

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

**Organisation:** St. Vincent's Hospital

**Name:** Dr Alex Wodak

**Telephone:**

**Date Received:** 24/07/2006

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**Subject:**

**Summary**

This Bill infringes a fundamental medical principle, namely that the health care of prison inmates must be equivalent to that provided in community settings. It violates a well-accepted principle: offenders are sent to prison as punishment, not for punishment. The Bill risks inmates becoming irreversibly infertile even if later found not guilty or released earlier than initially anticipated. It is unfair to inmates incarcerated as juveniles but possibly punished irrevocably as adults. Legislation based on a quite unusual case, such as this, often turns out to be problematic in practice. The Bill prohibits storage of ova in female inmates for which there is no known existing technique. It contravenes a requirement that doctors must always try to minimize side effects of medical treatments. Medical practitioners complying with this Bill may find that they are in breach of other laws. Some NSW Health Areas do not charge for semen storage in the community but if this Bill is enacted, all male inmates requiring treatment-causing sterility would be charged. This Bill provides a dangerous precedent for public policy and should not become legislation in NSW.

Dr Alex Wodak

Dr. Alex Wodak,  
Director, Alcohol and Drug Service,  
St. Vincent's Hospital,  
Darlinghurst, NSW, 2010,

Mr Stephen Frappell  
Director  
General Purpose Standing Committee No. 3  
Parliament House  
Macquarie Street  
**SYDNEY 2000**  
Monday, 24 July 2006

Dear Mr Frappell,

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

I offer this submission for the Standing Committee's consideration.

I am a Specialist Physician with additional qualifications in public health and addiction medicine having worked in the alcohol and drug field since 1980. Since 1982, I have been the Director of an Alcohol and Drug Service in a university teaching hospital. I helped establish a number of innovations in Australia including: the first needle syringe programmes (1986); the National Drug and Alcohol Research Centre (1987); the NSW Users AIDS Association (1989), the Australian Society of HIV Medicine (1988) and the first Medically Supervised Injecting Centre in the country (1999). Two of these projects were reluctant acts of civil disobedience (needle syringe programme; Medically Supervised Injecting Centre). I have undertaken numerous consultancies for the World Health Organization and UNAIDS in Asia and the Middle East. I was the first President of the International Harm Reduction Association (1996-2004). For more than ten years I have been a member of the Justice Health Human Ethics Research Committee. I have published more than 220 scientific papers including several papers reporting research related to drug use in prison and received a number of national and international awards for my work including listing in the 'Drug & Alcohol Honour Roll' of the 2006 National Drug and Alcohol Awards (Ted Noffs Foundation, Australian Drug Foundation, Alcohol and Other Drug Council of Australia and the Australian National Council on Drugs).

I am strongly opposed to the Correctional Services Legislation Amendment Bill 2006

**Summary:**

This Bill infringes a fundamental medical principle, namely that the health care of prison inmates must be equivalent to that provided in community settings. It violates a well-accepted principle: offenders are sent to prison *as* punishment, not *for* punishment. The Bill risks inmates becoming irreversibly infertile even if later found not guilty or released earlier than initially anticipated. It is unfair to inmates incarcerated as juveniles but possibly punished irrevocably as adults. Legislation

based on a quite unusual case, such as this, often turns out to be problematic in practice. The Bill prohibits storage of ova in female inmates for which there is no known existing technique. It contravenes a requirement that doctors must always try to minimize side effects of medical treatments. Medical practitioners complying with this Bill may find that they are in breach of other laws. Some NSW Health Areas do not charge for semen storage in the community but if this Bill is enacted, all male inmates requiring treatment-causing sterility would be charged. This Bill provides a dangerous precedent for public policy and should not become legislation in NSW.

### **Background to the Correctional Services Legislation Amendment Bill (2006):**

After a newspaper published private details about the medical treatment of a particular inmate, the NSW Government hastily drafted this Bill.

When members of the general community are undergoing treatment for cancers (or similar conditions), an offer is made currently to the patient to store semen before treatment has commenced because cancer treatments often cause temporary or permanent infertility. Consistent with this medical practice in the community, semen is currently stored when prisoners undergo similar treatments. It is not currently the practice in NSW to store the semen of male prisoners in any other circumstances.

Private fees for storing semen are approximately \$250 per year. Some Area Health Services in NSW do not charge patients in the community for these storage costs.

### **Concerns raised by the Bill:**

**(1) Infringes fundamental concept of medical care of prison inmates:** The international convention, also widely accepted in Australia, is that medical treatment of prisoners and other detainees must be equivalent to health care provided to citizens in the community. An Australian Medical Association (AMA) Position Statement on the Health Care of Prisoners and Detainees (1998) states:

"Medical practitioners should not deny treatment to any prisoner or detainee on the basis of their culture, ethnicity, religion, political beliefs, gender, sexual orientation or the nature of their illness. *The duty of medical practitioners to treat all patients professionally with respect for their human dignity and privacy applies equally to the care of those detained in prison, whether convicted or on remand, irrespective of the reason for their incarceration.*" [Italics added]

**(2) Irreversibility of infertility for inmates who might be released early:** Some inmates may be found by courts subsequently to be not guilty and then released. But if this Bill becomes law, inmates could become permanently sterile after developing a serious condition (such as leukaemia, lymphoma, or testicular cancer) while in custody and then be released early after their sentence was annulled.

