Submission No 28

INQUIRY INTO CORRECTIONAL SERVICES LEGISLATION AMENDMENT BILL 2006

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Subject:

Summary

This submission is a personal reflection on my response to the prospect of this legislation becoming law in New South Wales and what I see as the implications of this Bill for the practice of medicine, particularly within the prison system

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SUBMISSION TO: **General Purpose Standing Committee #3**
Parliament House, SYDNEY NSW

RE: Corrective Services Legislation Amendment Bill 2006

Disclaimer
These views are my own and are not those of my employer.

Introduction
This submission is a personal reflection on my response to the prospect of this legislation becoming law in New South Wales and what I see as the implications of this Bill for the practice of medicine, particularly within the prison system.

I became a registered medical practitioner in 1983. Since then, I have worked in a number of fields and now work full-time in the specialty of Addiction Medicine. As an employee of NSW Health and thus of the government of NSW, I am a public servant.

This legislation threatens the delivery of a basic health care service, being the freezing of the semen of male prisoners, prior to their undergoing radical treatment of potentially life-threatening conditions – such as various cancers and a small number of other medical conditions – which will render them permanently or temporarily sterile.

This prospect is abhorrent to me.

The basis of my perspective…
Since 1991, I have worked in Addiction Medicine. I am constantly reminded of the random nature of conditions such as Substance Dependence, which wreak havoc in the lives of so many members of our community, with enormous emotional, financial and practical costs to individuals, families and society.

My children and relatives are not immune; nor are those of our political representatives, as we so powerfully understood several years ago, when Bob Hawke revealed on national television that a member of his family had been "substance dependent" and spoke movingly of the impact of this.

And nor are yours. Statistically, at least one member of this Committee or a member of their immediate families will have direct and relevant experience.

The basis of my practice of medicine…
During the 23 years that I have been a doctor, the 15 years that I have worked in Addiction Medicine and the 6 years that I have worked in the NSW prison system, one principle has provided the basis for how I do my job.

I do what I can to provide health care equivalent to that which I would want a member of my

family – my child, my partner, my sibling, my parent – to receive, were they to happen to be in the same circumstances as each of my patients.

It may sound trite, but every patient was once someone's baby.

The same is true for each prisoner – whoever their parents, whatever their life story and whatever the circumstances that have brought them into custody.

Every patient is a person…
Sometimes, when I write a prisoner's name on a medication chart, it is painfully clear that someone took great care in naming this person, some number of years ago. The name has a rhythm or a meter; it was carefully chosen. And yet, things have gone wrong somewhere. Somehow, things did not work out as was probably hoped, when such attention was paid to this important detail.

No individual is born "bad". Sometimes, things go wrong.

When one takes the time – which very few people do – to sit down with a person who has come into contact with the criminal justice system and invite them to tell their life story, the accounts are often astounding.

Some of these patients first lived on the streets at frighteningly tender ages, under horrifying circumstances; they were clearly not "tender" for long. It is not the least bit surprising that a particular individual has ended up in gaol; what is astonishing is that they have survived such neglect and trauma.

The situation of "Legislators"…
None of us can guarantee that a member of our family will not at some point do something daft and end up being incarcerated.

Your child or nephew or brother could be the subject of this legislation.

What this legislation will really mean…
One of my patients is nearing the end of his sentence. He reports "abandoning" his alcoholic mother and taking to the streets at the age of 5. Inevitably, he became a child prostitute on the streets of Sydney. He was sentenced some years ago for the murder of a man he believed to be a sex offender.

He is a handsome, healthy-looking, fit, well-built man. He is articulate and of above average intelligence. Within the criminal justice system, he has learned to read and write (not having achieved this previously) and has achieved some qualifications, which improve his likelihood of employment following release.

Now entering early middle age, he looks forward to his release from custody.
He deeply regrets his non-existent childhood and the lack of familial relationships. He hopes to "find a nice girl, settle down and have a family." Fair enough.

Now – let us add two hypothetical conditions to this thus far true scenario: -

1. This legislation is gazetted and
2. Two weeks later, this man - nearing the end of his sentence for a "serious indictable offence" – tells staff that he has noticed that one testicle is larger than the other.

