Submission to Legislative Council Select Committee on Juvenile Offenders.

1. The Juvenile Offenders Legislation Amendment Act 2004 (No.103) is convoluted, bringing with it unnecessary complications in the guise of providing solutions to problems encountered with the administration of Kariong (Secure) detention centre.

The Act defines *correctional centre*

inmate

juvenile correctional centre

adult correctional centre

juvenile inmate

older detainee

Although capable of legal interpretation, confusion is raised in the common use of these terms when under discussion one compared with another.

2. The purported need for the legislation arises from the reckless and pusillanimous action of the government in removing Kariong from Juvenile Justice control and placing it under the administration and day-to-day management of Correctional Services.

A primary undesirable result of this action has been to deprive the Juvenile Justice detention centre system of a secure centre for juveniles (those aged under 18) who are denoted as being management difficulties.

The legislation would have been unnecessary if the government had had the

strength of purpose to allow Kariong to remain under Juvenile Justice control, but reinforcing the management regime.

3. The principal obstacle to proper management and control of Kariong under Juvenile Justice auspices was the presence in a "juvenile detention centre" of offenders who are in fact of adult age. Although some previous legislative efforts have been made to reduce the impact of adults in a juvenile centre, management of juveniles and adults together will remain a difficulty even under Correctional Services control.

The fact remains that it is wrong in principle for adults and juveniles to be detained in the one facility, whether it be a juvenile detention centre or an adult correctional centre. In this regard I attach a document *Kariong detention centre* which I wrote in October 2004 at the height of controversy relating to the centre. The document details the principles, especially those arising from United Nations rules, that arise in this context.

4. Consequently, proper administration of Kariong would involve repeal of this recent legislation and return of the centre to Juvenile Justice administration and control, but with officers trained in the appropriate management of detainees exhibiting difficult behaviour, rather than "social workers" or "youth workers." This may require the officers to have training in discipline management akin to that undertaken by Correctional Services officers.

Adult detainees (those who were juveniles at the time of their offences) should be incarcerated in an adult correctional facility, but one which caters specially for the "young adult offender" group of 18-24 years.

Legislation should specifically provide that a person who is of adult age at the time of sentencing should *prima facie* be sentenced to a young adult offender's correctional facility, unless special reasons can be shown. The legislation should spell out those special reasons, as courts have been too willing to find reasons for departing from the norm.

Adults who might be detained in a juvenile detention centre (but separately from juveniles in the same centre) include those who were juveniles when sentenced but are completing their sentence within 6 months of attaining 18 years of age, and offenders who have been assessed as either intellectually handicapped or not sophisticated in the nature of their offending when compared with other adults of the same age.

Kariong was designed to be an effectively secure facility for juveniles who cannot be appropriately contained within the less secure facilities managed by Juvenile Justice. With effective management at Kariong, the occasion for transfer of a juvenile to an adult correctional centre should be a rarity.

5. Juvenile detention centres are provided for under the Children (Detention Centres) Act 1987 (as amended).. Departmentally, and for public consumption, these centres are promoted as "Juvenile Justice Centres". In former years they have also been known as "reformatories", "institutions", "training schools", "homes", "training centres". The euphemism of "Juvenile Justice Centre should be

discarded. They are not centres at which *justice* is dispensed. The centres should use the term provided for under the prevailing Act, *ie* "detention centres".

6. Incarceration and rehabilitation

Item 2(h) of the Committee's Terms of Reference queries the effect of incarceration on recidivisim and rehabilitation.

My own experience covered 44 years in the courts system, including 25 years as a Magistrate, and 18 years as the chief magistrate of Children's Courts. From that experience I am able to say I have never encountered an instance of a person having been "rehabilitated" as a result of incarceration, whether as an imprisoned adult or a detained juvenile.

"Rehabilitated" in that contest I define as a person who has completely reformed attitudes to societal norms such that he feels within himself that offending is utterly repugnant.

I have seen many instances where an incarcerated person is deterred from further offending (or, being detected) by the experience of incarceration. Such a person does not wish to have the same experience again, but their intrinsic attitudes towards law and society cannot be said to equate with "rehabilitation".

Incarceration remains a necessary measure for frequently repetitive or serious offenders. Rehabilitation, especially in the case of juveniles, remains a goal to be achieved for those who have not been frequent or serious offenders, for which numbers of measures can be effective, *eg* youth conferencing, court-administered cautions, probation, and community service.

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Kariong detention centre

Kariong detention centre seems to have been repeatedly in the news in recent weeks.

The centre is a good and necessary facility for recalcitrant and serious young offenders. Like any other detention centre its physical condition will have "aged" quickly, due principally to the treatment it receives from its inmates. To suggest, as the responsible Minister appeared to, that it should be abandoned or replaced is to neglect the essential problem, that is the appropriate placement of offenders of these categories. When opened, in the early '90s, Kariong replaced the significantly outdated 19th century gaol at Tamworth, euphemistically titled "Endeavour House" – it was highly appropriate that it do so.

The underlying criticisms of Kariong are not the physical nature of the facility, but

- that a great many of the inmates detained should never be there in the first place;
- that oversight and programmes of those inappropriately detained are directed towards "treatment" of children rather than sophisticated offenders (whose offences have effects in the community as bad or often worse than many adult offenders.)

