

***Human Rights and Equal Opportunity Commission***

**Submission to the NSW Legislative Council General  
Purpose Standing Committee No 3**

**Inquiry into the Correctional Services Legislation  
Amendment Bill 2006**

**26 June 2006**

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**Introduction**

1. The Commission thanks the Committee for its invitation to make a submission to the Inquiry into the Correctional Services Legislation Amendment Bill 2006 (the Bill).
2. The Human Rights and Equal Opportunity Commission (the Commission) is established by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act). It is Australia's national human rights institution.
3. The Commission's relevant functions are set out in s 11 of the HREOC Act and include the power to promote an understanding and acceptance, and the public discussion, of 'human rights' in Australia.<sup>1</sup>
4. 'Human rights' are defined for the purpose of the HREOC Act to include the rights set out in the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC).
5. The Commission also has functions in relation to the International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD).<sup>2</sup>

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<sup>1</sup> Section 11(1)(g) of the HREOC Act.

<sup>2</sup> Section 20(1) of the *Racial Discrimination Act 1975* (Cth).

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6. Further, in relation to the human rights of Aboriginal and Torres Strait Islander peoples the Commission must also have regard to the International Covenant on Economic Social and Cultural Rights (ICESCR).<sup>3</sup>
7. This submission focuses on Schedule 1 of the Bill, which seeks to amend the *Crimes (Administration of Sentences) Act 1999* by introducing, amongst other provisions, section 72B(3). The effect of section 72B(3) is to make it a criminal offence for a 'serious indictable offender' to provide and store reproductive material while serving a sentence.
8. This submission also discusses Schedule 2 of the Bill, which seeks to apply section 72B(3) to juvenile offenders.

### **Australia's human rights obligations regarding prisoners**

9. Article 10(1) of the ICCPR requires that all persons deprived of their liberty must be treated with humanity and respect for their inherent dignity. Article 37(c) of the CRC is similar to article 10(1) of the ICCPR and reads as follows:

Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person and in a manner which takes into account the needs of persons of his or her age...  
(Article 37(c))

10. There are several United Nations instruments that assist in the interpretation of article 10 of the ICCPR and article 37(c) of the CRC. One of those instruments is the United Nations *Basic Principles for the Treatment of Prisoners* which states that:

Prisoners shall have access to the health services available in the country **without discrimination on the grounds of their legal situation**. (Principle 9 – emphasis added)

11. In addition, 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 and Degrading Treatment or Punishment* (Medical Ethics Principles) states 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 treatment of disease of the **same quality and standard as is afforded to those who are not imprisoned or detained**. (Principle 1 – emphasis added)

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<sup>3</sup> Section 46C(4) of the HREOC Act.

12. Article 12(1) of ICESCR requires Australia to ensure that all persons can enjoy the right to health:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the **highest attainable standard** of physical and mental health. (Article 12(1) – emphasis added)

13. The provisions of ICESCR are also reflected in article 24(1) of the CRC. In addition, article 3(1) of the CRC requires that the best interests of the child be a primary consideration with respect to laws impacting on children.

14. The United Nations Committee on Economic, Social and Cultural rights has considered the scope of the right to health in its General Comment 14. The Committee has explicitly noted that the right to health includes reproductive rights:

The right to health is not to be understood as a right to be *healthy*. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including **sexual and reproductive freedom**, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides **equality of opportunity for people to enjoy the highest attainable level of health**. (General Comment 14, paragraph 8 – emphasis added)

Reproductive health means that women and men have the freedom to decide if and when to reproduce and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice... (General Comment 14, footnote 12).

15. In addition, article 23(2) of the ICCPR protects the right of every person to found a family.
16. Article 14(7) of the ICCPR protects all persons against being punished twice for the same crime (double jeopardy).

### **Inconsistencies between the Bill and Australia's human rights obligations to prisoners**

17. The Commission understands that any male person in Australia has the right to collect sperm and store it for a yearly fee. The Commission also understands that it is common practice for a medical practitioner to offer a post-pubertal male the option of storing semen in the event that his reproductive organs may be damaged in the course of medical treatment. In the case of women, there are medical procedures available to assist in the storage of embryos.

