

## **INQUIRY INTO JUVENILE OFFENDERS**

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**Subject:**

**Summary**

**Submission to**

Parliament of New South Wales  
Legislative Council Select Committee on Juvenile Offenders

**Inquiry into Juvenile Offenders**

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Joined CSU in 1998, and teaches a juvenile justice course specialisation in justice studies and social welfare, as well as social policy and case management subjects. Prior to 1998 worked in NSW government for 12 years in statutory welfare. Juvenile justice positions include youth worker in a detention centre, social worker in remand centre and manager of community based juvenile justice services in central metropolitan Sydney. Has been an Official Visitor to Riverina Juvenile Justice Centre and is presently a member of the Juvenile Justice Advisory Council.

### **Terms of reference**

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 staff at Kariong and Baxter detention centres
  - b) whether the transition of Kariong Juvenile Justice Centre into a correctional centre operated by the Department of Corrective Services is the most effective method of addressing management problems at that centre
  - c) the issue of adult detainees sentenced as juvenile offenders at Kariong and elsewhere in the juvenile detention system,
  - d) the classification system and appropriateness of placements for detainees
  - e) alternatives to the establishment of a juvenile correctional centre
  - f) the wider social implications of incarcerating juveniles in juvenile correctional centres run by the Department of Corrective Services
  - g) management of staff assault issues in the juvenile justice system
  - h) whether incarcerating juveniles in juvenile correctional centres achieves reduced recidivism, rehabilitation and compliance with human rights obligations.

## Submission

### Introduction

The invitation to meet with the Committee is appreciated.

The haste of the transfer of Kariong and enactment of enabling legislation has precluded opportunity for public access to information and discourse about the issues, policy alternatives and potential consequences.

My submission, like others, is limited by this haste. Thus, I am not well placed to respond to all issues raised in the terms of reference, or to any great depth on any, but to focus on aspects of the terms of reference about which I have some knowledge or experience.

### Background

#### From bipartisan to bipolar juvenile justice policy

In the 1990s most Australian States and Territories introduced new statutes, policies and programs that shifted juvenile justice from a welfare needs based model toward a justice response. In NSW the approach to reshaping juvenile justice policy and programs was marked by a bipartisan approach that resulted from the following consultative process:

- 1992 Green paper (JJAC)
- 1993 Public consultation on Green Paper
- 1994 White paper *Breaking the Crime Cycle*

This process was in keeping with sound juvenile justice policy making. It was informed by accurate information about social values about young people, crime, social harms and remedies; juvenile offender characteristics and offence profiles; and preventive, diversionary, surveillance and treatment options to achieve the desired social outcomes for various offenders. Developed through a public consultation process, it allowed for input from affected and interested parties and experts.

#### Management crisis and transfer of Kariong

It is widely known that the Department of Juvenile Justice (DJJ) has, since Kariong's commissioning, experienced problems in managing it as a maximum security juvenile detention centre.

Public evidence is:

- media coverage of incidents of staff/resident conflicts and security breaches
- NSW Ombudsman report on juvenile detention 1996
- NSW Ombudsman report on Kariong 2000
- Vern Dalton report to Minister Beamer, 5 October 2004

Not in the public arena are reports provided by staff of DJJ to management and by the NSW Council on the Cost and Quality of Government (COCQG) in its 2000 review of juvenile detention. Six monthly reports of Official Visitors to Kariong to the Minister of the day would most likely provide additional insight.

Thus, without full knowledge of the identified management issues and their recommendations and implementation it is difficult to assess the relative merits of management solutions. It is apparent from information in the public arena that some management deficiencies identified in the Ombudsman's reports (1996 & 2000) are raised again in the Dalton report (October 2004). Recurring management issues include: an over reliance on casual staff; unsatisfactory staff skills and training; ineffective communication between management/line staff; poor inmate behaviour management systems; and weak security. These all contribute to low staff morale and poor staff/inmate relations that are conflictual and ineffective in delivering the required security and safety, or an environment in which to deliver effective rehabilitation programs.

### **An effective management solution?**

While the Dalton report is silent on architecture, the Ombudsman's reports (1996 & 2000) identify Kariong's architecture as contributing to the management problems. Clearly the transfer of administrative responsibility to the Department of Corrective Services (DCS) will not address the architectural limitations.

### Architectural inappropriateness of Kariong

The Ombudsman (1996 & 2000) identified serious architectural limitations relating to both the site and building for its purpose as a high/maximum security juvenile detention centre.

[It was the view of the architects that, while the detainees in this Centre are alleged to be]...the most intractable in the system, the Centre architecturally would not contribute to the rehabilitation of those detainees. (NSW Ombudsman 1996 Vol.1:156)

5.13 One of the most puzzling aspects of Kariong was how its design was considered appropriate for a maximum security centre to accommodate those detainees considered to present the most significant management difficulties for the system.

...A list of major shortcomings in the design is set out at Appendix 2.

