

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

**Organisation:** International Commission of Jurists Australia (ICJ)  
**Name:** Mr Nicholas McNally  
**Position:** Council Secretary & Treasurer  
**Telephone:**  
**Date Received:** 28/07/2006

---

**Subject:**

**Summary**

**From:** "Nicholas McNally"  
**To:** <gpscno3@parliament.nsw.gov.au>  
**Date:** 28/07/2006 4:44 pm  
**Subject:** Inquiry into the Correctional Services Legislation Amendment Bill 2006

**CC:** "John Dowd AO QC (E-mail 2)" <president@icj-aus...

Dear General Purpose Standing Committee No. 3,

On behalf of The Hon John Dowd AO QC, I hereby provide to the Committee the submissions from ICJ Australia in relation to the Correctional Services Legislation Amendment Bill 2006.

It is not proposed that we will send it in another format, unless requested to do so. If another format (such as Word format) would be of greater use to the Committee, we are happy to oblige.

It would be greatly appreciated if these submissions could be placed before the Committee for its consideration.

Regards,

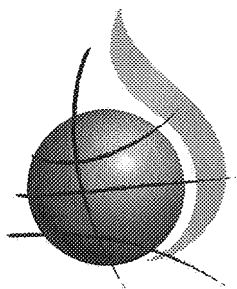
---

Nicholas McNally  
Council Secretary & Treasurer  
ICJ Australia

The International Commission of Jurists, founded in Berlin in 1952, is an international non-governmental organisation with consultative status to the United Nations, UNESCO, the Council of Europe, and the Organisation of African Unity. Its headquarters are in Geneva, with autonomous national sections and affiliates around the world. The Australian Section of the International Commission of Jurists was founded in 1958.

--

Message protected by MailGuard: e-mail anti-virus, anti-spam and content filtering.  
<http://www.mailguard.com.au/mg>



INTERNATIONAL  
COMMISSION  
OF JURISTS

28 July 2006

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

Fax: (02) 9230 3416

Dear Committee members,

**Re: Correctional Services Legislation Amendment Bill 2006**

We thank the Committee for the opportunity to make submissions on this proposed legislation, and we commend the parliamentarians who saw fit to refer it to this Committee for inquiry.

ICJ Australia is gravely concerned about this Bill, not only in relation to its direct and indirect impacts (which are significant), but also in relation to the mentality behind it. ICJ Australia opposes the Bill in its entirety.

We note the *Legislation Review Committee* (the LRC) examined this Bill and reported on its human rights and international law impacts in its Digest No 8 of 2006 (extract attached hereto). We endorse the findings and report of the LRC, and recommend that your Committee rely on it to conclude that having regard to the human rights and international law implications, the Bill should not proceed.

Whilst New South Wales is not a signatory to the various international treaties and conventions outlined therein, this State still has a duty, in the context of its role within a Federal system of government, not to enact laws that result, either directly or indirectly, in Australia, or one of its States or Territories, being in breach of international law and the nation's treaty obligations. The LRC analysed a number of breaches of international law that the Bill commits. This is a very serious matter.

The LRC suggests that the Bill arose after a Daily Telegraph story about a particular case. Certainly, no single case should result in a response so disproportionate as to result in Australia being in breach of international law.

# ICJ AUSTRALIA

GPO Box 173  
Sydney NSW 2001  
Australia

+61 (0)2 9286 8767  
+61 (0)2 9283 3323  
info@ICJ-Aust.org.au

[WWW.ICJ-AUST.ORG.AU](http://WWW.ICJ-AUST.ORG.AU)

