Submission of the

NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES

to the

General Purpose Standing Committee No. 3 of the NSW Parliament's

Inquiry into Issues relating to the Operations and Management of the NSW Department of Corrective Services

Contents

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1 Executive Summary

1. The New South Wales Council for Civil Liberties ('CCL') believes that the High Risk Management Unit at Goulburn Gaol should be closed down. It should be replaced by a more humane facility with a greater emphasis on rehabilitation. It should also only house those inmates who have been *objectively* assessed to be a risk to the general prison population or staff.
2. CCL is concerned that terrorist suspects are being sent the HRMU as a matter of course. There is no rational reason to treat those suspected or convicted of terrorist offences in a manner different from people suspected or convicted of other crimes. The inmate classification of "Category AA" for men and "Category 5" for women, for inmates who are perceived to threaten national security, should be removed from the Regulations.
3. The use of orange prison uniforms for Category AA inmates is degrading and humiliating and should cease immediately. It makes the HRMU look like "little Guantanamo".
4. As a matter of urgency, a comprehensive independent assessment of the operation of the High Risk Management Unit needs to be undertaken. That assessment needs broad terms of reference. CCL would be willing to provide assistance to such an inquiry.
5. The *Standard Guidelines for Corrections in Australia* need to be amended to accord with international standards set out in the UN *Standard Minimum Rules for the Treatment of Prisoners*. CCL is concerned about the failure of the Australian guidelines to guarantee access to fresh air and to prohibit degrading and humiliating clothing.
6. CCL is also concerned about recent developments in inmate transfer procedures. CCL's concerns can be summarised as follows:
    (1) the new regime will result in higher prisoner populations;
    (2) the new regime will result in some prisoners having to serve the whole of their sentences in gaol when they would otherwise be suitable for release on parole, creating injustice;
    (3) the ban on transferring certain categories of prisoners may increase their risk of re-offending; and
    (4) the ban on temporary transfers will mean an increase in indigenous prisoners in gaol.
7. CCL offers one final observation about the lack of transparency in the way the Department of Corrective Services operates. The Department's Operations Manual is not publicly available on its website. CCL has placed the publicly available parts of the Operations Manual on its website, but ultimately it would be more appropriate for the Department to upload and maintain the Operations Manual on its website.

2 'High Risk' Prisoners

2. The management of high risk prisoners by the Department of Corrective Services with regard to:

a. Access and contact by non-correctional persons including their security screening
b. The effectiveness of the High Risk Management Unit (HRMU) at Goulburn Gaol
c. The objectivity of the prisoner classification system
d. Staffing levels and over-crowding.

2.1 conditions in the HRMU

8. CCL has been concerned for some time about the conditions in the so-called 'SuperMax' facility in Goulburn Gaol. There have been some extremely serious complaints emanating from the HRMU, which indicate no-compliance with the UN *Standard Minimum Rules for the Treatment of Prisoners*.[1]

9. CCL has seen several complaints from inmates of the HRMU. The most detailed is signed by twenty-one inmates of the facility in 2003. The complaints allege that there is a lack of access to fresh air, to sunlight, to adequate medical care and to legal assistance. There have been several instances of total lock-downs lasting for several days, during which time inmates were not allowed out of their cells at all. There have been reports of self-harm and hunger strikes. Particularly disturbing allegations include:

    - no access to fresh air
    - no direct sunlight
    - inmates are being racially segregated
    - no heating in the cells
    - no regular access to education or teachers
    - limited access to communications facilities to stay in touch with family and lawyers
    - the housing of accused people on remand at this facility
    - no hot food in the cells after 3 p.m.
    - lack of adequate facilities for indigenous inmates.

10. To CCL's knowledge, these complaints have never been investigated in a satisfactory manner by an independent body. In 2004, CCL passed these complaints to the NSW Ombudsman and the federal Human Rights and Equal Opportunity Commission, but both bodies conveniently declined to investigate on the grounds that they could not accept complaints from a third party. This amounts to a complete lack of oversight of the HRMU by any independent body and needs to be addressed by Parliament.

[1] UN *Standard Minimum Rules for the Treatment of Prisoners*, approved by UN Economic and Social Council in July 1957. Text of Guidelines available at: <http://www.ohchr.org/english/law/treatmentprisoners.htm>.

