Submission No 10

INQUIRY INTO JUVENILE OFFENDERS

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Subject:

Summary

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Our Ref: LS:EK

7 March 2005

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

Dear Sir/Madam,

RE: INQUIRY INTO JUVENILE OFFENDERS

Thank you for providing the Youth Justice Coalition with the opportunity to make a submission to the Inquiry into Juvenile Offenders and the recently passed *Juvenile Offenders Legislation Amendment Act 2004*.

The Youth Justice Coalition (YJC) is a network of youth workers, children's lawyers, policy workers and academics working to promote the rights of children and young people in NSW.

The YJC has been a key player in advocating for children's rights over many years; campaigning for law reform, advising government, conducting research, consulting with children, and providing community legal education.

Examples of the work of the Youth Justice Coalition include:

- *Kids In Justice: A Blue Print for the Nineties (1990)*
- Contribution to the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission Inquiry into Children and the Legal Process (1997)
- *Youth Street Rights - A Policy and Legislation Review* (1999)
- *It's Our Act* - a submission to the review of the *NSW Care and Protection Act 1998* and a youth participatory project (1999)
- Research into young people's experiences of the *Young Offender's Act* in NSW (2002).

In addition we have made many submissions to the NSW and Commonwealth governments on various measures relating to the rights of children and young people.

Our Submission

Our submission contains two principal sections. Section A, an outline of our general position and Section B, our response to the terms of reference

Section A - An outline of our general position

At the outset, we note that the Youth Justice Coalition, alongside the Council of Social Services of NSW (NCOSS), vigorously opposed the passing of the *Juvenile Offenders Legislation Amendment Act* ("the Act") in late 2004.

Our concerns were raised through various political channels prior to the introduction of the Bill. Regrettably, despite our concerted efforts to bring to the fore the serious deficiencies in the proposed amendments, the Bill was passed on 9 December 2004. Accordingly, we are now in the somewhat strange position of making submissions to an Inquiry regarding the rationale behind its introduction, and offering an evaluation of the likely impact of legislation that has no formal review mechanism. Given that the Bill has already been passed, and it contains no formal review clause, the purpose of the Inquiry is unclear. This is new law and therefore we are unable, as yet, to give practical examples of how its operation has affected (and will continue to affect) young people in detention. We also note the unusually short time frame provided for the making of written submissions to this Inquiry.

Despite the fact that the purpose of this Inquiry is unclear, we consider it important to make submissions and place our concerns on the public record, as we fear that the amendments will prove to be problematic. Furthermore, we are greatly concerned that the Government's lack of consultation with relevant community groups including ourselves, together with the Government's apparent urgency to quickly push the amendments through Parliament, has meant that there are many questions in relation to the practical workings of the Act that remain unanswered.

At the outset, we have grave concerns regarding the general purpose and direction of this legislation.

- It flies in the face of the Department of Juvenile Justice's own research that clearly demonstrates that children in Juvenile Justice Centres represent some of the most disadvantaged members of our community.[1]
- It contravenes both the spirit and the actual wording of the *Australasian Juvenile Justice Administrators Standards for Juvenile Custodial Facilities (Australasian Rules)*, a set of standards which was developed partly in response to intense lobbying from the NSW government and to which NSW is a party.
- It is discordant with the otherwise progressive direction of the juvenile justice system in NSW, which has increasingly focused on differentiating the juvenile system from the adult criminal justice system.
- It ignores rehabilitative and restorative approaches to juvenile justice and, as a corollary, fails to have regard to the research that indicates the success of those approaches in reducing juvenile recidivism in NSW.

[1] NSW Department of Juvenile Justice, NSW Young People in Custody Survey, 2003, Table 26.

- It provides no safeguards for the special needs of juveniles in detention. It makes no guarantees regarding their rights to education and their need for an environment that will foster their return to the community as active and socially productive citizens.
- It appears to ignore recommendations of Royal Commission Into Aboriginal Deaths in Custody, which we refer to below.
- It is unclear what arrangements will be made for young female detainees who may be subject to a transfer order.
- By placing juveniles in an adult corrections environment managed by the Department of Corrective Services, they will be exposed to a range of negative influences, and an environment that is potentially threatening to their physical safety and psychological well-being.
- Children in facilities under the management of Corrective Services may be exposed to a range of harsh punishment regimes that are inappropriate for juveniles.
- The Act removes judicial discretion to direct where a juvenile will serve a term of detention/imprisonment, and vests this decision making power in Director General of Department of Juvenile Justice.
- The Act makes sharp and inflexible distinctions between juveniles based on age (ie. whether 16 years and over) and offence category. This new emphasis on detainee classification starkly contradicts the principle that when children are sentenced regard should be had for their background and personal circumstances, not just the nature of their offence(s).