## ICJ GENEVA

**President**  
The Hon Justice Arthur Chaskalson SC  
former Chief Justice  
Constitutional Court of South Africa

**Secretary-General**  
Nicholas Howen

**Chairperson of  
Executive Committee &  
Australian Commissioner**  
The Hon John Dowd AO QC

**Australian Commissioner**  
The Hon Justice Elizabeth Evatt AC

## ICJ AUSTRALIA

### NATIONAL SECTION

**President**  
The Hon John Dowd AO QC

**National Vice-President**  
The Hon Justice David Malcolm AC

**Chairperson**  
Steve Mark  
Legal Services Commissioner, NSW

**Secretary-General**  
David Bitel  
Solicitor

**Council Secretary & Treasurer**  
Nicholas McNally  
Solicitor

**Assistant Secretary-General**  
Lucy Robb

### STATE BRANCH PRESIDENTS

**Australian Capital Territory**  
The Hon Justice Terry Connolly  
Supreme Court of ACT

**New South Wales**  
Judge John O'Meally AM RFD  
President, Dust Diseases Tribunal of NSW

**Northern Territory**  
Mr Colin McDonald QC  
William Forster Chambers, NT

**Queensland**  
The Hon Justice Rosalyn Atkinson  
Supreme Court of Queensland

**South Australia**  
The Hon Justice David Bleby  
Supreme Court of SA

**Tasmania**  
The Hon Justice Alan Blow OAM  
Supreme Court of Tasmania

**Victoria**  
The Hon Justice Bernard Bongiorno QC  
Supreme Court of Victoria

**Western Australia**  
The Hon Justice Robert Nicholson AO  
Federal Court of Australia, WA

Aside from international law concerns, the Bill is also a gross overreach by government (and if passed, by the parliament) into the judicial sentencing function.

Further, it will deprive a section of the community who would otherwise be entitled to storage of reproductive material before undergoing medical treatment known to cause sterility. The ability to store sperm and ova in such a situation is an inseparable aspect of such medical treatment, as a measure to mitigate against harmful side-effects, and which preserves the patient's reproductive health.

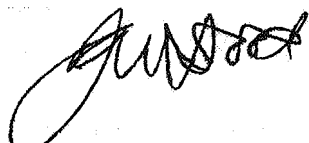
The Bill panders to the lowest common denominator of prejudice in the community by playing on the misconception that criminality can somehow be linked to one's genes. The policy rides on the fears and emotions used to justify eugenics as a response to crime, and it has no place in our society.

The Bill also gives a lie to any suggestion that prisoners are to be rehabilitated. It is a cynical deviation from what should be the principal focus of the criminal sentencing regime - the protection of the community from crime, the reduction of recidivism, and ensuring that offenders do not emerge from prison better criminals than when they went in.

Of course there is a punitive element to criminal sentencing, but it is the deprivation of liberty that is the punishment for crime. Offenders are not sent down so the State can then inflict further punishment whilst gaoled. This is a political stunt designed to demonstrate the government being tough on law and order by depriving the rights of an inevitably unpopular section of the community. It is a return to medieval concepts of punishment for evil.

Further, this Bill will have retrospective effect so that prisoners already sentenced will be adversely affected. It is an ill-conceived knee jerk reaction to the emotions of an isolated case. The legislation should not proceed.

Yours sincerely,  
ICJ AUSTRALIA

A handwritten signature in black ink, appearing to read 'John Dowd', with a stylized flourish at the end.

**The Hon John Dowd AO QC**  
**President**

### 3. CORRECTIONAL SERVICES LEGISLATION AMENDMENT BILL 2006

Date Introduced: 23 May 2006  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon Tony Kelly MLC  
Portfolio: Justice

#### Purpose and Description

1. The Bill's objects are to:
  - prohibit inmates who are serving sentences for serious indictable offences or who are awaiting sentencing for such offences from providing their reproductive material for use, or storage, for reproductive purposes at hospitals and other places, and
  - 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.