11. CCL is concerned that the conditions in the HRMU amount to cruel and inhuman treatment, contrary to Article 7 of the *International Covenant on Civil and Political Rights* ('ICCPR'). The treatment of HRMU inmates is far from humane and respectful, contrary to Article 10(1) of the ICCPR. Nor does it appear that the main aim of the HRMU fosters the reformation and social rehabilitation of convicted inmates, contrary to Article 10(3) of the ICCPR.

12. Some of the conditions in the HRMU fail to meet the United Nations *Standard Minimum Rules for the Treatment of Prisoners* ('Standard Minimum Rules'). The Standard Minimum Rules offer valuable guidance in the interpretation of what is required by Article 10 of the ICCPR.[2] The Standard Minimum Rules have been adopted by the UN Economic and Social Council and have also been endorsed by the UN Human Rights Committee.[3]

13. CCL is concerned that Australian Corrective Services Ministers have deliberately chosen to ignore important parts of the Standard Minimum Rules. The Standard Minimum Rules state that (italics added):

> 11. In all places where prisoners are required to live or work,
>
> (a) The windows shall be large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air *whether or not* there is artificial ventilation;

The Corrective Services Ministers chose to ignore this and instead wrote in the *Standard Guidelines for Corrections in Australia*:[4]

> 5.26 In all places where prisoners are required to live or work:
>
> the windows should be large enough to enable the prisoners to read or work by natural light, and should be constructed in such a way that they allow entrance of fresh air except where there is artificial ventilation.

14. **The Corrective Services Commissioner is simply wrong when he said in evidence before the Standing Committee that the HRMU meets the UN Standard Minimum Rules on artificial ventilation**.[5] On the Commissioner's own evidence "forced air" is pumped into cells, rather than allowing "the entrance of fresh air". This lack of natural fresh air at the HRMU, which inmates have complained about, highlights how conditions in the 'SuperMax' facility fail to meet minimum international standards.

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[2] *Potter v NZ* (1997) UN Doc CCPR/C/60/D/632/1995 at [6.3] (UN Human Rights Committee).
[3] UN Human Rights Committee, *General Comment 21* (humane treatment of persons deprived of liberty), 1992, [5].
[4] Conference of Correctional Administrators, *Standard Guidelines for Corrections in Australia* (1996), <http://www.aic.gov.au/research/corrections/standards/aust-stand_1996.html>.
[5] NSW Parliament, General Purpose Standing Committee No. 3, *Inquiry into the Operations and Management of the Department of Corrective Services*, Evidence (8 December 2005), 37.

15. CCL welcomes the Standing Committee's visit to inspect the HRMU. CCL looks forward to the Standing Committee's inspection report. However, a comprehensive independent non-political investigation needs to be undertaken into the management of, and need for, the HRMU.

The High Risk Management Unit should be shut down and replaced with a more humane facility.

A comprehensive independent assessment of the need for, and management of, the High Risk Management Unit needs to be undertaken urgently. Such an investigation should be undertaken by a retired judicial officer.

The *Standard Guidelines for Corrections in Australia* need to be amended to accord with international standards set out in the UN *Standard Minimum Rules for the Treatment of Prisoners*.

2.2 Category AA inmates

16. CCL is extremely concerned that terrorist suspects are being treated contrary to international human rights standards. Terrorist suspects, like all unconvicted accused, should be presumed innocent[6] and be treated differently from convicted inmates.[7] Furthermore, bail-refused terrorist suspects should be housed, like other accused people, in a general *remand* facility such as the MRRC, unless they represent a *rational* threat to the security and good order of the institution. This will allow them to be closer to their families and legal teams.

17. The introduction in 2004 of the new "AA" security classification for men and "Category 5" for women is a disturbing development.[8] "Category AA" male and "Category 5" female inmates are those who:[9]

> in the opinion of the Commissioner, represent a special risk to national security (for example, because of a perceived risk that they may engage in, or incite other persons to engage in, terrorist activities) and should at all times be confined in special facilities within a secure physical barrier that includes towers or electronic surveillance equipment.