We also have serious doubts about the appropriateness of the Act as a response to what appeared to be essentially managerial problems in *one* Juvenile Justice Centre.

We believe that the legislative response was over-zealous and overtly political:

- The problems at Kariong Juvenile Justice Centre could have been approached in a range of other ways, for example - by a review of the staffing structure, staff position descriptions and job contracts, staff training needs and security arrangements.
- Alternatively, even if there was a sense that Kariong needed to be re-classified as a different sort of juvenile facility, this could have occurred without taking it outside the portfolio of the Department of Juvenile Justice.
- There is no guarantee that by transferring the problems at Kariong from Juvenile Justice to Corrective Services this action will resolve the problems identified, especially since the Department of Corrective Services has historically had a less than adequate record in dealing with inmates.

Finally, we also believe that there are considerable shortfalls in the drafting of the Act.

- Many of the key provisions vest significant decision making power in the Director General, yet fail to specify clear decision making criteria.
- There is a lack of transparency and no clear review mechanism for departmental decisions.
- The provisions regarding delegation of decision making authority are unclear and do not specify to whom that power may be delegated.
- The legislation does not limit the number of Juvenile Correctional Centres that may be established. The amendment to section 225A of the *Crimes*

(Administration of Sentences) Act 1999 states that "any premises" may be declared to be a juvenile correctional centre. Whilst the amendments grew out of the problems at Kariong (and the media coverage given to such problems), the legislation is not Kariong-specific and thus there is a real danger that it could be extended to other Juvenile Justice Centres in NSW.

Human rights and a child-focused framework

The Youth Justice Coalition adopts a human rights approach to its work and in preparing this submission we are guided by relevant human rights principles. We are also guided by a child-focused approach. This requires an emphasis on both (i) the rights of children and (ii) the best interests of children.

As a signatory to the *UN Convention on the Rights of the Child (CROC)*, Commonwealth and State governments have an obligation to ensure that all legislative and policy reforms comply with both the intention and the wording of *CROC*. We will argue throughout this submission that the *Juvenile Offenders Legislation Amendment Act 2004* offends many of the core principles of *CROC*.

One of the overarching principles of *CROC* is that the best interests of the child must always be the primary consideration in all actions undertaken by government that affect children.[2] This principle has been enshrined in a range of laws and instruments that govern the NSW Juvenile Justice Detention Centre system. The *Children (Detention Centres) Act 1987* states as an object:

> "*the welfare and interests of persons on remand or subject to control shall be given paramount consideration*".[3]

Furthermore, children must have their age taken into account when they are dealt with by the justice system, and should be treated differently to adults. As stated in Article 37(c) of *CROC:*

> "*Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of every human person, and in a manner which takes into account the needs of persons his or her age*".

A similar principle is stated as an object of the *Children (Criminal Proceedings) Act 1987:*

> "*children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance*".

We submit that the *Juvenile Offenders Legislation Amendment Act 2004* is a response to managerial and structural problems at *one* Juvenile Justice Centre, and has

[2] *Article 3, United Nations Convention on the Rights of the Child.*

[3] *Children (Detention Centres) Act 1987* - Sect 4 (2)(a)

completely disregarded the rights and interests of the child detainees. This was a politically pragmatic response to a complex problem. Rather than designing an appropriate response, the legislature has simply transposed an existing adult system upon the Kariong detainees. The juvenile detainees will have to adapt to that system, rather than the system adapting to them.

Throughout this submission we will also draw attention to the *UN Standard Minimum Rules on the Administration of Juvenile Justice (the Beijing Rules)*, the *UN Rules for the Protection of Juveniles Deprived of their Liberty* and the *Australasian Juvenile Justice Administrators Standards for Juvenile Custodial Facilities (the Australasian Rules)*. These documents enunciate a range of relevant principles that seek to ensure that the rights and best interests of children remain paramount considerations when Governments approach issues relating to juvenile justice. In particular, we are concerned that the Government is now seeking to contradict and undermine the important and carefully formulated juvenile justice policies created by the *Australasian Rules*.

The need for an empirical and research based approach to juvenile justice

We wish to emphasise the importance of adopting an empirical and research based approach when considering juvenile justice issues. As a corollary of our stated child-focused position, we submit that in determining what is in fact in the best interests of children and the strategies which optimise their reintegration into society, government must focus on the available evidence, even where that evidence contradicts popular opinion and stereotypes.