#### Background

2. Although it is not stated in the second reading speech, it would appear that the Bill has been introduced in response to concerns voiced recently when a convicted gang rapist, aged 22, had a sperm sample frozen before he began chemotherapy for Hodgkin's disease, which would leave him sterile. The man was 17 at the time of the crimes for which he was convicted.<sup>12</sup>
3. This appears to have been referred to in a decision of the NSW Court of Criminal Appeal in *R v Mohammed Skaf*,<sup>13</sup> in which expert evidence was cited to the effect that:

Hodgkin lymphoma is one of the best characterised malignancies of the lymphatic system and is one of the forms of malignant disease most readily curable by radiotherapy, chemotherapy or a combination of the two.<sup>14</sup>
4. The judgment confirmed that the cancer treatment did in fact render the patient sterile, and that he was receiving further treatment for ensuing depression in respect of his sterility.<sup>15</sup>

#### The Bill

5. The Bill inserts proposed s 72B into the *Crimes (Administration of Sentences) Act 1999* [the Act].

---

<sup>12</sup> See *The Daily Telegraph*, 12 May 2006.

<sup>13</sup> [2005] NSWCCA 298 per Studdert, Bell and Latham JJ at paragraphs 28 – 41.

<sup>14</sup> At paragraph 34.

<sup>15</sup> At paragraph 34.

6. Under the Bill, no grant of leave of absence to a serious indictable offender will be allowed for the purpose of the offender providing reproductive material for use, or storage, for reproductive purposes at any hospital or other place [proposed s 72B(2)].
7. The Bill makes it an offence for a serious indictable offender to provide reproductive material for use, or storage, for reproductive purposes at any hospital or other place [proposed s 72B(3)]. The maximum penalty is 100 penalty units (currently \$11,000) or imprisonment for 6 months, or both.
8. It was noted in the second reading speech that:

[o]ne hundred penalty units is the maximum penalty applicable under comparable legislation, the Human Tissue Act 1983, for obtaining or using a sperm donor's semen for an improper purpose. A custodial sentence is desirable as an alternative or additional penalty for an inmate who may not be deterred by the prospect of facing only a financial penalty.<sup>16</sup>
9. Prisoners other than serious indictable offenders who have their reproductive material stored for reproductive purposes at hospitals or other places, and serious indictable offenders whose reproductive material was stored for reproductive purposes *before* the commencement of the proposed section are to pay a charge for storage of the material [proposed s 72B(4) & (5)].

## Issues Considered by the Committee

### Trespasses on personal rights and liberties [s 8A(1)(b)(i) *LRA*]

#### Right to receive medical care: proposed s 72B(2)

10. Article 25 of the 1948 UN *Declaration of Human Rights* provides that everyone has the right to the provision of medical care adequate for his or her health and well-being.
11. Article 12 of the UN *International Convention on Economic, Social and Cultural Rights*, to which Australia is a signatory, recognises the right of everyone to "the enjoyment of the highest attainable standard of physical and mental health". The UN's General Comment on Art 12 states as follows:

The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation.<sup>17</sup>
12. In NSW, a prisoner is legally entitled to receive reasonable medical care for his or her medical conditions. Indeed, s 72A of the Act provides that:

<sup>16</sup> Mr P E McLeay MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 23 May 2006.

<sup>17</sup> [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En?OpenDocument). The ICCPR also states that the men and women of marriageable age have the right to marry and to found a family shall be recognised: Art 23.2. According to the UN *General Comment No.19*, the right to found a family "implies, in principle, the possibility to procreate". Any provisions relating to these rights should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory.

An inmate must be supplied with such medical attendance, treatment and medicine as in the opinion of a medical officer is necessary for the preservation of the health of the inmate, or of other inmates and of any other person.

13. Other recent legislation in NSW has accepted the concept that competent professional medical practice includes practice that is widely accepted by a medical practitioner's peers [see s 50 of the *Civil Liability Act 2002*].
14. The Committee understands that it is common medical practice for a post-pubertal male who has been diagnosed with cancer to be offered an option of having semen stored, in case the treatment renders that person sterile.<sup>18</sup> The Committee also understands that the ongoing cost of storing sperm is usually a private expense.
15. Accordingly, in so far as a prisoner who is diagnosed with cancer is offered a medical option of having sperm stored and preserved before cancer therapy is undertaken, this is entirely consistent with standard medical practice offered to any person of reproductive age in Australia.
16. However, the Bill prohibits persons described as "serious indictable offenders" whilst in custody, from being permitted to provide either sperm or eggs for the purpose of being used or stored for reproductive purposes at any hospital or any other place.
17. There would appear to be no Australian precedent to base decisions for treatment on a "moral evaluation" of why the person needed the treatment, eg, persons with emphysema are not deprived from treatment because they developed as a result from smoking. Rather, decisions for health care availability have always been based on the principles of equality of access, depending on clinical need and prognosis.