18. The policy behind this classification is oppressive and violates Australia's international human rights obligations. The UN Standard Minimum Rules permit remand inmates to be treated differently from other remand inmates only on the grounds that it is 'necessary in the interests of the administration of justice and of the security and good order of the institution'.[10] In international law, **national security is not a legitimate ground upon which to discriminate against remand inmates**. Such discrimination is only permitted under the *International Covenant on Civil and Political Rights* in a time of proclaimed public emergency 'which threatens the life of the nation' and which has been officially notified to the UN Secretary-General.[11] These pre-conditions have not been met and therefore NSW is in violation of Australia's international human rights obligations.

[6] ICCPR Article 14(2).
[7] ICCPR Article 10(2)(a).
[8] NSW Minister of Justice, 'Minister Announces Tough New Management Regime for Terrorist Inmates' (Media Release, 27 October 2004) <http://www.dcs.nsw.gov.au/media/releases/20041027Terrorist.pdf>.
[9] Crimes (Administration of Sentences) Regulation 2001 (NSW) rr.22 & 23, as updated by Crimes (Administration of Sentences) Amendment (Category AA Inmates) Regulation 2004.
[10] UN Standard Minimum Rules, n 1, rr.84-93.
[11] ICCPR Article 4 (derogations).

19. Also as a matter of policy, the grounds on which the Commissioner of Corrective Services may execute his discretion to classify an inmate as a Category AA or Category 5 inmate are extremely disturbing. This decision is *not* reviewable in a court of law. Given the oppressive conditions under which Category AA inmates are treated, this is grossly inappropriate. The Commissioner of Corrective Services is *not* a court of law. He is not a judicial officer. He is an administrator. He is not the appropriate person to decide who is and who is not a terrorist. Nor is the Commissioner the competent authority to decide who is and who is not a 'special risk to national security'.

20. In relation to practice and procedure, Commissioner Woodham, in evidence to the Standing Committee, outlined the extreme consequences of an AA classification.[12] In summary, according to Hagbarth Strom:[13]

> ...another alarming effect of the regulation is that Category AA prisoners are subjected to a severe form of segregation. Prisoners are not allowed any contact visits unless it is "deemed safe", and all mail not to or from defined 'exempt bodies' is screened. Furthermore, "AA inmates would have no recourse to the 'official visitor' provisions available to other NSW prisoners".[14] As a result, remand prisoners wrongly accused of terrorist offences could be held in isolation for long periods of time with limited access to lawyers and other aid.

21. These conditions become even more outrageous when it is observed that Commissioner Woodham, in evidence to the Standing Committee, acknowledged that all terrorist suspects are *automatically* classified as Category AA inmates.[15]

22. This is extremely disproportionate and a gross violation of civil rights. It amounts to inmate classification *by offence charged*, rather than by *risk assessment* on a case-by-case basis. There is no rational reason why all terrorist suspects or offenders necessarily represent an *actual* risk to the general prison population or staff. There is also no rational reason why they need to be detained in 'special facilities'. The UN Human Rights Committee has made it very clear that this kind of confinement is only to be used in 'exceptional circumstances'.[16] These conditions are not rationally connected to any legitimate aim. They are disproportionate. As such, **the automatic classification of terrorist suspects and offenders as Category AA inmates is arbitrary and a violation of fundamental civil rights**.

[12] Evidence (8 December 2005), n 5, 39-40.
[13] in an upcoming CCL background paper on prisoners' rights.
[14] Stephen Gibbs 'Top gaol rating for terrorism suspects', *Sydney Morning Herald* (Sydney), 30 October 2004, 6.
[15] Evidence (8 December 2005), n 5, 39.
[16] UN Human Rights Committee, *Concluding Observations on Denmark* (1996) UN Doc CCPR/C/79/ADD.68, [12].

23. Furthermore, this inmate classification-by-offence exposes independent organisations outside the Department of Corrective Services to accusations of corruption. For example, the DPP and police are open to accusations that they have charged someone with a terrorist offence in order to ensure that person is classified as a "Category AA" inmate.

24. CCL is also concerned about the use of orange uniforms for terrorist suspects. The UN Standard Minimum Rules state that (italics added):

> 17(1): Every prisoner who is not allowed to wear his own clothing shall be provided with an outfit of clothing suitable for the climate and adequate to keep him in good health. *Such clothing shall in no manner be degrading or humiliating*.

