

Prisoners and reproductive health services:

Submission to the NSW Legislative Council General Purpose Standing Committee No3

Inquiry into the Correctional Services Legislation Amendment Bill 2006

28 July 2006

Carol Berry
Solicitor - Health Policy & Advocacy

1. Introduction

The Public Interest Advocacy Centre (**PIAC**) seeks to promote a just and democratic society by making strategic interventions on public interest issues.

PIAC is an independent, non-profit law and policy organisation that identifies public interest issues and works cooperatively with other organisations to advocate for individuals and groups affected.

In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program. PIAC generates approximately forty per cent of its income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

2. General comment

PIAC is concerned by the introduction of the Correctional Services Legislation Amendment Bill 2006 (**the Bill**) because it considers the Bill to be a regressive step in the recognition of each citizen's right to access health care and health care procedures. Although those incarcerated are being punished by the state, prisoners are still citizens, whether it is politically expedient to acknowledge this or otherwise.

PIAC is concerned that the State Government is seeking to enact legislation to discriminate against a certain category of citizens in regard to their access to a certain kind of health care procedure. The impact of the proposed discrimination is to effectively impose a serious life-long penalty. This is not a precedent that PIAC believes ought to be enshrined in legislation in any jurisdiction.

3. The Correctional Services Legislation Amendment Bill 2006

The objects of the Correctional Services Legislation Amendment Bill 2006 are to:

- prohibit inmates who are serving sentences for serious indictable offences or who are awaiting sentencing for such offences from providing their reproductive material for use, or storage, for reproductive purposes at hospitals and other places, and
- require inmates who have had their reproductive material stored for reproductive purposes to pay charges for the storage during any period during which they are imprisoned.

It appears that this Bill was introduced as a reaction to a controversial political issue that arose back in early May 2006 when a story broke in *The Daily Telegraph* about a convicted gang rapist who had sperm frozen before he began chemotherapy for Hodgkin's disease.¹

If this Bill is in fact a reaction to a political issue causing the State Government some embarrassment, PIAC would urge against enacting legislation with serious human rights implications.

This Bill, if enacted, will have broad-reaching consequences, especially on reforming prisoners, on prisoners incarcerated as children, as well as those whose conviction may be overturned on appeal. In PIAC's view, if enacted, this Bill will result in unfair, discriminatory and unintended consequences.

4. The infringement of the right to health care and the right to found a family

This Bill will place treating doctors in a difficult position where they will have to refuse prisoners medical care that they would otherwise feel ethically bound to provide.

The AMA position statement on the Health and Care of Prisoners and Detainees (1998) states:

Medical practitioners should not deny treatment to any prisoner or detainee on the basis of their culture, ethnicity, religion, political beliefs, gender, sexual orientation or the nature of their illness. 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.²

In PIAC's view, the law of New South Wales should maintain the same standard.

The Bill raises a number of important human rights considerations. International human rights instruments related to the health of prisoners are underpinned by the requirement that everyone deprived of his or her liberty is to be treated with humanity and with respect for the inherent dignity of the human person. The provision of health care to prisoners is expected to be equivalent to the standard of care available in the community.

As it stands, if the Bill is passed, it will contravene Article 12 of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, to which Australia is a signatory, recognises the right of everyone to 'the enjoyment of the highest attainable standard of physical and mental health'. The UN General Comment on the right to health outlines that this includes the right to control one's health and body, including the right to reproductive freedom.

Section 72A of the *Crimes (Administration of Sentences) Act 1999* (NSW/Cth) outlines that:

An inmate must be supplied with such medical attendance, treatment and medicine as in the opinion of a medical officer is necessary for the preservation of the health of the inmate, or of other inmates and of any other person.

Additionally, the right not to receive punishment in addition to that ordered by the Court in sentencing is a fundamental human right, recognised under Australian common law, and enshrined in Article 14(7) of the *International Covenant on Civil and Political Rights (ICCPR)*.

¹ *The Daily Telegraph* (Sydney) 12 May 2006.

² Australian Medical Association, Position Statement: *Health Care of Prisoners and Detainees* (1998) <<http://www.ama.com.au/web.nsf/doc/SHED-5G4V6U>> at 25 July 2006.

5. The purpose of imprisonment and punishment and the criminal justice system

One of the key reasons as to why defined sentences form an integral part of the criminal justice system is that punishment for offences should not be indefinite.

Similarly, inherent in the criminal justice system is the belief that offenders can be reformed.

This Bill flies in the face of these two important fundamental precepts of the criminal justice system in this State.

Firstly, prohibiting a certain class of inmates from providing their reproductive material for use or storage prior to receiving medical treatment that affects their reproductive capacity means that the State is aiming to prohibit those persons from ever going on to become a parent. For most of us, the chance of one day becoming, or choosing to become a parent, is one of our basic human wishes. Proposing to legislate to take this option away from a certain category of citizens is a regressive, cruel and inhumane development in our Parliament. This is a life-long, and indefinite punishment, one that Governments and the criminal justice system in this country quite properly refuses to embrace.

Secondly, to argue that someone should never have the right to parent on the basis of their offence, which is the essence of this Bill, runs in contradiction to the belief that offenders can be reformed. We must not lose sight of the principle that offenders can recognise and alter their offending behaviour. The system, by setting limited-term sentences and providing a range of rehabilitation services in prisons, chooses to give offenders a second chance to exist as a law-abiding citizen within the broader community, and to return to them all the rights they possessed before they engaged in offending behaviour. The freedoms which may be exercised post-release should include the chance to one day be a parent.

6. Conclusion

This Bill, if enacted, will discriminate against a certain group of offenders in terms of the health care and treatment that will be provided to them. This creates a precedent that will allow differentiated health care treatment for prisoners as compared with the rest of the community. In broad policy terms, this differentiated standard of treatment is inappropriate and unacceptable in a civilised society.

The essence of this Bill is that one set of individuals, due to their offence, is not entitled to the same level of access to treatment, or the right to parent, as the rest of the community. This is a dangerous precedent to have enshrined in legislation.

As has been outlined by Michael Levy in the publication 'Prisoners as Citizens':

Most criminal justice systems in Australia subscribe to a rehabilitative model of justice, even if political expediency promotes the retributive model through the mass media to the general public.³

³ Michael Levy, 'Prisoners right to health and safety', in D. Brown & E. Wilkie (Eds) *Prisoners as Citizens* (2002) 240, 253.