He turns out to have testicular cancer and is referred to a surgeon. The surgical team conducts a series of investigations and counsels him during treatment planning. He is to undergo surgery, involving the removal of one, or both, testicles, and subsequent radio- and chemotherapy, once the nature and extent of the cancer are determined.

If this happened now, or after his release from custody, he would be referred to a Reproductive Physician, to consider the option of having his semen frozen prior to treatment.

If he were, however, still in custody at the time of diagnosis, this legislation would deny him this option – thus perhaps denying him what might be the greatest chance that he has ever had to make good the harm done to him, the possibility that – despite all that has gone wrong in his life – he might still be able to father children and parent them differently to the way in which he was parented.

The health care of prisoners…
Each correctional centre has a clinic, staffed by doctors, nurses and other health care providers. The health services within each centre vary, depending on the health care needs of the population of that centre. As stated in other submissions, the goals of the service which provides this care is to provide prisoners with health care that is equivalent to that available to the remainder of the community. This is in the interest of the prisoners themselves and of the general community, into which all but a very small number of individuals will inevitably be released (most within 6 months).

Contrary to what has been recently reported in the media, there is no queue-jumping, no preferential treatment, no special service provision.

As one nursing colleague puts it, "They get Medicare basic; not gold-plated, but the basics."

Prisoners and payment…
Prisoners do not contribute financially to the costs of clinical consultations, investigations (e.g. blood tests, x-rays, etc) or prescription medications. This is consistent with the general community, where the cost of health care –treatment, investigation and medications – is subsidised by Medicare and the Pharmaceutical Benefits Scheme, according to income.

Prisoners' income…
During incarceration, prisoners receive $12.60 per week if "unemployed"; sentenced inmates can earn from about $25 to $63.30 per week. This income is minimal and does not go very far.
The storage of prisoners' semen…
This service is not provided within the prison system, being only offered – as outlined previously – prior to patients undergoing treatment for life-threatening conditions, such as: -

- Testicular cancer
- Other pelvic tumours
- Leukaemia
- Lymphoma
    - Hodgkin's
    - Non-Hodgkin's
- Other "germ" cell tumours
- Other proliferative conditions – e.g. Systemic lupus erythematosis

During investigation for such conditions, prisoner patients are generally referred to local public hospitals. In most instances, patients with serious illnesses are transferred to city gaols and managed at major teaching hospitals – where their doctors are employees of NSW Health.

As other submissions will state, referral to Reproductive Physicians is regarded as obligatory during treatment planning in such circumstances.

Discrimination…generally…
All medical practitioners are required to provide health care, without discrimination. It would not be appropriate to deny a patient a service on the basis of race, gender, religion, sexuality, medical condition, smoking status, social status, income or any other grounds.

Yet, the NSW Parliament seeks to force us to discriminate between our patients on the basis of the crime with which they have been charged – even if they have not yet been sentenced.

Discrimination…on the basis of gender…
This legislation has been drafted to include that the freezing of ova is also prohibited – in the hope of avoiding accusations of sexual discrimination. In this instance, "Nature" does the discriminating – the legislation is quite ridiculous in this, as there is currently no process for the successful freezing of unfertilized ova.

Discrimination…on the basis of race…
The circumstances which led to this Legislation being drafted must not be ignored. Today, this man has been named in the Press for the first time.

As a boy, he was involved in a series of dreadful crimes. He was found guilty and sentenced – while still a minor – to a long period of incarceration. Within months of being sentenced, he was diagnosed with lymphoma. He was provided with standard medical treatment, which included the storage of his semen.

When he was again before the Courts, during an appeal against the severity of his sentence, his legal team chose to reveal his diagnosis and treatment to the Court. This prompted outrage in the popular press – and the rest is history!

It is on the public record that this young man was "convicted for the same crimes" as a high profile Islamic man and that the co-offenders were also Islamic. The young man whose treatment has

brought about this furore is also Islamic.

Would the response have been the same and would this legislation have been drafted if this prisoner had been Aboriginal or Italian or Mauritian?

I seriously doubt it.

And imagine the response, the public outcry and the political backlash!