The last statistics I have access to are published by the Australian Institute of Criminology in *Statistics on Juvenile Detention 1981-2001.* These indicate that on 30th June 2001 there were 72 males and 7 females aged over 18 years in detention in NSW. It is clear that of the 72 males there must have been a significant proportion in other centres than Kariong, eg. "Baxter", Mt. Penang. When I retired in 1995 my recollection is that at least one-third of detainees at Kariong were aged over 18 years. To be "eligible" at all for a juvenile detention centre the offences of these persons must have occurred while they were under the age of 18. I am unaware how many of those young

adults in detention are completing sentences *imposed* before they turned 18, but no doubt this information could be obtained under Freedom of Information provisions.

Let us be clear about this – whether or not they were legally "children" when they committed their offences (often with adult-like consequences as above), these persons are now **adults.**

I have been endeavouring to convince governments for the best part of 20 years that it is wrong in principle and for proper management to detain young adults in the same facility as juveniles.

The *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")* provide:

> "Clause 13.4 – Juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults"

> "Clause 26.3 – Juveniles in institutions shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults"

Commenting on these provisions the *(United Nations) Office of High Commissioner for Human Rights* noted: (see: http://www.unhchr.ch/menu3/b/h_comp48.htm)

> The danger to juveniles of "criminal contamination" while in detention must not be underestimated. It is therefore important to stress the need for alternative measures. The Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in its resolution #4 on juvenile justice standards, specified that the Rules, inter alia, should reflect the basic principles....that no minors should be held in a facility where

they are vulnerable to the negative influences of adult detainees and that account should always be taken of the needs particular to their stage of development."

It will be noted that in the international conferences leading up to formation of the "Beijing Rules", Australia was at the forefront in recommending the substance of Rules 13.4 and 26.3.

It is correct to observe that the basic intent of the Rules is to prevent juveniles being imprisoned in adult gaols. The principle nevertheless remains the same – significant numbers of young adult offenders being detained in juvenile detention centres pose the same problem of "criminal contamination" towards the juvenile inmates. The effect is precisely the same whether it is the mixture of juveniles and adults in gaols or in detention centres.

While the U.N. Rules suggest that it may be acceptable to detain adults and juveniles in the same institution, so long as they are in separate parts of that institution, the likelihood with Kariong is that complete separation is not being achieved. This would certainly be the case in a detention centre such as Baxter.

It is pertinent to ask how exactly these adults come to be in juvenile detention centres. To suggest that they are there because their offences were committed as juveniles alone is simply an absurdity.

As an illustration of this absurdity and the system's dependence upon an arbitrary age barrier (18 in this State): suppose a group of offenders set out to commit the crime of rape – the group consists of youths who are aged both 17 and 18. Found guilty, those who were 18 will be imprisoned without discretion as to their place of incarceration. Those who were 17, but

probably 18 by the time of trial and sentence, are entitled to the consideration of discretion as to imprisonment or detention, even if their individual participation was worse than the 18 year olds.

As management and treatment measures, the adults gather no self-esteem by continuing to be treated as children, yet gain that hierarchical "eminence" in the eyes of juvenile inmates that is endemic in all correctional systems.

The adults are there because:

(a) the higher courts are given a discretion under Part 2, Division 4, of the *Children (Criminal Proceedings) Act* to direct (for "serious indictable offences") that a person who was a juvenile but now an adult when sentenced may serve his sentence in a detention centre, at least until the age of 21 years; or in the case of other indictable offences to either direct imprisonment or detention.

An amendment to s.19 in 2001 providing that a higher court may find "special circumstances" for detention rather than imprisonment is too wide in its ambit of defined special circumstances, leading the higher courts to too readily specify detention. I am sure that an examination of sentences of young adults (for "juvenile" offending will show that the discretion to find special circumstances has been exercised in the vast majority of cases. This makes a mockery of the phrase "special". The Act should firstly specify that there is a presumption (in the light of the United Nations Rules) that adults in this category should be imprisoned, and secondly that it spell out more precisely what reasons are acceptable for a detention direction to be given.

(b) the sentencing process of the higher courts should be examined. Firstly, those courts are not specialists in juvenile law. A Judge will apparently be easily persuaded by (i) the offender's counsel, (ii) the low-key terms of presentence reports prepared by Juvenile Justice officers; (iii) the lack of input into the sentencing process by prosec-

utors and (iv) a misguided sense that the offender will better redeem himself in detention than in gaol.

Courts are required to give reasons when according sentencing discounts to offenders. The youth of an offender at the time of commission of the offence is a reason for an offender frequently receiving a lesser term than that for an equivalent adult offence. Providing the additional discount of juvenile detention to a young adult is an erroneous application of discretion.

The fact that the Act permits discretions between imprisonment and detention leads the higher courts to view detention of young adults as a proper sentencing measure. Nobody from the Crown has argued before them the effect of the United Nations Rules.

(c) The Children's Court has no discretion when sentencing a young adult for an offence committed while a juvenile – the only measure is detention. In 1988 while John Dowd was Attorney General, an effort was made to amend the previous government's Act to give the Children's Court the discretion it had always previously had – to sentence to imprisonment in appropriate cases. In the interests of securing other necessary amendments this provision was not persisted with.

The problems currently at Kariong can be identified strongly with the underlying issues noted above. A solution is for there to be purposely created a separate gaol for young adults (18-24 years of age.) During 1995 it was my understanding that Parklea was to be developed for this purpose, but it seems this may not have been exclusively persisted with.