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3 August 2006

Legislative Council  
General Purpose Standing Committee No. 3  
Parliament House, Macquarie Street  
Sydney NSW 2000

Dear Committee

**The Correctional Services Legislation Amendment Bill 2006 (NSW) and international human rights standards**

I am writing to you on behalf of Australian Lawyers for Human Rights (ALHR) to express concern over the proposed Correctional Services Legislation Amendment Bill 2006 (NSW) (the Bill).

ALHR is a network of Australian lawyers active in practicing and promoting awareness of international human rights standards in Australia. We have a national membership of over 1000 people, with active National, State and Territory committees. ALHR promotes the practice of human rights law in Australia through the implementation of international human rights standards within the domestic setting.

In accordance with our mandate, we have identified several concerns raised by the Bill in relation to international human rights standards provided for in international treaties such as the International Covenant on Civil and Political Rights (the ICCPR), to which Australia is a party, and more general, widely accepted human rights principles.

**1. Violations of the International Covenant on Civil and Political Rights**

*(a) Violation of article 7 of the ICCPR – cruel and inhuman treatment*

The Bill makes it an offence for a serious indictable offender to provide their reproductive material for storage (section 72(B)(3)). This prohibition applies to men, women, adults and juveniles. The effect of the prohibition is that in cases where treatment for serious medical conditions may affect a prisoner's fertility, they are no longer able to have their reproductive material stored prior to treatment. The result of this prohibition is that individuals (including juveniles) with a medical condition requiring treatment may lose their capacity to have children in the future.

We are concerned that the proposed section of the Bill violates several provisions of the ICCPR.

Firstly, the prohibition on the storage of the reproductive material of these offenders may amount to a cruel and inhuman punishment, thus violating article 7 of the ICCPR. The Committee should note that the UN Human Rights Committee (the HRC) has stated that the aim of this provision is to protect both the dignity and the physical and mental integrity of the individual (General Comment 20, para. 2). The HRC further emphasises that the prohibition in article 7 applies not only to acts that cause physical pain but also to acts that cause mental suffering to the victim (General Comment 20, para. 5). The HRC notes that this prohibition extends to, and includes, excessive chastisement ordered as punishment for a crime or a disciplinary measure. Finally, it should be noted that the HRC categorically affirmed the application of article 7 to the protection of children. Australia, in recognising its obligations under international human rights law, has incorporated article 7 within domestic law under Article 1 of the Crimes (Torture) Act 1988 No. 148 of 1988 – SCHEDULE.

We submit that by removing the possibility of having reproductive material stored for offenders undergoing medical treatment, the Bill may have the effect of causing mental suffering and unduly impinges on the right for a prisoner to have his/her dignity and physical and mental integrity protected. Moreover, this prohibition, in effect, amounts to an additional punishment above and beyond the original sentence which would further violate article 7.

*(b) Violation of article 23 of the ICCPR – right to found a family*

Article 23 of ICCPR protects the right of men and women of marriageable age to marry and to found a family. In particular, the Human Rights Committee has stated that this protection implies the protection of “the possibility to procreate” (General Comment 19, paragraph 5). The HRC further stipulates that State “family planning policies...should...not be discriminatory or compulsory.” In prohibiting the storage of prisoners’ reproductive material the Bill may be regarded as denying individuals’ rights to procreate on a discriminatory and compulsory basis.

*(c) Violation of article 15 of the ICCPR – additional penalties after sentence*

Article 15 of the ICCPR stipulates that no heavier penalty can be imposed than the one that was applicable at the time when the offence was committed. We submit that the inclusion of section 72(B)(3) would amount to an additional penalty being imposed on these offenders.

*(d) Violation of article 10(1) of the ICCPR – concerning individuals deprived of liberty*

Finally, article 10(1) of the ICCPR has been noted by the Human Rights Committee to have a complementary relationship with article 7 (General Comment 21, para. 3), discussed above. It provides a positive obligation on States Parties that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. The HRC has stated that persons deprived on their liberty must enjoy all the rights provided for in the Covenant, subject to the restrictions that are unavoidable in a closed environment (General Comment 21, para. 3). We submit that fundamental human rights standards such as the right to reproduce, the right to be treated with humanity and respect for human dignity, are being impermissibly violated by this Bill.