5.17 ... This design, combined with the centre's location, makes it entirely unsuitable for its current role within the juvenile detention system. (NSW Ombudsman 2000:143-144)

### **Legislative basis for transfer of juveniles to correctional centres**

The process of introducing the Juvenile Offenders Legislation Amendment Act 2004 seems reactionary, piecemeal and ill informed, and risks making juvenile justice policy a tool for political point scoring once more.

The legislation's hasty introduction exploited negative public opinion about the:

- heinous offences of several Kariong detainees, whose trial, sentencing and appeals received extensive media coverage
- detainees' contributions to the violent conflicts between detainees and staff, and the resultant property damage and personal injury.

The Juvenile Offenders Legislation Amendment Act 2004 (No. 103) has more far reaching consequences for juveniles than simply to transfer the Kariong facility from the administration of the DJJ to DCS.

Negotiating the boundaries of juvenile and adult corrections is clearly problematic. The Ombudsman (1996 Chapter 16; 2004) has previously dealt with this in considerable detail. However, unlike the Dalton report (2004), the content of the report is well researched and provides an evidence base that quantifies the extent of the problem in terms of offence types and offender characteristics. A further contrast is in its recommendations, which are justified in light of international human rights treaties, legislation and policy for its recommendations.

### **Implications of the Juvenile Offenders Legislation Amendment Act 2004**

The legislation is complex and amends at least three statutes. The provisions go far beyond what is reflected in the Minister's second reading speech and a mere transfer of the administrative responsibility for Kariong juvenile justice centre from the DJJ to DCS.

#### Interpretation of the Juvenile Offenders Legislation Amendment Act 2004 (No. 103)

The complexity of this legislation makes its interpretation and implications difficult to understand easily. My interpretation is that it:

- establishes **juvenile correctional centres**, administered by DCS, as a new category of custodial institution for youth aged from 16 – 20 years, a hybrid between the pre-existing **juvenile detention centres** administered by DJJ and **adult correctional centres** administered by the DCS
- establishes **older detainees (16-20 years)** as a new category of juvenile detainee who may be subject to a court order or administrative transfer from a juvenile detention centre to a **juvenile correctional centre**
- establishes **juvenile inmates (under 21 years)** as a new category of juvenile correctional centre inmate who may be subject to administrative transfer to an adult correctional centre
- is not limited to the Kariong site, but provides for other sites to be proclaimed as juvenile correctional centres in the future
- extends legal authority beyond the judiciary to the Director General of DJJ and the Commissioner of DCS to initiate administrative processes that will result in the location of selected juveniles, aged 16-20 years, in juvenile and adult correctional centres
- empowers the Director-General of DJJ to reclassify certain offenders aged 16-20 years, and transfer them from a DJJ **juvenile detention centre** into a DCS **juvenile correctional centre**, and the Commissioner of DCS to make a reverse transfer
- extends the grounds under which older detainees (16-20 years) can be transferred from juvenile detention centres to juvenile correctional centres to youth who are:
  - identified by the Director General of DJJ as having satisfied him/her that their **behaviour 'warrants the making of such an order'**.
- creates a mechanism through which the Commissioner of DCS can initiate administrative transfers of juvenile inmates (16-20 years) from juvenile correctional centres to adult correctional centres, on grounds that:

- the **inmate wishes** to be transferred, or
  - the inmate's **behaviour is or has been such** that he or she should be transferred, or
  - it is in the inmate's **best interests**...., or
  - the **association with other juvenile inmates** constitutes, or is likely to constitute, a threat to personal safety, security or good order
- establishes administrative review mechanism with powers to approve certain transfers of 16-20 year olds from juvenile detention centres, to juvenile correctional centres, and to adult correctional centres upon the recommendation of the Director-General of DJJ and Commissioner of DCS.

No doubt many impacts of these provisions would contravene the United Nations *Rules for the Protection of Juveniles Deprived of their Liberty (1990)*. While a thorough analysis remains to be done, some hypothetical scenarios illustrate how this could occur.

*Scenario 1:*

*Transfer of 16 year old behaviourally disturbed youth.*

*A 16 year old girl or boy, remanded or sentenced to juvenile detention, acts out their distress or anger in a non-criminal way. This behaviour is considered by a DJJ staff member to 'warrant the making of such an order'. A recommendation is made to the Director-General, who in turn recommends the young person's transfer to a juvenile correctional facility. The absence of any criminal charge or other judicial oversight means that approval can be given by an administrative review body.*

*Scenario 2:*

*Segregation of juvenile in adult corrections centres*

*The comparatively small numbers of girls in juvenile detention means that there is no economy of scale to justify the creation of a juvenile correctional facility for females. A 16-20 year old girl older detainee who is administratively transferred to a juvenile correctional facility could thus be placed in a segregated area of a juvenile correctional centre that accommodates males or of a women's prison that has been proclaimed for this purpose. Boys could also be placed in segregated areas of adult prisons that have been so proclaimed.*