As in the case of access to fresh air, the Australian Standard Guidelines conveniently leave out that last sentence.[17]

25. There is absolutely no rational reason why terrorist suspects or offenders, especially remand inmates, should wear a different uniform from other inmates. Given the obvious connotations of the US military's detention camp at Guantanamo Bay, this amounts to degrading and humiliating clothing. This unnecessary practice should cease immediately.

26. Perhaps more significantly, Article 7 of the ICCPR prohibits 'cruel, inhuman or degrading treatment'. National security can *never* be used to excuse cruel, inhuman or degrading treatment.[18] The use of orange uniforms can only serve to humiliate and degrade the inmate, who must be presumed innocent. It is not reasonable to argue that these orange uniforms in some way preserve and protect Australia's national security. CCL submits that the use of these bright orange uniforms constitutes degrading treatment, in violation of the *International Covenant on Civil and Political Rights*.

Categories AA and 5 should be removed from the Regulations. There is no rational reason to treat those suspected or convicted of terrorist offences in a manner different from people suspected or convicted of other crimes. National security is not a legitimate ground upon which to discriminate against remand inmates.

If the Categories are to remain, then terrorist suspects must not be automatically classified as Category AA or Category 5 inmates. This automatic classification is arbitrary and violates the individual's right to the presumption of innocence. It also amounts to inmate classification by offence charged, rather than on an objective case-by-case basis.

The use of orange prison uniforms for inmates suspected or convicted of terrorist offences is degrading and humiliating and should cease immediately.

[17] *Standard Guidelines for Corrections in Australia*, n 4, [5.50].
[18] ICCPR Article 4(2).

3 Interstate Transfer of Offenders and Parolees

3. The inter-state transfer of Offenders and Parolees with regard to:
a. Communication and agreement between Authorities
b. Ministerial sign-off under the Acts and informal arrangements made between jurisdictions.

3.1 Background

27. The issue of interstate transfer of offenders and parolees came to light in New South Wales because of the "informal" transfer of a particular child sex offender on parole from Western Australia to New South Wales in 2005.

28. Up to the present time, an agreement has existed between the authorities in each state and territory that transfers would be allowed between states and territories prior to the Minister formally "signing off" on the transfers. In other words, parolees could be transferred before a formal order for their transfer had to be made. This meant that once the relevant authorities in the transferring state and the receiving state had determined that a prisoner was entitled to be released on parole and that it was appropriate that their parole be served in another state or territory, their release did not have to be delayed pending formal approval by the Minister.

29. The agreement that existed across the jurisdictions for the transfer of the supervision prior to the formal transfer of the parole order involved an exchange of documentation, approval by the district manager of the receiving office, and a home visit assessment. In the case of a serious offender, including a child sex offender, specific guidelines were in place to ensure that prior to the person arriving at the receiving district office, the chain of command was informed and appropriate supervision of the case management of the person in the community was in place.

3.2 The New Regime

30. As CCL understands it, following media interest in the incident of the child sex offender being transferred from Western Australia to New South Wales and incidents in other jurisdictions, the state and territory authorities have determined to formalise all transfer procedures. The new system will mean that when an offender applies to transfer across a border, if the parole authority in the receiving state or territory makes a decision to agree, the transfer will not take place until the Minister has formally singed off on the transfer order. The new regime will also spell the end of temporary transfers, which have had particular application to indigenous offenders.

31. NSW is chairing a National Working Party in 2006 to develop standard guidelines for the transfer of parolees between jurisdictions. The Working Party is also to consider how to deal with short term interstate transfers, in particular for transient indigenous offenders. It will also consider how to incorporate risk assessment processes for the termination of transfers – that is, with regard to people who have been transferred, but whose parole supervision has been terminated.

32. At the hearing of the inquiry of the operations and management of the Department of Corrective Services on 8 December 2005 (the Inquiry), the Commissioner of Corrective Services in NSW gave evidence that an in principle agreement had been reached between the administrators across the jurisdictions in relation to the transfer of high risk prisoners and people charged with terrorist offences interstate without warning in order to be able to "disrupt the plans of people involved in threats to national security".