- |     |  |
|-----|--|
| 18. | <b>The Committee notes that the right to adequate medical care is an internationally-recognised human right.</b>   |
| 19. | <b>The Committee also notes that this right is expressed in section 72A of the <i>Crimes (Administration of Sentences) Act 1999</i>.</b>   |
| 20. | <b>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.</b> |
| 21. | <b>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.</b>   |

<sup>18</sup> The Committee notes that the equivalent option is less common for female patients, as there are more technical difficulties in harvesting and freezing eggs than there are in collecting sperm. An additional complication is that to collect eggs requires the commencement of treatment to be delayed until the next monthly ovulation cycle, and many women are understandably reluctant to delay the commencement of necessary treatment in case the cancer progresses in the meantime.

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".

**Right to freedom from interference with, and to found, a family: proposed s 72B(2)**

24. Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR), to which Australia is also a signatory, provides that:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.<sup>19</sup>

25. Article 23.2 of the (ICCPR) provides that:

The right of men and women of marriageable age to marry and to found a family shall be recognized.

26. Article 8 of the European Convention on Human Rights is the equivalent of Art 17. It provides as follows:

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

27. In interpreting the application of Art 8<sup>20</sup> to prisoners in detention, the recent decision of the European Court of Human Rights in *Dickson v United Kingdom*<sup>21</sup> upheld the validity of a UK policy in relation to prisoners who were not suffering from any relevant illness or disease. The policy that was upheld provided as follows:

Requests for artificial insemination by prisoners are carefully considered on individual merit and will only be granted in exceptional circumstances. In reaching decisions particular attention is given to the following general considerations:

- whether the provision of AI facilities is the only means by which conception is likely to occur

---

<sup>19</sup> The term "unlawful" means that no interference can take place except in cases envisaged by the law. Interference authorised by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant. However, in its General Comment on Art 17, the ICCPR Committee has stated that the expression "arbitrary interference" can also extend to interference provided for *under the law*: "The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances." States parties are under a duty themselves not to engage in interferences inconsistent with Art 17 of the Covenant and to provide the legislative framework prohibiting such acts by natural or legal persons.

<sup>20</sup> Article 12 of the convention provides the right found a family in similar terms to Article 23.2 of the ICCPR. While submissions were also made in relation to the right to found a family in *Dickson*, it was conceded that it was not necessary to consider that right separately from the right to respect for family life.

<sup>21</sup> [2006] ECHR 44362/06.



- whether the prisoner's expected day of release is neither so near that delay would not be excessive nor so distant that he/she would be unable to assume the responsibilities of a parent
- whether both parties want the procedure and the medical authorities both inside and outside the prison are satisfied that the couple are medically fit to proceed with AI
- whether the couple were in a well established and stable relationship prior to imprisonment which is likely to subsist after the prisoner's release
- whether there is any evidence to suggest that the couple's domestic circumstances and the arrangements for the welfare of the child are satisfactory, including the length of time for which the child might expect to be without a father or mother
- whether having regard to the prisoner's history, antecedents and other relevant factors there is evidence to suggest that it would not be in the public interest to provide artificial insemination facilities in a particular case.