*Scenario 3:*

*Escalation from juvenile detention to adult correctional centre*

*Three juvenile inmates (16-20 years) in a juvenile correctional centre are transferred to an adult correctional centre due to behaviour management difficulties arising from conflict amongst a wider group of older detainees. Amongst the three is a 16 year old who has been transferred from a juvenile detention centre due to behaviour determined by DJJ to warrant this action.*

These scenarios demonstrate the reach of the legal provisions to relatively young people. Also, how the administrative transfers can be approved on the basis of conditions that are broad in scope and ill defined and through administrative rather than judicial oversight. Their impacts could well be to place 16-20 year old youth in correctional centres designed for adults under security and surveillance systems designed for adult offenders. Juvenile inmates would not have access to the health care, educational programs and rehabilitation programs offered in juvenile detention.

They would be at risk of social isolation due to the need to segregate them from adults or of brutalisation.

Another concern arises from the conditions under which juvenile inmates (16-20 years) can be transferred to adult correctional centres. The conditions can be met by a simple request for transfer by the inmate.

A critical limitation here is a young person's ability to give informed consent. The notion of informed consent has been developed in the medical literature. It is now widely accepted that the necessary conditions for informed consent are that consenting parties:

... are competent to provide consent, receive a thorough disclosure of relevant information, understand that disclosure sufficiently well, are able to voluntarily consent ..., and communicate that they do consent... (Clarke & Levy 2005 forthcoming)

It could be argued that only the last of these five conditions could be met where a 16-20 year old youth seeks transfer to a correctional centre. A recent NSW survey of the health of juvenile detainees provides evidence that a large percentage will likely lack the emotional, intellectual and educational competence to give informed consent:

The mean WASI Full Scale score was in the low average range.

Seventeen percent had cognitive functioning scores consistent with a possible intellectual disability.

Eighty-eight percent reported mild, moderate or severe symptoms consistent with a clinical disorder.

Thirty percent reported high or very high psychological distress implying that they may have a greater than 50% chance of an anxiety or depressive disorder. (NSW Department of Juvenile Justice 2003:9).

Given that 16 year olds in the general population would likely lack the maturity to be considered as competent to give informed consent to be transferred to an adult correctional facility, this population will be less competent. As the legislation does not include a requirement for independent counselling, legal advice or advocacy juvenile inmates would be unable to access all the relevant information or to understand the possible implications. Their lack of personal autonomy arising from their incarceration means that their request will most likely be motivated by a negative desire to flee their present hostile environment than a positive informed choice.

### **Adult detainees sentenced as juvenile offenders in juvenile detention**

In 1996 (pp. 251-277) and 2004 the Ombudsman considered the issue of transfer of juvenile offenders from juvenile detention centres to the adult correctional system in detail

Unlike the Dalton report (2004), recommendations were evidence based, taking account of the contextual issues as well as the extent and nature of the problem. Specific detail is provided on:

- policy values and goals as evidenced in UN standards, the Green Paper and
- existing NSW provisions, including statutes and DJJ policies, protocols and procedures



- statistical evidence of the nature and incidence of serious offences over three years and some characteristics of serious offenders (i.e. age and gender)
- evidence of the extent of monitoring by administrators of individuals on a case study basis and of the overall system statistically, for placing serious offenders within the juvenile and adult prison system.

These reports have identified the scope and extent of the problem, the effectiveness of the current administrative arrangements and the safeguards that a system ought to protect, for offenders and the administration.

### **Incarceration of juveniles in juvenile and adult correctional centres**

The risks associated with this legislation include the establishment of a scattered system of juvenile correctional centres within the adult correctional system. There is no evidence that incarceration is effective in rehabilitation of young offenders. On the contrary, the best predictor of imprisonment is prior imprisonment. Young people placed within the adult system will number less than 100 in a prison population of 9,000. They will be lost to the system either literally or in terms of having their needs for protection and programs addressed in the allocation of scarce capital, operational and program commitment – both of time and funding.

The vulnerability of young people within the adult prison could compound problems of personal and social functioning by:

- placing remanded youth together with sentenced youth, thus stigmatising remanded youth who have not yet been found guilty
- exposing them to exploitation and brutality during incarceration
- providing adult offender role models and networks that might continue into the community
- reducing their access to treatment programs during their incarceration and post release programs designed for young people.

### **Alternative option**

Given that criticism should offer alternative constructive ideas, the following is offered as an alternative way forward:

- Consultative law reform that includes the option of establishing juvenile correctional centres for 17-20 year old youth
- Legislation to incorporate UN standards
- Budget allocation for capital establishment
- Joint administration by DJJ (programs) and DCS (security)
- Provision for selected 17 – 20 year olds to be detained
- Disallow administrative transfer of youth from juvenile detention to juvenile correctional centre or from juvenile correctional centre to adult correctional centre

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