

Submission of the

NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES

to the

General Purpose Standing Committee No. 3

Inquiry into

The Correctional Services Legislation
Amendment Bill (2006)

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Executive Summary

1. The NSW Council for Civil Liberties (CCL) strongly opposes the Bill in its present form. The Bill is unacceptable because:
 - a) It contravenes the internationally accepted rights of prisoners to access health care while in prison and to lead a normal family life after their release;
 - b) It can have irrevocable consequences for prisoners facing infertility as a consequence of illness or medical treatment;
 - c) It reduces the prospects of rehabilitating offenders by denying them the chance to form strong family bonds on release;
 - d) It will require doctors to act unethically; and
 - e) It represents an extra punishment in addition to the sentence of the Court.
2. CCL believes that prisoners should be permitted to store reproductive material in the same circumstances and at the same cost as the general population.
3. At a minimum the Bill should be amended to provide that prisoners who face the possibility of becoming infertile prior to their release due to illness or medical treatment are entitled to store reproductive material at their own expense.
4. Under no circumstances should this legislation apply to minors.
5. Any decision to deny a prisoner the right to store reproductive material should be made by a court or at least should be subject to judicial review. Access to such storage may only be relevant to a small number of prisoners, but any decision to deny the right in circumstances where a prisoner faces infertility will have significant and lifelong consequences for those inmates and their families. Parliament should only allow a decision of such importance to be made by a court.

1. Human Rights Concerns

6. It is widely accepted under international and domestic law, and under standards of human decency, that prisoners in civilised countries lose some of their rights, but retain others. The *UN Basic Principles for the Treatment of Prisoners*¹ (*UN Basic Principles*) provide that:

Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights ... as well as such other rights as are set out in other United Nations covenants.²

7. Specifically, international law allows that prisoners are entitled to retain:
- The right to equal health care; and
 - The right to establish a family on their release.

The Draft Bill infringes both these rights.

1.1 Equal Health Care

8. International and domestic laws provide that prisoners should have access to health care that is equal to the rest of the population, specifically:
- The *UN Basic Principles*³ require that all 'Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation';
 - In NSW the *Crimes (Administration of Sentences) Act 1999*, s72 provides for equal access to medical treatment;
 - The *International Covenant on Economic Social and Cultural Rights* (ICCPR), art 12 also includes the right to the 'highest attainable health care standards'.

This Bill sets an appalling precedent by applying different standards of medical care for prisoners. It is contrary to the principles set out above and to the basic obligation of governments to respect the dignity of the human person.⁴

1.2 Interference With Family Life

9. Respect for the family and the right to found a family are also internationally recognised human rights.⁵

¹ Set out in General Assembly Resolution 45/111 (1990).

² Para 5.

³ General Assembly Resolution 45/111 (1990), para 9.

⁴ ICCPR, art 10.

⁵ ICCPR, art 23.

10. Where prisoners face a future of infertility, this Bill will contravene their right to found or extend a family in the future. It will also infringe this right in respect of a spouse of the inmate. These are personal rights over which no state can legitimately exercise control.
11. CCL sympathises deeply with the victims of crime and with the legislature's wish to keep our communities safe. While this motive is admirable, the methods chosen in this Bill are in the worst tradition of state attempts to exercise coercive control over reproduction and family life.

This Bill undermines the internationally accepted rights of prisoners to access health care and to lead a normal family life on release.

2. Reduced Rehabilitation Prospects

12. Most prisoners covered by this legislation will ultimately return to society. This legislation reduces the chances of prisoners becoming responsible members of the community on release.
13. Courts⁶ and clinical researchers⁷ have acknowledged that instability in living arrangements, family and relationship status can significantly influence the likelihood of successful rehabilitation. This legislation has the potential to damage a prisoner's ability to form stable family bonds and therefore increases the risk of a prisoner re-offending.
14. The primary importance of rehabilitation is acknowledged in international law. The ICCPR provides that 'the essential aim' of imprisonment should be 'reformation and social rehabilitation'.⁸ The *UN Principles* provide that 'Favourable conditions shall be created for the reintegration of the ex prisoner into society under the best possible conditions.'⁹

The Bill risks increasing the probability that effected individuals will re-offend, by sabotaging their chance of establishing a stable family life on release.

⁶ See eg, *Buonocore v R* [2006] NSWCCA 159 [19].

⁷ Motiuk & Brown, 'Factors Relating to Recidivism Among Released Federal Sex Offenders' XXVI International Congress of Psychology (1996) <http://www.csc-scc.gc.ca/text/rsrch/reports/r49/r49e_e.shtml>; Klein, Alexander & Parsons, 'Impact of family systems intervention on recidivism and sibling delinquency: A model of primary prevention and program evaluation' *Journal of Consulting and Clinical Psychology* 45(3):469-474.

⁸ Art 10.

⁹ Para 10.