But what else were medical staff to do, but offer him "standard treatment" for a serious medical condition?

A glaring absence from the discussions…
Over the last several weeks, there has been a great deal of discussion between and among parties concerned about this Legislation – medical and legal practitioners, human rights organizations, professional bodies, prisoner groups, etc. It has not been a loud and public debate, but there has been a significant amount of email traffic!

It is an indictment of the current situation between Islamic and non-Islamic people, both in New South Wales and more broadly, that Islamic groups have not been able to become publicly engaged in this issue.

I hope that the Islamic Council of NSW has been prepared to make a submission to this Committee – but I would not be surprised if this is not the case.

The crime is generally not the business of health staff…
When I started working in correctional centres, I quickly discovered a dilemma; I did not really want to know what patients were charged with, when the crimes were abhorrent. My view was – and remains – that my patients just happen to be within the criminal justice system and that this has no bearing upon my responsibility to provide them with appropriate health care.

Nonetheless, as an Addiction Medicine specialist, I need to have some idea of the relationship between a person's substance use and their offending history. Further, it is often helpful to have some idea of how long they were likely to be on remand and in custody, how protracted and stressful the Court process is likely to be, etc, if treatment planning is to be appropriate and practicable. In this setting, these are the stressors impacting upon on patient's health and "current outlook" and this practice is consistent with how I would inquire about any patient's current stressors.

However, such inquiry is for the benefit of the patient and only necessary insofar as it informs treatment. If I were treating a patient's ingrown toenail, tonsillitis, broken arm, toothache or cancer, I would regard such information as confidential and none of my business – because it had no bearing on their medical care.

A frightening side-effect of this Legislation is that it would legitimise health staff asking patients

about the charges that they face and providing health care services on this basis – rather than on the basis of need.

Another hypothetical…
What if my son did something horribly stupid – vulnerable, because of a sheltered upbringing, to the attraction of a charismatic "unsavoury character" – and ended up in custody on a "serious indictable offence"? What if he then developed lymphoma and needed to undergo radio- and chemotherapy? What if this legislation prevented his sperm being stored?

What if he were your son? What if he were the Prime Minister's?

What if his sentence were 10 years and he were released at the age of 27? In the normal course of events, his "fathering days" would hardly be behind him.

And another…
What if this man was subsequently found not guilty on appeal – released from custody, but nonetheless "sentenced" to infertility?

These illnesses occur randomly.

Laws must be fair and equitable. This Legislation is not.

Possible effects of this legislation on the health of prisoners…
Prisoners are a mixed bunch. They are people from all walks of life, all kinds of backgrounds and a wide range of levels of education.

They vary from being well-informed and knowledgeable to having misconceptions about all kinds of things – including their health and its management.

A likely outcome of this legislation is that prisoners will not seek medical assessment, investigation and treatment if they fear that they have a condition which would involve treatment that might render them infertile. This could lead to delayed diagnoses of such conditions as testicular cancer, leukaemia or lymphoma – possibly increasing health costs and worsening patient outcomes.

It is not out of the question that patients will decline potentially life-saving treatment, because they are denied the possibility of still being able to father children. Again, this could be costly in terms of both health care (treatment not being definitive, but sub-optimal and palliative) and for the Department of Corrective Services.

It is not out of the question that both these situations would increase the incidence of deaths in custody, if diagnoses were delayed or if treatment were sub-optimal.

Prisoners are sentenced to "deprivation of liberty" – not "deprivation of liberty <u>plus</u>".
Incarceration is *generally* effective in preventing patients having children for the term of their sentence. This is accepted by our judiciary, our legal practitioners, the community and prisoners.

Prisoners are not sentenced to being incarcerated, plus the random imposition of a caveat, which means that if they happen to develop a serious medical condition, they may be rendered permanently sterile, but will be denied the possibility of still being able to father children in the future, following the completion of their sentence.

The implication that there will be no "correction"…
None of us who work in this system pretend that rehabilitation is "certain" or even "likely". Most of us, I think, accept that change is "possible" and provide the treatment and assistance that is within our professional ambits.