We believe that the Act is discordant with the recommendations and findings of recent research about juvenile crime, juvenile offenders and recidivism. This will be an underlying theme of this submission.

Section B - The Terms of Reference

In addition to our general concerns raised above, we make the following submissions in relation to the specific 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

During the political debate prior to the passing of the Act, the problems at Kariong were often ascribed to the different nature and needs of the detainees at Kariong. We contend that the core reason for the transfer of management responsibility for Kariong to Corrective Services was security and staffing problems at the Centre. We are concerned that the Government's response to the Kariong situation failed to address the staffing problems and mismanagement, and instead shifted blame to the detainees.

We acknowledge that juveniles detained at Kariong represent some of the more serious juvenile offenders in the state, but refute the idea that there is such a clear distinction between Kariong detainees and other juvenile detainees as to warrant a completely different managerial structure and approach.

We are not in a position to make detailed submissions on the reasons for the transfer. However, in terms of the consequences of the transfer, we submit that the impact on juvenile detainees in NSW will be significant and detrimental.

The differentiation between the juvenile justice system and the adult system is in part about recognition of the special needs of juvenile offenders. It recognises their vulnerability in dealing with the justice system as well as their vast capacity for rehabilitation. Juvenile crime is different in nature to adult crime. Young people who offend often come from severely disadvantaged backgrounds, broken or high conflict families, or have suffered abuse and neglect during their childhood. Often their offending behaviour can be circumvented by addressing these risk factors.[4] Punitive measures are not appropriate, and the focus must always be on rehabilitation.

A range of principles operate at every stage of the juvenile justice and policing system in NSW to take account of this difference and ensure that the focus remains on rehabilitation. These principles are fundamentally about the best interests of children, but importantly, they also serve the interests of the greater community. It is in the interests of everyone that children who offend are dealt with in a way that best prevents re-offending and promotes their rehabilitation.

We submit that transferring responsibility for Kariong to Corrective Services undermines this differentiation and as such, denies those children access to a range of safeguards and basic rights.

There is a need for separate administration of juvenile and adult justice systems to ensure that these foundational principles are reflected in all aspects of the system. It is essential that juvenile detainees are provided with an environment which best fosters their capacity to reintegrate into the community upon release. As stated in the *Beijing Rules*, juvenile detention facilities must develop conditions that:

> "*will ensure for the juvenile a meaningful life in the community, which, during that period in life when she or he is most susceptible to deviant behaviour, will foster a process of personal development and education that is as free from crime and delinquency as possible*".[5]

This principle is at the heart of the juvenile justice detention centre system in NSW. Indeed, one of the objects of the *Children (Detention Centres) Act 1987* is that:

> "*persons on remand or subject to control take their places in the community as soon as possible as persons who will observe the law*".[6]

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[4] Cunneen, *Juvenile Justice. An Australian Perspective*. Oxford University Press, 1995; NSW DJJ 2003 The Health of Young People in Custody (op.cit)
[5] United Nations *Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*. Rule 1.2
[6] *Children (Detention centres) Act 1987* Section 4(1)(a)

One of the key ways in which such an environment can be fostered is through the provision of education and personal development activities. This objective is given paramount status in the children's criminal jurisdiction. The *Children (Criminal Proceedings) Act 1987* states as an object:

> "*that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption*".[7]

Children in detention also need opportunities for association with peers, physical exercise, social and leisure activities. These needs are inconsistent with current practices and standards in adult correctional facilities.

Due to their particular vulnerability and often difficult backgrounds, juvenile detainees have a need for specialised health, counselling and welfare services. Once again, there is no safeguard of these rights under management by the Department of Corrective Services.

We submit that the Department of Corrective Services is not the appropriate agency to ensure that these objectives are achieved, and there is nothing in this new legislation, or the overarching objects and principles governing the operation of adult facilities, that guarantee that these needs will be met. We are greatly concerned that Department of Corrective Services Officers and Staff have not been given adequate training in youth specific and juvenile justice issues, nor have they been provided with Indigenous cultural training (and training that is more than merely tokenistic). We are concerned that such lack of training will lead to the increase of incidents of self-harm activities including paint-sniffing.

We submit that aside from abrogating the rights of juveniles in detention, this new regime will expose juvenile detainees to the harsh adult prison environment, to their detriment. Adult prisons utilise a range of punishment and security regimes that are inappropriate for juveniles. There is nothing in this new legislation that limits their application in the new juvenile correctional centres. We are greatly concerned by the case example contained in the Legal Aid Commission's submission to this Inquiry, concerning the young detainee TD who was segregated for 23 hours per day for 10 days, and then for a further period of 7 days, for what appeared to be a relatively minor contravention.

