subject to control and their families.

The CDC Act applies to children and young adults in juvenile justice centres. It has no bearing on the management of children and young adult inmates in a juvenile correctional centre. There is no equivalent provision in the *Crimes (Administration of Sentences) Act 1999* (NSW) to s4 of the CDC Act.

In meeting the requirements of s4 of the CDC Act, the NSW Department of Juvenile Justice has developed and implemented specific programs that cater for juvenile offenders including post-release facilities that assist young offenders to reintegrate into the community. These programs cater for varying levels of understanding and maturity and provide vocational training so that detainees can participate meaningfully in society on their release from custody. Programs are also designed so that children on remand can continue to receive an education and maintain a relationship with their families. A caseworker is assigned to each child detained in a juvenile justice centre.

Rule 22 of the Beijing Rules provides the need for professionalism and training to ensure "...the impartial and effective administration of juvenile justice"⁵. Rule 22 requires:

⁴ Office of the United Nations High Commissioner for Human Rights, *Committee on the Rights of the Child*: <http://www.ohchr.org/english/bodies/crc/index.htm>

⁵ n3 at Rule 22 Commentary

22.1 Professional education, in-service training, refresher courses and other appropriate modes of instruction shall be utilised to establish and maintain the necessary professional competence of all personnel dealing with juvenile cases.

22.2 Juvenile justice personnel shall reflect the diversity of juveniles who come into contact with the juvenile justice system. Efforts shall be made to ensure the fair representation of women and minorities in juvenile justice agencies.

In recognition of this requirement of the Beijing Rules the NSW Department of Juvenile Justice employs officers on the basis of experience and skill in managing juvenile offenders. For example, selection criteria for advertised positions at the NSW Department of Juvenile Justice include⁶

- Demonstrated casework experience in working with adolescents and/or their families.
- Sound negotiation, oral and written communication skills.
- Understanding of issues relevant to juvenile offenders.
- Understanding of issues relating to Juvenile Justice.

...

While the New South Wales Department of Corrective Services outlines a commitment to rehabilitation and re-settlement of offenders, in its 2004-1007 corporate plan there is currently no reference to specific commitments for the management of children and young adult inmates.

Kariong Juvenile Correctional Centre is the first juvenile correctional centre to be established. Children and young adults will serve sentences of imprisonment at Kariong. Children will also be held on remand at Kariong pending trial. Some children held on remand may be acquitted or plead guilty to less serious offences enabling them to serve their sentences in juvenile justice centres.

It is considered important that Australia's international obligations under the CRC are met for inmates at juvenile correctional centres. In order to meet those requirements, a significant commitment of resources will be required to allow the New South Wales Department of Corrective Services to develop and provide specialist programs equivalent to that available to detainees in juvenile justice centres.

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

The Commission is unable to comment on whether the transfer of management is the most effective method of addressing management problems at Kariong.

⁶ See <http://jobs.nsw.gov.au/JobDetails.asp?JobAdvertId=35027>

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

Article 37 of the CRC requires that "...every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so..."⁷. However, where a juvenile offender receives a sentence that spans the transition from child to young adult, the court has the discretion to make an order directing that the child serve all or part of the sentence of imprisonment in juvenile facilities, rather than being automatically transferred to adult custody on turning 18.⁸

An order that a child, who will turn 18 whilst in custody, should complete part of all of his or her sentence in a juvenile justice centre in the opinion of the Commission, acknowledges that serving a sentence in a correctional centre amounts to a harsher penalty.

Young adults are particularly vulnerable to sexual and physical assaults within the mainstream adult prison system. Research⁹ on sexual abuse in the New South Wales prison system found that of 300 prisoners aged between 18 and 25 who were interviewed, 25 percentage had been sexually assaulted, and 50 percentage physically assaulted while in prison, mainly within the first few weeks. It was found that the prisoners most likely to be assaulted were those who were the youngest, had the lightest build, and those who had undeveloped contact systems within the prisons. Overcrowding, where prisoners were forced to share cells, was a key factor and facilitated abuse of younger detainees by older detainees.

The CDC Act emphasises rehabilitation in the management of juvenile offenders. The principles of rehabilitation are embodied in the objects of the Act. Where a child has turned 18 but remains in custody at a juvenile justice centre the CDC Act continues to apply to that detainee. It is important in the opinion of the Commission that children who become young adults during a term of imprisonment are rehabilitated. If the offence was committed while the offender was a child, the principles of rehabilitation should continue to apply throughout the term of imprisonment.

The *Crimes (Administration of Sentences) Act 1999* (NSW) does not emphasise rehabilitation and does not specifically cater for the management of juvenile offenders, or young adult offenders sentenced as juveniles.

(d) The classification system and appropriateness of placements for detainees

⁷ Above n1 at Rule 37(c)

⁸ Section 19 of the *Children (Criminal Proceedings) Act 1987* (NSW)

⁹ David Heilpern, 'Fear or Favour' (1998), Southern Cross University Press.

In the Commission's opinion rigid application of inmate and detainee classifications can lead to children being held in custody at a juvenile correctional centre without any regard for the child's prior criminal history, or an individual risk assessment of the child.

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

Alternative models for detaining children and young adults in custody must take into account international obligations relating to the detention of children in custody.

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

The Commission reiterates its comments in relation to (a).

(g) Management of staff assault issues in the juvenile justice centre

The Commission is unable to comment on management of staff assault issues in the juvenile justice centre.

However, the Commission is aware that some matters involving detainees in juvenile justice centres have been successfully resolved through youth justice conferences under the *Young Offenders Act 1997* (NSW).

(h) Whether incarcerating juveniles in juvenile correctional centres achieves reduced recidivism, rehabilitation and compliance with human right obligations

The Commission is unable to comment.

Conclusion

The Commission is grateful for the opportunity to make these submissions and for the extension of time granted to lodge them. The Commission looks forward to being able to comment further on any draft recommendations produced following this inquiry.