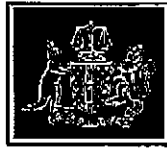


**INQUIRY INTO CORRECTIONAL SERVICES
LEGISLATION AMENDMENT BILL 2006**

Organisation: The NSW Bar Association
Name: Mr Michael Slattery QC
Position: President
Telephone:
Date Received: 28/07/2006

Subject:

Summary



The NSW Bar Association

FACSIMILE

To General Purpose Standing Committee No.3

From Cindy Penrose, NSW Bar Association

Date 28 July 2006

Re Correctional Services Legislation Amendment Bill 2006

Fax No 9230 3416

No of pages 8

Please find attached a copy of The New South Wales Bar Association's submission regarding the *Correctional Services Legislation Amendment Bill 2006*.

Kind regards

Cindy Penrose

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The New South Wales Bar Association

03/269

28 July 2006

Mr Stephen Frappell
Director
General Purpose Standing Committee No. 3
Parliament House
Macquarie St
Sydney NSW 2000

Dear Mr Frappell

Correctional Services Legislation Amendment Bill 2006

The New South Wales Bar Association welcomes the opportunity to comment on the Correctional Services Legislation Amendment Bill 2006.

A copy of the Association's submission is attached.

Please do not hesitate to contact me _____ should you have any queries about the Association's comments.

Yours faithfully

Michael Slattery QC
President

NEW SOUTH WALES BAR ASSOCIATION

**NEW SOUTH WALES BAR ASSOCIATION SUBMISSION TO
NSW LEGISLATIVE COUNCIL STANDING COMMITTEE NO. 3
CONCERNING THE CORRECTIONAL SERVICES LEGISLATION
AMENDMENT BILL 2006**

JULY 2006

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The Bill

1. The Bill amends the *Crimes (Administration of Sentences) Act 1999*. Its purpose is to prohibit prisoners who are serving sentences for or awaiting sentencing on serious indictable offences from providing their "reproductive materials for use, or storage, for reproductive purposes at hospitals or other places". The proposal is to make this a criminal offence attracting a prison sentence of 6 months and/or a fine of 100 penalty units (presently \$11,000). It also requires prisoners who have had "their reproductive material" stored for reproductive purposes to pay for the storage during any period of imprisonment and provides that there shall be no grant of leave of absence to any such offenders to enable them to furnish their reproductive materials for such purposes.
2. In addition, it amends the *Children (Detention Centres) Act 1987* to provide that the new provision applies to juveniles subject to control in detention centres.
3. All those prisoners who are serving sentences for any crimes at all before the legislation commences and who have had their reproductive materials stored for reproductive purposes are to be required to pay for their storage.

Background

4. Evidently, one of the Skaf brothers was diagnosed with Hodgkin's disease a little over a month after he had been sentenced and was offered the option of having his sperm stored cryogenically before starting chemotherapy. He was aged 21 years.
5. The facility of storing sperm is routinely offered in the community because of the very high likelihood that cancer treatment will lead to infertility. Justice Health, a division of NSW Health and the health service which provides treatment to prisoners and juvenile justice detainees in NSW, pays for the medical treatment of prisoners in this State. The policy of Justice Health is that prisoners should receive the same standards of health treatment in all areas as members of the community. The standard treatment policy was applied in the *Skaf* case and sperm collection and storage was organized by the health staff.
6. Although these events apparently occurred about two years ago,¹ the story was only recently leaked to the media (see *Daily Telegraph* 6 May 2006) and the Bill followed soon afterwards.

¹ See *R v Mohammed Skaf* [2005] NSWCCA 298

The proposed legislation is unnecessary, disproportionate and unjust

7. The NSW Bar Association opposes the legislation. It is unnecessary. The vice to which it is apparently directed is obscure. It is also disproportionate to any conceivable harm.
8. In addition, it violates several important and internationally accepted legal principles. For example:
 - i. It constitutes a cruel and unusual punishment for prisoners, by imposing an additional sentence over and above that imposed by the courts.
 - ii. It amounts to double jeopardy.
 - iii. It discriminates against prisoners as a group without sound reason or proportionality.
 - iv. It applies to adult and juvenile offenders alike.
 - v. It exposes health professionals to the risk of a criminal prosecution for doing no more than acting in accordance with their professional ethics.
 - vi. It punishes the innocent, i.e. the wives of prisoners who are potentially deprived of the right to bear children and their children who are prevented from having siblings.
9. According to the review conducted by the Legislation Review Committee there is no Australian precedent for denying a person a treatment option on moral grounds. The Committee points to the example that persons with emphysema are not denied treatment in public hospitals because the disease was caused by smoking. On the contrary, the Committee observed that decisions about health care have always been based on the principle of equality of access, depending on need and prognosis.

The Bill offends human rights

10. The proposed legislation also offends several internationally accepted human rights norms:
 - i. The right to adequate medical treatment, contrary to article 25 of the 1948 Declaration of Human Rights and to "reproductive freedom" contrary to article 12 of the International Convention on Economic Social and Cultural Rights.

- ii. Article 7 of the International Covenant on Civil and Political Rights (ICCPR) ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment").
 - iii. Article 10.1 ICCPR ("All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.").
 - iv. The right to freedom from interference with, and to found, a family, contrary to article 17 and 23.2 of the ICCPR and article 8 of the European Convention on Human Rights.
 - v. The principle of double jeopardy (article 14(7) of the ICCPR and *Cf. R v Carroll* (2002) 213 CLR 635).
 - vi. Article 10.2 ICCPR ("The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall ... be accorded treatment appropriate to their age and legal status.").
 - vii. Article 26 ICCPR ("All persons are equal before the law and are entitled without any discrimination to the equal protection for the law ...").
11. The proposed legislation also appears to offend against the Standard Minimum Rules for the Treatment of Prisoners² which include:

"57. Imprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of taking from the person the right of self-determination by depriving him of his liberty. Therefore the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation.

58. The purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.

59. To this end, the institution should utilize all the remedial, educational, moral, spiritual and other forces and forms of assistance which are appropriate and available, and should seek to apply them according to the individual treatment needs of the prisoners.

² Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977

60. (1) The regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings..”

12. In *Hirst v The United Kingdom (No. 2)* [2004] ECHR 681 (6 October 2005) at [70] the International Court of Human Rights emphasized that there was no place under the Convention system, “where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion”. Although New South Wales is plainly not a party to the European Convention on Human Rights, it remains a democracy where the same principles should surely operate. What is more, the platform of the Australian Labor Party recognizes that “respect and support for internationally recognised human rights is fundamental to an equal, just, democratic, inclusive and tolerant society, and inherent to the dignity of each and every Australian”³ and commits the ALP to supporting the international human rights instruments to which Australia is a signatory, including, specifically the UN Declaration of Human Rights and the ICCPR.
13. The NSW Bar Association submits that it is one thing to require payment for medical or related services but another to criminalize conduct that has no criminal flavour to it and which is in breach of so many well accepted human rights principles. It is also inappropriate to punish the innocent, such as the wives and children of prisoners.
14. The proposed legislation smacks of eugenics and has no place in a liberal democracy.

Conclusion

15. The legislation should be withdrawn. Alternatively, it should at least be reviewed to ensure that it does not violate international human rights instruments to which Australia is a signatory.

³ See <http://www.alp.org.au/platform>