Adult prisons are also significantly overcrowded compared to juvenile facilities. There are a range of other specific safety and security risks associated with mixing children and young adults in detention facilities and these will be discussed in further detail below under item (c).

(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

[7] *Section 6 Children (Criminal Proceedings) Act 1987*

We submit that the transfer of responsibility for Kariong to the Department of Corrective Services will not provide an automatic solution to the managerial problems at the Centre, and further, will have a range of negative impacts which grossly outweigh any perceived benefit. Some of these impacts have been outlined in our introduction, and will be discussed in more detail below.

The response to the problems at Kariong should have been tailored to the needs and rights of the Kariong detainees, with due consideration given to the particular issues faced by staff, and the particular security breaches that had occurred. The transposition of an adult managerial framework upon juveniles is a quick-fix response. The change may indeed bring about increased security, however it will do so in a totally inappropriate way. The punishment and security regimes in adult facilities are inappropriate for juveniles and are likely to inflict long-term psychological harm.

We submit that a more measured and less far-sweeping response would have been more appropriate and effective. For example, there should have been a review of the staffing structure, staff position descriptions and job contracts, staff training needs and security arrangements, with the view to increasing staff accountability.

In the event that such measures were insufficient to deal with security issues, the government could have considered far lesser amendments to the *Juvenile (Detention Centres) Act 1987* to allow for the introduction of differential security arrangements to deal with issues at Kariong. At least this would have left intact the other aspects of the current detention centre system that have been designed to safeguard the special needs of juvenile detainees.

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

The mixing of adult and juvenile detainees is problematic and in breach of international human rights principles. A range of human rights instruments refer to the right of child detainees to be separated from adults. Article 37(c) of *CROC* states:

> "*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*".

Often this right is stated with a qualification that allows for certain circumstances where it may be appropriate to mix adults and juveniles, for example, where they are detained with a parent or adult family member.[8]

The risks associated with mixing children and adults relate to negative peer influence as well as high rates of assault and sexual assault in adult facilities. Younger detainees[9] people with intellectual disability, and mental illness are especially vulnerable to these risks.

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[8] For example, Rule 29 of United Nations Rules for the Protection of Juveniles Deprived of their liberty(1990)

[9] Heilpern,D. 1998, *Fear or Favour*, Southern Cross University Press

This is an issue that requires careful consideration, as it is sometimes appropriate for young adults sentenced as juvenile offenders to remain in juvenile detention. Placing such a class of young adults in adult facilities exposes them to a range of significant risks. The appropriateness of allowing young adults to remain in juvenile facilities depends on a wide range of factors, including the length of their sentence, their maturity, their background and the way they have behaved whilst in detention as a juvenile. We contend that the judiciary with access to social work, health and other expert reports are best placed to make such an assessment. The Act, in transferring discretion from the judiciary to the Minister, fails to ensure that a young person's full range of personal circumstances will be taken into account upon sentencing.

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

This new legislation places a new significance and emphasis on detainee classification, which is based on their offence type and their age. In line with the issues raised above under item (c), we argue that a wider range of circumstances must be taken into account when making decisions regarding the placement of detainees.

This symbolises a further shift away from the basic right of children to have their circumstances and needs taken into account when dealt with by the justice system.

One of the core principles of sentencing in children's criminal proceedings in NSW, and in the various human rights instruments relevant to juvenile justice, is the notion that juveniles should be sentenced with regard to their individual background and circumstances. This is sometimes referred to as the "principle of proportionality".[10]

Rule 5 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)* states:

> "*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*".

We submit that the changes to Section 28 of the *Children (Detention Centres) Act 1987* and Section 41 of the *Crimes (Administration of Sentences) Act 1999*, which deal with the transfer of juveniles between Juvenile Justice Centres, Juvenile Corrections Centres as well as adult corrections facilities, are highly problematic.

The changes to Section 28 of the *Children (Detention Centres) Act 1987* allow the Director General to order the transfer of "older detainees" from a Juvenile Justice Centre to a Juvenile Corrections Centre in a range of circumstances. "Older detainees" is defined as detainees of or above the age of 16, and the circumstances under which a transfer may be ordered are set forth in the s28(2) in four alternate criteria (a) – (d). Section 28(2)(b) allows a transfer of detainees who are convicted of serious indictable offences. Section 28(2)(d) alarmingly allows for a transfer where "the detainees behaviour is or has been such as warrants the making of such an order".