This Legislation seems to cynically imply that rehabilitation is not probable and that an opportunity to mete out additional punishment will be grasped.

Cruel, unusual and random punishment…
This will be addressed by other submissions. Suffice to add here – again – that cancer is a random thing and must not in itself be used as an opportunity to "punish" a remanded or sentenced person, in addition to the penalty imposed by the Courts.

The implications for doctors…
I have no doubt that other submissions will also advise this Committee of the invidious situation in which this legislation would place medical practitioners – who would be, without exception, employees of NSW Health.

"Damned if we do and damned if we don't!" That sums it up!

We are required to provide medical care in accordance with currently accepted, standard, evidence-based practice. If we are accused of doing something wrong, of causing – or failing to prevent – harm, we are "judged" initially by our peers, in such contexts as the Medical Board or the Health Care Complaints Commission.

How could our actions be "judged" in the circumstances which this legislation would cause? Patients tell us of their problems. We can provide them with "usual treatment" and face prosecution for abetting a crime or we can refuse to do so and face prosecution for failing to act in accordance with our duty of care, in providing treatment which has been around for decades.

It is neither reasonable nor appropriate that the NSW Parliament place its own employees in this predicament.

The real cost of the "harvesting", transport and storage of semen…
In short – not much!

The reality is this. The patient attends a public hospital, accompanied by two officers of the Department of Corrective Services, for counselling and treatment planIf this service is to be provided (i.e. the patient is male, has not had children and chooses this option), he goes into a

booth with a "girly magazine" and a receptacle. As he is a prisoner outside of a correctional centre, his remains handcuffed. Some officers would not leave him in private. He masturbates and collects his semen in the container. The "specimen" is labelled, taken to the laboratory, frozen and transported by the next courier (who is going anyway) to an existing storage facility (a freezer, which is operating anyway).

There is a little paperwork involved, but the immediate costs are very little and the ongoing costs are essentially zero. They are certainly not $250 per year, as suggested in the press.

The potential costs of <u>not</u> storing such a patient's semen…

A. The patient becomes deeply depressed; he is in custody, with a potentially life-threatening condition and he is infertile. If life had been different, he might still have got ill, but he might still have been able to have children, eventually. He needs regular consultations with the Visiting Psychiatrist (at some $160 – $200 per hour x perhaps ½ hour per week for 4 weeks then maybe monthly for the next 5-20 years) and anti-depressant medication at $200 - $500 per year
B. The Reproductive Physician has not provided the treatment – and is sued by the wealthy father of the patient for failing to provide "standard care". As the doctor's employer is NSW Health, their professional defence is paid for out of Treasury Managed Funds.

It *might*, just *might*, have been cheaper to store the semen.

The implications for patients…
Unfortunately, I cannot count the number of patients who, over the last 6 years, have told me that they have children now, that despite their lives having been less than idyllic, they now have a sense of responsibility and both the desire and the reason to "get on with their lives" outside of the criminal justice system (which is not quite how they put it!)

Another hypothetical…
It is possible that individuals directly affected by this Legislation could become less amenable to rehabilitation than might otherwise have been the case.

A young man commits an armed robbery (a "serious indictable offence") and then develops leukaemia. His childhood sweetheart stands by him. She has confidence that he is basically a good man, going through a bad phase.

Because of this Legislation, his sperm cannot be stored.
Deprived of the opportunity to father children, he becomes less than well-disposed to society. His "rehabilitation" is affected, as are the lives of his girlfriend and both their families.

AMA Position Statement
This may have been tendered repeatedly in submissions to this Committee. It certainly should have been.

The AMA Position Statement on the Health Care of Prisoners and Detainees (1998) neatly states

the following: -

"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."

(See at http://www.ama.com.au/web.nsf/doc/SHED-5G4V6U)

So now, I have to work out how to end this…

ENDING A. What health care do you want, if you end up in prison?

OR

ENDING B. Please let us provide appropriate health care on the basis of need.

OR

ENDING C. Perhaps it all comes down to the separation of powers…

- The Parliament determines the laws.
- The legal system implements the Law.
- The health care system provides health care.

Quod era demonstratum.

Yours sincerely,

Dr Catherine Silsbury