**(3) Unfair to juvenile inmates:** As drafted, the legislation will apply to inmates incarcerated as juveniles although the punishment resulting in sterility would only happen when the prisoner had become an adult.

(4) **Laws based on an exceptional case are often problematic:** This Bill came about in response to publicity about an individual inmate. It is generally accepted that laws based on quite unusual cases are often very problematic when implemented. Although the community outrage regarded the particular crime may be very understandable, parliaments must try to avoid a perception of revenge. Communities should not descend to the same level as the criminals they abhor.

(5) **The Bill is seriously flawed scientifically.** As drafted, the Bill pertains to males and females. But at present there is in no known technology for storing ova. Thus the Bill prohibits something that does not currently exist (and may never exist). This could result in the state of NSW being ridiculed for prohibiting something that does not exist and may never exist. The ban on storage of ova may have only been included to overcome possible problems with anti-discrimination legislation.

(6) **Violates a fundamental concept of incarceration:** It is a generally well-accepted notion that offenders are sent to prison ‘*as* punishment and not *for* punishment’.

(7) **Infringes a requirement that doctors should always minimize side effects of medical treatment:** Although some argue that the storage of semen is not a “treatment issue”, medical practitioners are always required to prevent untoward side-effects of treatment as far as it is possible to do so.

(8) **Places medical practitioners in an invidious legal situation:** Medical practitioners complying with this Bill may be in breach of other laws. Medical practitioners may be legally liable under this legislation. Associate Professor, Dr. Sandra Egger, Head of the School of Law, UNSW, advised that medical practitioners may be liable for criminal charges. She noted:

“Medical practitioners may be liable for criminal charges in the following two ways under the common law principles of accessory liability:

- as a principal in the second degree: where the medical practitioner is present at the commission of the crime and aids and abets its commission. This would apply to assistance or encouragement in the storage of “reproductive material” for “reproductive purposes”;
- as an accessory before the fact: where the medical practitioner is not present at the commission of the crime but has counselled or procured the commission of the crime by participating in the planning and preparation for the storage of “reproductive material” for “reproductive purposes”.

Medical practitioners may also be liable for criminal charges under the common law principles of conspiracy:

A conspiracy charge may be available where the medical practitioner arranges the treatment with the prisoner and they agree as to the procedures which will be undertaken at some time in the future. No further acts are necessary; the agreement constitutes the offence of conspiracy. The scope of this offence is wide and would apply to any health professional who enters into an agreement

to facilitate the storage of “reproductive material” for “reproductive purposes” by a serious indictable offender.

An important issue justifying the opposition of the Bill by medical practitioners relates to the legal ramifications they alone will have to face. Under statute, they must not offer the treatment. On ethical grounds, they should offer the treatment. Under tort law (duty of care) they must offer the treatment:

A medical practitioner who declines to offer the treatment because of the risk of criminal prosecution may still be liable in tort and may be exposed to the payment of compensatory damages. It is difficult to know which of these conflicting laws would prevail and what the legal position of the doctor would be.

A medical practitioner who offers the treatment can be prosecuted and sentenced to imprisonment. They will not be liable in tort, but they will have a criminal record”.

This would put medical practitioners in a difficult situation - committing a crime if they offer the service and guilty of failing to fulfil their duty of care if they do not. All those involved would be employees of NSW Health - which covers the indemnity of these doctors.

Further medical and legal arguments against the legislation include:

- Creates a precedent for discrimination against prisoners in the quality of health care and the treatment alternatives provided
- May result in health services being sued for failure to provide treatment equivalent to that available to other community members
- Fails to take into account circumstances where a conviction is overturned on appeal, after the inmate has undergone treatment for cancer and without storage of semen
- Courts might be faced with passing sentence on an individual recently diagnosed with a cancer who, if incarcerated, would not be provided with “medical treatment equivalent to that available in the community”. A Court may be reluctant to impose a custodial sentence in such circumstances.
- May contravene the Commonwealth Disability Discrimination Act
- By causing a sentence beyond incarceration constitutes “cruel and unusual punishment”
- Provides judges with the power to sentence offenders, in effect, to sterility

**(9) The Bill has been harshly criticized by numerous major medical and legal professional organizations including:**

- The Australian Medical Association (AMA);
- Royal Australasian College of Physicians (RACP);
- International Commission of Jurists;
- Human Rights and Equal Opportunity Commission;

- Public Interest Advocacy Group;
- Justice Action;
- NSW Law Society; and the
- NSW Bar Association.

#### **(10) Personal aspects**

In the 1970s, I worked briefly as a medical practitioner in Holloway prison, London. At that time, health professionals were employed by the Prisons Department. Warders would often try to show me (and other doctors) press clippings of the trials of these female prisoners just before I was due to have a medical consultation with an inmate. It was clear to me then that it was very important that the health care provided to prisoners had to be separated from the custodial aspect of prisons.

In the 1990s, my family had confirmation of something we had long suspected. We learnt that my paternal grandmother had perished in a Nazi concentration camp during the Second World War. An aunt and cousin (by marriage) survived concentration camp. During the Second World War, the medical profession in Germany readily acquiesced to the illegal and immoral commands made by the state including inflicting punishment on detainees. This should be a chilling, never forgotten lesson: the medical profession must vigorously resist attempts by the state to carry out unlawful punishments on prisoners and other detainees.

I would be pleased to support this written submission with an oral submission, should your Committee request my appearance.

Yours sincerely,

Dr. Alex Wodak, MB BS, FRACP, FAFPHM, FACHAM  
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