[10] United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules). Rule 5, Commentary

These criteria provide no assurance that detainees' circumstances will be considered, and provide no clear guidelines for the exercise of this decision making prerogative. We are particularly concerned about the breadth of s28(2)(d), and the lack of guidance as to what sorts of behaviours would warrant a transfer order. The lack of clear criteria relating to the transfer power has the secondary implication that decisions made under this provision will lack transparency. The other concern is that s28 provides no clear mechanism for returning to a Juvenile Justice Centre once transferred out and does not allow for judicial review of transfer orders.

Similar concerns apply to the changes to Section 41 of the *Crimes (Administration of Sentences) Act 1999* that allows for the transfer of juvenile inmates to adult correctional facilities. In addition, Section 41 allows a "juvenile inmate" to self select to go into the adult system. This is concerning as some inmates may make uninformed 'choices'. For example they may be motivated to transfer for the perceived benefits of an adult prison (ie- less rigidity in programming, the availability of cigarettes, or because it marks them out as 'real men').

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

Please see submissions under item (b) regarding possible alternatives.

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

There are significant and far-reaching social implications of incarcerating juveniles in this new type of correctional facility. Detainees will no longer receive the benefit of the range of principles, laws and policies built into the juvenile justice system, that are designed to foster the rehabilitation and reintegration of young offenders into the community.

We submit that as a result of this, their chances of rehabilitation and reintegration will be undermined, to the detriment of those young people as well as their families and the broader community. This will be discussed in further detail below under item (h).

(g) management of staff assault issues in the juvenile justice system

We are not in a position to comment specifically on staff assault issues. However, as outlined above under item (b) we take the general position that security issues alone could have been dealt with through a more tailored response, even if this required minor amendments to the *Children (Detention Centres) Act 1987*.

It appears that the Government, in attempting to strike a balance between the rights of staff not to be assaulted and the human rights of juvenile detainees, elected to favour the rights of the more powerful group, whilst at the same time failing to actually address the occupational health & safety issues that existed at Kariong.

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

As argued throughout this submission, placing juveniles in correctional facilities under the management of the Department of Corrective Services will significantly compromise the ability to rehabilitate those young people and represents the abrogation of a range of human rights. We have given a wide range of examples under item (a) in particular, and elsewhere in this submission.

Rehabilitation and reintegration into the community requires a wide range of special programs and facilities; educational programs, cultural programs, opportunities for normal peer contact and social activities; and the availability of appropriate health and welfare services to try and address any underlying risk factors. Young people have a right to these special facilities in international law,[11] and the *Children (Detention Centres) Act 1987* and the management protocol of the Department of Juvenile Justice ensures that these needs are somewhat met.

Additionally, the negative influences and harm caused by exposure to an adult prison environment can further inhibit the likelihood of rehabilitation. This has been discussed in some detail above under item (a).

Statistics on recidivism rates for juvenile and adult detainees suggest that the juvenile system, for a range of reasons, is considerably more effective at reducing the likelihood of re-offending.[12]

Concerns regarding Aboriginal and Torres Strait Islander detainees

There are several aspects to these changes that may have particularly detrimental effects for indigenous juvenile detainees. We note that the Indigenous Law Centre has made a submission to the Inquiry, and we fully endorse this submission.

The new requirement for certain juveniles to be sent to a particular Juvenile Correctional Centre, like Kariong, will undermine the capacity for them to remain near their families and communities. Recommendation 21 of the *Royal Commission into Aboriginal Deaths in Custody* states that "visits by family members or friends should not be unreasonably restricted". As indigenous people are more likely to come from remote non-urban backgrounds, this "centralisation" of older and more serious offenders will likely increase the number of relocations, further isolating indigenous juveniles from their families and, therefore, increasing the associated risks.

[11] *Convention on the Rights of the Child (1989) Article 37(c); United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) (1985) Rule 26; United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990) Part IV The Management of Juvenile Facilities, Section D Physical Environment and accommodation*

[12] Luke and Lind, *Reducing Juvenile Crime: Conferencing versus Court*, NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin, n.69 April 2002.

Endorsements

We wish to state that we have read and fully endorse the submissions made to this Inquiry by the Council of Social Services of NSW (NCOSS), the Shopfront Youth Legal Centre, the Legal Aid Commission of NSW (Children's Legal Service) and the Indigenous Law Centre.

Contact for further information

Please do not hesitate to contact the Convenor of the Youth Justice Coalition on 9559 2899 if you require further information or wish to discuss any further aspects of our submission.

Yours Faithfully,
The Youth Justice Coalition

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