## **2. Inconsistencies with other international standards**

In addition to binding international human rights legal instruments such as the ICCPR, there are several non-binding international instruments which are of relevance to the Bill. It should be noted that although these instruments are non-binding in a strictly legal sense, they nevertheless reflect international consensus on particular standards.

*(a) Inconsistency with UN Standard Minimum Rules for the Treatment of Prisoners*

Firstly, of relevance to the Committee are the Standard Minimum Rules for the Treatment of Prisoners (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). In particular, we would like to bring to the Committee's attention rule 24 which requires medical officers to examine every prisoner with a view particularly to the discovery of physical or mental illness and the *taking of all necessary measures*. We submit that the taking of all necessary measures would include an assessment of the potential impact of medical treatment on a prisoner's fertility and the taking of necessary precautions to prevent the negative effects of a particular treatment. As a result, we believe that the proposed prohibition contained in the Bill would be a violation of this rule.

*(b) Inconsistency with the International Conference on Population and Development*

Regarding reproductive rights more generally, we would like to draw the Committee's attention to the International Conference on Population and Development, held in Cairo in 1994. During this Conference, in which Australia played an active, constructive and innovative role, it was concluded that reproductive rights embrace certain human rights which are already recognised in international human rights instruments. These rights rest on the recognition of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents. Again, we submit that the proposed Bill contravenes these fundamental human rights principles.

*(c) Inconsistency with the Beijing Rules*

In relation to the proposed amendment of the Children (Detention Centres) Act 1987, to conform with the Bill, we would like to refer the Committee to the Beijing Rules (the United Nations Standard Minimum Rules for the Administration of Juvenile Justice Adopted by General Assembly resolution 40/33 of 29 November 1985). The Beijing Rules state that the objectives of institutional treatment of juveniles is to provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society. These juveniles shall receive care, protection and all necessary assistance-social, educational, vocational, psychological, medical and physical-that they may require because of their age, sex, and personality and in the interest of their wholesome development. We submit that the failure to provide juvenile prisoners' with the capacity to store reproductive material which could be materially damaged as a result of medical treatment, is a violation of the fundamental principles underlying the Beijing Rules. The Bill would have a life-long effect on juvenile prisoners and is not in conformity with the principle that incarceration is an opportunity to assist prisoners' in developing the capacity to resume socially constructive and productive roles in society following the end of their incarceration.

*(d) Inconsistency with the United National Principles of Medical Ethics relevant to the Role of Health Personnel*

Lastly, we would like to alert the Committee to the difficult position this Bill places on medical practitioners with dual obligations to best meet the needs of their patients and to comply with legislative requirements. We would like to direct the Committee's attention to the United Nations Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or

Degrading Treatment or Punishment (adopted by General Assembly resolution 37/194 of 18 December 1982). There are several principles that would be contravened by medical practitioners complying with the prohibition provided for in s 72(B)(3) of the Bill.

Principle 1 provides that Health personnel, particularly physicians, charged with the medical care of prisoners and detainees have a duty to provide them with protection of their physical and mental health and treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained. As the prohibition on the storage of reproductive material does not apply to non-prisoners, health professions would be violating Principle 1 by complying with the Bill.

Principle 2 states that it is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment. As we have submitted that the Bill may amount to cruel, inhuman or degrading treatment, the Bill would make health professions in the correctional justice system complicit in such acts, contravening fundamental human rights standards.

Finally, principle 4(b) states that it would be a contravention of medical ethics for health personnel to certify, or to participate in the certification of, the fitness of prisoners or detainees for any form of treatment or punishment that may adversely affect their physical or mental health and which is not in accordance with the relevant international instruments, or to participate in any way in the infliction of any such treatment or punishment which is not in accordance with the relevant international instruments. We strongly submit to the Committee that compliance with the Bill would, in this case as well, violate a fundamental principle of medical ethics and human rights.

We ask the Committee to consider the fundamental human rights principles which are in danger of being violated and contravened by the proposed Bill that we have outlined in this submission.

We urge the Committee to recommend that the Bill not be passed.

Yours sincerely,

*by email*

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