3. Ethical Concerns

15. This legislation has the potential to place doctors in a position where they must choose between contravening the rights of patients and the requirements of their own ethical codes or breaking the law. A responsible Parliament should not place this burden on medical practitioners.
16. The Australian Medical Association ethical guidelines provide that 'Prisoners and detainees have the same right to access, equity and quality of health care as the general population'.¹⁰ The guidelines also create positive duties for medical practitioners to uphold these rights, stating that it is:

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.¹¹
17. Medical practitioners will not be able to comply with these requirements and obey the requirements of this legislation.

4. Extrajudicial Punishment

18. Full punishment for an offence is reflected in the sentence imposed by the courts. The denial of reproductive rights in this way can only be regarded as further punishment, imposed by a non-judicial body.

5. Irrevocable consequences

19. Certain medical treatments, such as chemotherapy, often cause sterility in patients. It is standard practice in such cases for patients of reproductive age to store sperm or ova for later use. Failure to preserve material at the time cannot be remedied later. An ex-prisoner may have been released and become a responsible member of the community, but the consequences of this legislation will endure.
20. The Bill could also lead to deaths if inmates refuse or delay medical treatment in the hope of surviving their sentence and preserving their ability to reproduce.
21. Unlike the sentences our courts impose, these consequences are irrevocable in cases of wrongful conviction. In a worst-case scenario, this legislation could give rise to a situation where a wrongly convicted prisoner with a serious illness is effectively sentenced to a life of infertility.

¹⁰ AMA, *Position Statement: Health Care of Prisoners and Detainees* (1998) <<http://www.ama.com.au/web.nsf/doc/SHED-5G4V6U>>.

¹¹ AMA, *Position Statement: Health Care of Prisoners and Detainees* (1998) <<http://www.ama.com.au/web.nsf/doc/SHED-5G4V6U>>.

The Bill in its present form effectively forces prisoners to choose between permanent infertility or refusal of life-saving medical treatment.

6. Scope

22. In its current form, the Bill – and its possible life-long consequences – will apply to a large number of people convicted of a range of crimes. In addition to the offences identified in the explanatory note, the Bill will for example apply to:
- *Honesty offences* – eg giving a false statement or declaration or making a false announcement regarding a takeover.
 - *Property crimes* – eg robbery, stealing and receiving stolen goods;
 - Possessing an unregistered firearm;
 - *Drug offences* – eg being present on drug premises; and
 - Aiding suicide.
23. While these are all seriousness offences, many individuals convicted of these crimes will return to the community in five years or less and will be expected play a responsible role. If the community is to be spared further criminal conduct, it is important to ensure that these people are given the best opportunity to establish a lawful and responsible life. Forming strong family bonds can be important part of this process.

6.1 Minors

24. This legislation should not be applied to minors. *The Convention on the Rights of the Child*, Article 24, provides that 'children have the right to the enjoyment of the highest attainable standard of health and to access to health and medical services'. The Bill would be in breach of this requirement.
25. Rehabilitation is a particularly important consideration in the treatment of juvenile offenders. As discussed in section 2 above, this Bill has the potential to undermine the prospect of rehabilitating offenders subjected to its requirements.

This legislation must not be applied to minors

7. Expenditure Priorities

26. CCL believes much of the sentiment which led to the drafting of this Bill flows from a belief that using taxpayer funds to preserve reproductive material does not represent an appropriate expenditure when other government services are under-funded. The appropriateness of allocating public funds to support storage of reproductive material is open to debate. CCL only argues that prisoners should have access on the same terms as the rest of the community. Prisoners should at least be permitted to store this material at their own expense.
27. This legislation is also likely to result in increased resources being devoted to appeals. For example a recently convicted offender may be diagnosed with an illness, the treatment for which will render them infertile. This medical fact, together with legislation that will prevent them storing reproductive material, may render the sentence more burdensome¹² in a way that the judge did not take into account in sentencing. The legislation may therefore operate to give the offender new grounds to appeal a sentence.

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| Understandable concerns about inappropriate expenditure do not justify an outright ban much less the imposition of criminal sanctions. |
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8. Recommendations

28. CCL believes that prisoners should be permitted to store reproductive material in the same circumstances and at the same cost as the general population.
29. At a minimum the Bill should be amended to provide that prisoners who face the possibility of becoming infertile prior to their release, are entitled to store reproductive material at their own expense.
30. Under no circumstances should the restrictions proposed in the Bill be applied to minors.
31. Any decision to deny a prisoner the right to store reproductive material should be made by a court or at least should be subject to judicial review. Access to such storage may only be relevant to a small number of prisoners, but any decision to deny the right in circumstances where a prisoner faces infertility will have significant and lifelong consequences for those inmates and their families. Parliament should only allow a decision of such importance to be made by a court.

¹² On medical situations rendering sentences unduly burdensome and justifying appeal of sentence see: *R v Kenneth William Bailey* (1988) 35 A Crim R 458; *Rigby v Regina* [2006] NSWCCA 205.

Prisoners should be permitted to store reproductive material in the same circumstances and at the same cost as the general population. The Bill should be amended to provide that prisoners who face the prospect of infertility, are entitled to store reproductive material at their own expense.