

27 July 2006

General Purpose Standing Committee No. 3
Parliament House
Macquarie St
Sydney NSW 2000

The New South Wales branch of the Public Health Association Australia (PHAA) submission to the Parliamentary Inquiry: Correctional Services Legislation Amendment Bill 2006

The PHAA NSW welcomes the opportunity to present their concerns to this Parliamentary Inquiry on the Correctional Services Legislation Amendment Bill 2006.

Parliamentary Inquiry: Correctional Services Legislation Amendment Bill 2006

Summary:

It would appear that the amendments to the Correctional Services Legislation Bill 2006 have not been given due consideration and this Bill has no other merits or benefits. In contrast, it has a number of major flaws one of which would have a direct affect on Physicians treating this group of patients. The Bill risks causing inmates to become irreversibly infertile even though they may later be found not guilty or be released much earlier than initially anticipated. The Bill is unfair to inmates incarcerated as juveniles. Laws such as this based on individual cases often turn out to be very problematic. The Bill is scientifically flawed as it prohibits an act (storage of ova which cannot be carried out). The Bill infringes a fundamental concept of incarceration that offenders are sent to prison as punishment and not for punishment. It also infringes a fundamental concept of medical care of prison inmates that medical care of inmates must be equivalent to care in the community. Further, it infringes a requirement that doctors must always try to minimise the side effects of medical treatment. Medical practitioners complying with this Bill may be breaching other laws. The Bill has been harshly criticised by major medical and legal professional organisations. Some Health Areas in New South Wales do not charge for the service of sperm storage in the community but all inmates would be charged for this service.

Background to the Correctional Services Legislation Amendment Bill (2006):

After a newspaper published private details about the medical treatment of an inmate, the NSW Government hastily drafted this Bill.

Sperm is currently stored when members of the general community are undergoing treatment for cancers or similar conditions because cancer treatments often cause temporary or permanent infertility. Consistent with this medical practice in the

community, sperm is currently stored when prisoners undergo similar treatments. It is not currently the practice in NSW to store the sperm of male prisoners in any other circumstances.

In NSW, Justice Health is part of NSW Health Department and provides medical and other health services to those within the jurisdiction of the NSW Department of Corrective Services (i.e. in prison, on remand or under sentence, or held awaiting appearance, pending bail etc). Justice Health has its own Board and CEO and reports to the Minister of Health (while the Department of Corrective Services reports to the Minister for Justice). The provision of health services to inmates by the Department of Health rather than the Department of Corrective Services is becoming more common in other developed countries and is generally regarded as a superior arrangement.

Estimation for private fees for storing sperm is \$250 per year; however, some health services do not charge patients in the community for these storage costs.

What are the issues?

- 1) **Irreversibility of infertility for inmates who might be released early:** The legislation at present would cover inmates on remand – i.e. individuals who have not as yet been sentenced. These inmates may later be found by the courts to be not guilty and released. But because of this Bill, these individuals might become permanently sterile after developing a condition (such as leukaemia, lymphoma, or testicular cancer) while in custody.
- 2) **Unfair to juvenile inmates:** As drafted, the legislation will apply to inmates incarcerated as children.
- 3) **Laws based on individual cases often problematic:** This Bill came about in response to publicity about an individual inmate. It is generally accepted that laws based on an individual case are often problematic.
- 4) **The Bill is scientifically seriously flawed.** The Bill as drafted pertains to males and females but as at present there is in no known technology for storing ova. Thus the Bill prohibits something that does not exist.
- 5) **Infringes fundamental concept of incarceration:** It is generally accepted that offenders are sent to prison ‘as punishment and not for punishment’. Offenders receive their punishment from the sentence handed down by the courts. The treatment they receive while in prison should not reflect their punishment.
- 6) **Infringes fundamental concept of medical care of prison inmates:** The international convention, also accepted in Australia, is that medical treatment of prisoners and other detainees must be equivalent to care provided to citizens

in the community. An Australian Medical Association (AMA) Position Statement on the Health 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."

- 7) **Infringes requirement that doctors always minimise side effects of medical treatment:** Although some argue that the storage of sperm is not a "treatment issue", medical practitioners are always required to prevent, as far as it is possible to do so, untoward side-effects of treatment.
- 8) **Medical practitioners complying with this Bill may be breaking other laws:** Medical practitioners may be legally liable under this legislation for not providing evidence based treatment. Associate Professor, Dr. Sandra Egger, and Head of the School of Law, UNSW, advised that medical practitioners would be liable for "aiding, abetting, counseling and procuring". She noted:

"An important issue justifying the opposition of the Bill by medical practitioners relates to the legal ramifications they alone will have to face. Under statute, they must not offer the treatment. On ethical grounds, they should offer the treatment. Under tort law (duty of care) they must offer the treatment".

A medical practitioner who declines to offer the treatment because of the risk of criminal prosecution may still be liable in tort and may be exposed to the payment of large compensatory damages. It is difficult to know which of these conflicting laws would prevail and what the legal position of the doctor would be.

A medical practitioner who offers the treatment can be prosecuted and sentenced to imprisonment. They will not be liable in tort, but they will have a criminal record.

This would put medical practitioners in a difficult situation - committing a crime if they offer the service and guilty of failing to fulfill their duty of care if they do not. All those involved would be employees of NSW Health - which covers the indemnity of these doctors.

Further medical arguments against the legislation include:

- Creates a precedent for discrimination against prisoners in the quality of health care and the treatment alternatives provided;
- May contravene the Commonwealth Disability Discrimination Act;
- By causing a sentence beyond incarceration, constitutes "cruel and unusual medical punishment";
- May result in health services being sued for failure to provide treatment equivalent to that available to other community members ;

- Fails to take into account circumstances where a conviction is overturned on appeal, after the inmate has undergone treatment for cancer without storage of sperm;
- Provides judges with the power to sentence offenders, in effect, to sterility; and,
- Courts might be faced with passing sentence on an individual recently diagnosed with a cancer who, if incarcerated, will not be provided with "medical treatment equivalent to that available in the community". A Court may be reluctant to impose a custodial sentence in such circumstances.

Your consideration of the above suggestions would be greatly appreciated. If you require any further information please contact Ms Mary Osborn on email at mary.osborn@racp.edu.au or by telephone on 02 9256 9606.

Yours sincerely

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PHA NSW branch