33. As CCL understands it, all requests for supervision of all categories of parolees in NSW other than child sex offenders by an interstate authority will be co-ordinated centrally by the sentence administration branch in NSW head office. Prior to the approval being granted, the interstate authority must contact the Director of Sentence Administration.

34. The NSW Community Offenders' Services (COS) must not supervise any new interstate parolee without a transfer being approved by the Commissioner under any circumstances. All correspondence and approvals will be processed and retained by the Director of Sentence Administration.

35. In relation to interstate transfer of parolees from NSW, an inmate's request to reside interstate will not be recommended for approval unless, first, the request for registration of a transfer parole order has been agreed to by the other state or territory, and, second, the registration of the order on the date the inmate attends the approved corresponding district office of the other state or territory. No registrable offender parolee included under the *Child Protection Act 2000* will be eligible for interstate transfer.

36. Once confirmation has been registered interstate, the District Office will be advised by Sentence Administration that the parole order can be discharged. When a parolee requests to reside in another state or territory prior to the expiration of their parole order, similar steps are to be followed.

37. While the new regime will require Federal legislative amendment, there has been a tightening up of the previous informal arrangements since the NSW/WA incident in 2005.

3.3 Concerns

38. CCL's concerns may be summarised as follows:

    (1) the new regime will result in higher prisoner populations

    (2) the new regime will result in some prisoners having to serve the whole of their sentences in gaol when they would otherwise be suitable for release on parole, creating injustice

    (3) the ban on transferring certain categories of prisoners may increase their risk of re-offending

    (4) the ban on temporary transfers will mean an increase in indigenous prisoners in gaol

3.3.1 Higher Prisoner Population

39. At the hearing of the Inquiry, the Commissioner confirmed that the new regime would mean a reduction in the movement of child sex offenders around Australia. He said "I do not think you are going to find many, if any, states that are going to take anyone else's child sex offenders".[19] He did not, however, think there would be a decrease in transfers in relation to other crimes.

40. The evidence at the Inquiry was that from 1 July 2005 to 31 October 2005 there were a total of 58 incoming parolee transfers to New South Wales and 63 outgoing. The total of transfers from 1 July 2004 to 31 December 2005 was 221 incoming and 275 outgoing. This suggests that there has been a significant decrease in transfer numbers since the tightening up of the regime. There is therefore concern that there will be a decrease across the board of parolee transfers, not just for child sex offenders.

41. Under the existing legislation, the informal or temporary transfer arrangements meant that parolees were transferred first (once it was agreed between the interstate authorities that transfer was appropriate) and the formal order was made later. Under the new regime the parolee must wait until formal order is made before being transferred. Everything must be approved before any parolee is moved.

42. This means that prisoners who have been found suitable for release on parole will be incarcerated in gaol pending the formalisation of their transfer. They will therefore be in gaol for longer, which will increase prison populations, particularly in NSW, given the higher prison population in this State.

[19] Evidence (8 December 2005), n 5, 23.

3.3.2 Injustice for Some Prisoners

43. In the case of child sex offenders, the banning of interstate transfers will mean that people who would otherwise have been suitable for release on parole in a state or territory other than the one in which they are incarcerated will have to have to serve the whole of their sentences inside gaol. Apart from creating injustice for those people, this will also mean an increase in prison populations.

3.3.3 Risk of Re-offending

44. Where a child sex offender is incarcerated interstate and assessed as suitable for release on parole but their support base, family, connections to the community and work prospects are in NSW, it would clearly be preferable for them to be transferred for release on parole to NSW. If they were released within the state where they were incarcerated, they would have no community support and less chance of being monitored by family and friends, which would place them at a higher risk of re-offending. This would clearly be undesirable.

3.3.4 Impact on Indigenous Prisoners

45. The ban on temporary transfer of parolees will have a particular impact upon transient indigenous prisoners, meaning that indigenous people will remain incarcerated in prison when they should be released on parole. This is insupportable under circumstances where there is already a gross over-representation of indigenous people within the prison population.

46. Further, because of the over-representation of indigenous people in prisons, any increase in the prison population will have a disproportionate impact upon indigenous people in gaols across Australia.