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18. The proposed section 72B(3) makes a specific distinction between the rights of a 'serious indictable offender' serving a sentence in NSW and all other persons in Australia regarding access to health services. In the Commission's view this is inconsistent with article 12(1) of ICESCR as well as article 24(1) of the CRC.
19. In addition, the criminalisation of behaviour which is intended to preserve the reproductive rights of persons while in prison, offends the human dignity of those individuals. In the Commission's view this is inconsistent with article 10(1) of the ICCPR and article 37(c) of the CRC.
20. Further, section 72B(3) may amount to a second punishment for the original 'serious indictable offence' and therefore contravene the principle of double jeopardy. This is also inconsistent with human rights principles, particularly article 14(7) of the ICCPR.
21. Finally, the practical effect of section 72B appears to be that doctors treating 'serious indictable offenders' will be prevented from complying with their obligations under Principle 1 of the UN Medical Ethics Principles.

**Discrimination against Indigenous People, people with mental illness and people with intellectual disability**

22. Article 2(1) of the ICCPR requires that all rights in that treaty be enjoyed without discrimination on the basis of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or **other status**' (emphasis added). There are similar protections in article 2(2) of ICESCR and article 2(1) of the CRC.
23. Article 5(e)(iv) of ICERD protects against racial discrimination in the 'right to public health, medical care, social security and social services' and article 2(1)(c) of ICERD requires Australia to eliminate racial discrimination and 'to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.'
24. The Commission is concerned that the provisions in the Bill may be discriminatory in their application to Indigenous peoples, people with mental illness and people with intellectual disability because those groups are overrepresented in prison populations and therefore the proposed provisions will have a disproportionate impact on them.
25. While the Commission has not located statistics specifically relating to 'serious indictable offenders' in NSW, as at 30 June 2005 there were 5,656 Indigenous People in Australian prisons or 22% of the total prison population.<sup>4</sup> In 2003, The Australian Bureau of Statistics estimated that

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<sup>4</sup> ABS, Prisoners in Australia, 2005. Series cat. no. 4517.0, Commonwealth of Australia, Canberra, 2005.  
<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4517.0Main+Features12005?OpenDocument>

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Indigenous persons were 16 times more likely to be in prison than non-Indigenous persons.<sup>5</sup>

26. According to the NSW Law Reform Commission people with intellectual disability are detained at a rate four times greater than that of the general population.<sup>6</sup> In 1996, the NSW Law Reform Commission estimated that in NSW people with intellectual disability make up between 1% and 3% of the general population, but represent between 9% and 13% of the total NSW prison population.<sup>7</sup> A survey of NSW prisons in 2001 by the NSW Corrections Health Service found that approximately 11% of women and 11% of men were determined to have either an intellectual disability or were functioning in the borderline range.<sup>8</sup>
27. Studies also indicate high incidences of mental illness on admission to prison and high rates of prior treatment and assessment. A 2001 study by the Schizophrenia Fellowship of NSW suggests that 60% of people admitted to prisons have an active mental illness.<sup>9</sup> The NSW Corrections Health Service also conducted a survey which revealed that 54% of women and 41% of men reported that they had received some form of psychiatric treatment or assessment for an emotional or mental health problem at some point in their lives. Approximately one third of these people had been previously admitted to hospital as a psychiatric inpatient.<sup>10</sup>
28. The potentially disproportionate impact of the Bill's provisions on these three groups may amount to a breach of article 2(1) of the ICCPR, article 2(1) of the CRC, article 2(2) of ICESCR and, in the case of Indigenous Peoples, articles 5(e)(iv) and 2(1)(c) of ICERD.

## Conclusion

29. Due to the numerous human rights concerns raised by the Bill, the Commission urges the Committee to recommend that the Bill not be passed.

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<sup>5</sup> ABS, Prisoners in Australia, Series cat. no. 4517.0, Commonwealth of Australia, Canberra, 2003 p.5.

<sup>6</sup> NSW Law Reform Commission (1996). Report 80: People with intellectual disability and the Criminal Justice System. Available at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R80TOC>

<sup>7</sup> NSW Law Reform Commission (1996). Report 80: People with intellectual disability and the Criminal Justice System.

<sup>8</sup> Butler T, Milner L. (2003) The 2001 New South Wales Inmate health Survey. Corrections Health Service, Sydney.

<sup>9</sup> Schizophrenia Fellowship of NSW Inc. (2001) Report on the criminal justice system in Australia.

<sup>10</sup> Butler T, Milner L. (2003) The 2001 New South Wales Inmate health Survey. Corrections Health Service, Sydney.