28. The majority in the Court said that:

as a matter of general policy, requests by prisoners in the United Kingdom for artificial insemination are only granted by the authorities in exceptional circumstances. In reaching a decision as to whether such circumstances exist in any individual case, particular attention is given by the authorities to a number of general considerations which are set out in the Secretary of State's letter of 28 May 2003. As explained by the respondent Government, and as reflected in the judgments of the *Court of Appeal in R (on the application of Mellor) v Secretary of State for the Home Dept* [2001] EWCA Civ 472 and in the present case, two principal aims underlie the policy: 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.

As to the former aim, while reiterating that there is no place under the Convention 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 (*Hirst v UK (no 2)* [2004] ECHR 74025/01 at para 70), the Court nevertheless accepts that the maintaining of public confidence in the penal system has a legitimate role to play in the development of penal policy within prisons. The Court also considers valid that, in developing and applying the policy, the authorities retained certain criteria which concerned the interests of any child to be conceived. The very object of a request for artificial insemination is the conception of a child and the State has positive obligations to ensure the effective protection and the moral and material welfare of children.

As to the policy itself, the Court attaches particular importance to the fact that, in contrast to the law which was in issue in *Hirst v UK (no 2)* [2004] ECHR 74025/01, it did not operate to impose a blanket restriction on a prisoner's access to artificial insemination facilities, without any consideration of individual circumstances. On the contrary, as was explained in the letter of the Secretary of State, requests for artificial insemination were carefully considered on individual merit and according to the various criteria set out in the letter. Having examined these criteria, the Court does not find them to be arbitrary or not reasonably related to the underlying aims of the policy. Nor, on the material before the Court, can it be suggested that the examination of an individual case in the light of the considerations set out in the letter is merely theoretical or illusory: the unchallenged evidence before the Court of Appeal was that the Secretary of State had already allowed access to insemination facilities in certain cases, while two applications were struck out by the former Commission when

artificial insemination facilities were granted to the applicants (*PG v UK*, no 10822/84, Commission decision of 7 May 1987; and *G and RS v UK*, no 17142/90, Commission decision of 10 July 1991, both unpublished).

29. It may be inferred from the reasoning of the European Court of Human Rights that it would not be an undue trespass on a serious offender's right to family life to make him or her pay for the storage of reproductive material for the duration of his or her sentence, and to prohibit the use of that material until at or near the end of the sentence. However, a blanket restriction on a "serious indictable offender" providing reproductive material for storage without any consideration of individual circumstances, as provided in the Bill, could be regarded as an unacceptable breach of that right.

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".**

**Double jeopardy: proposed s 72B(3)**

37. The right not to receive punishment in addition to that ordered by the Court in sentencing is a fundamental human right, recognised under Australian common law,<sup>22</sup> and enshrined in Article 14(7) of the ICCPR.
38. Article 14(7) of the ICCPR provides that:

<sup>22</sup> See, eg, *R v Carroll* [2002] HCA 55.

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

39. In *Pearce v The Queen*, Kirby J referred to the long-standing nature of the concept:

It has been said that the principle that a person should not twice be placed in jeopardy for the same matter is a cardinal rule lying “[a]t the foundation of criminal law”. The rule has been explained as arising from a basic repugnance against the exercise of the state's power to put an accused person in repeated peril of criminal punishment.<sup>23</sup>

40. Insofar as the Bill applies to persons sentenced prior to its commencement, it appears to be adding an additional punishment to that given by the Court at sentencing. Presumably, a Court would have already reflected the severity of the crime of a “serious indictable offender” with a longer sentence or non-parole period than would have applied to persons who had been found guilty of less serious crimes.

41. Given that the punishment has already been reflected in the more serious sentence, there seems little reason that a “serious indictable offender” should invariably be denied any possibility of having his or her semen or eggs stored.

**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”.**

***The Committee makes no further comment on this Bill.***

---

<sup>23</sup> *Pearce v The Queen* [1988] HCA 57 at 73. Similarly, in *R v Hoar* (1981) 148 CLR 32 at 38, Gibbs CJ, Mason, Aickin and Brennan JJ stated that there is “a practice, if not a rule of law, that a person should not be twice punished for what is substantially the same act”.