

Kariong Juvenile Correctional Centre: countless contraventions of international law

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International law demands that children in detention be treated in a manner different to adults and when confined should have access to specialised programs and support workers to cater for their developmental needs. These fundamental principles along with others were ignored by the decision in November 2004 to transfer the management of Kariong, the maximum security detention centre housing children, from the Department of Juvenile Justice to adult correctional services. Years later, the rights of children continue to be ignored in New South Wales, Australia.

This article explores children's rights in the context of international law, and provides a detailed analysis of possible contraventions relating to the operations of Kariong Juvenile Correctional Centre. It discusses the historic background of Kariong, the nature of the transfer of management and the punitive consequences of the decision. The article postulates that the NSW Government's actions with respect to Kariong were hasty and responsive to media pressure and ignored comprehensive research which could have avoided such drastic changes. The article concludes with some law reform suggestions to counter this regrettable change in policy and practice.

The objective of training and treatment of juveniles placed in institutions is to provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society.

— Rule 26.1, United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 29 November 1985

Introduction

This article focuses on Kariong Juvenile Correctional Centre on the Central Coast of New South Wales, the management of which was transferred from the Department of Juvenile Justice, a specialist children's organisation, to the adult corrections administration of the Department of Corrective Services in November 2004. Kariong

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Juvenile Justice Centre¹ opened in 1991 and was intended to accommodate the most difficult or dangerous in the juvenile system who could not be managed in other centres (NSW Ombudsman 2000, 7). In 2007 Kariong was comprised of 32 people,² with the average number of young people in juvenile detention being 331.³

While 32 people is a relatively small number, given the 9568 people who make up the adult prison population in NSW,⁴ it is important to note that empirical studies of juvenile offenders suggest that, if badly managed, most juvenile offenders will inevitably spend most of their lives in adult prisons for serious offences (Zawitz 1988, 44; Krisberg 2005, 188–90). Viewed from this perspective, these 32 children are important because, if poorly catered for, they could potentially become 32 serious criminals requiring 32 lengthy and expensive trials leading to 32 lengthy and expensive adult sentences. Any short-term decision about their management must be balanced against potential long-term costs to the community and the harmful impact to the child offender.

This article contends that while Kariong Juvenile Correctional Centre houses only a small proportion of detainees and arguably may not be representative of juvenile detention conditions in NSW, the transfer and associated intensification of punishment in Kariong are deeply 'symbolic' of the trend towards 'popular punitiveness' (Pratt et al 2005), leading to countless contraventions of international law. As a result of media attention to *one* incident with *one* detainee, the whole nature and practice of how all juveniles with maximum classification would be treated changed within one week.

Status of international instruments in the context of Australian law

International law is relied upon in this article to establish the framework for assessing the transfer of management of Kariong. International conventions that have been signed and ratified do not automatically form part of the domestic law in Australia unless specifically enacted. They do not operate as a 'direct source of individual rights and obligations'.⁵ Groves (2001) observes that various judicial officers have made comments about the usefulness of international law in developing Australian

1 The Department of Juvenile Justice refers to its Juvenile Detention Centres as Juvenile Justice Centres. The centres are governed by the *Children (Detention Centre) Act 1987*.

2 NSW Department of Corrective Services 2007.

3 NSW Department of Juvenile Justice 2007, 47.

4 NSW Department of Corrective Services 2007.

5 *Minister of State for Immigration and Ethnic Affairs v Teoh*, 1995 (Mason CJ and Deane J).

law, especially where the common law is uncertain.⁶ Whether it is legitimate for the judiciary to incorporate international law as part of the process of domestic adjudication, and whether this usurps the executive's law-making authority, are beyond the scope of this article, but have been addressed elsewhere (Charlesworth et al 2005).

In *Minister for Immigration and Ethnic Affairs v Teoh*, 1995, the High Court dealt with the issue of whether the best interest principle within the Convention on the Rights of the Child (CRC)⁷ could be relied upon, despite the CRC not being incorporated into domestic law, and held that (at [26]):

But the fact that the Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law.

Yet in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*, 2003, the High Court raised serious doubt over the extent to which a ratified but unincorporated international instrument can influence administrative decision making. McHugh and Gummow JJ held that (at [99]):

However, in general, ratification, as an executive act, did not in the domestic constitutional structure thereby confer rights upon citizens or impose liabilities upon them. In that sense the ratified treaty was not 'self-executing' and lacked 'direct application' in that domestic system.

While the High Court in *Lam* did not specifically overrule *Teoh*, it did raise the question about the extent to which unincorporated international instruments can

6 For example, *Cunliffe v Commonwealth* (1994) 182 CLR 272, 297–98 (Mason CJ), 323–24 (Brennan J), 388 (Gaudron J); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38 (Deane and Dawson JJ); *Dietrich v R* (1992) 177 CLR 292, 306 (Mason CJ and McHugh J), 321 (Brennan J), 360 (Toohey J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 29 (Mason CJ), 48–50 (Brennan J), 74–75 (Deane and Toohey JJ).

7 On 17 December 1990, Australia ratified the convention with a reservation to Art 37(c) regarding separate imprisonment of children and adults.

influence administrative decisions, which for the purpose of this article is a question that could be extended to higher level 'executive' decisions, such as the transfer of management for Kariong.

To some extent, the Commonwealth must consider its obligations under international law because instruments such as the CRC are attached to the *Human Rights and Equal Opportunity Commission Act 1986*, which gives it some import for the purposes of the Human Rights and Equal Opportunity Commission (HREOC). In effect, 'this gives HREOC power to investigate complaints that CRC rights have been violated by or on behalf of the Commonwealth or a Commonwealth agency but only in the exercise of a discretion or an abuse of power' (Australian Human Rights Commission 1999, 9). HREOC also has an advisory role to the government through enquiries about human rights complaints and reports which can be sent to the federal Attorney-General and tabled in Parliament.

It is arguable that, despite not being a direct part of domestic law, international law and, in particular, the rights of children do have some direct relevance to Australian legislation so far as discretionary decisions are concerned. However, even if these higher level 'executive' decisions by the Commonwealth could be influenced by unincorporated international instruments and subject to the scrutiny of an international body or a UN treaty body,⁸ the next question would be the extent to which the Commonwealth would be able to bind the state of NSW. Groves (2001) has concluded that 'there are many areas of State responsibility under the Australian Constitution, such as the administration of prisons, in relation to which the States would almost certainly greet any legislative intrusion by the Commonwealth with great hostility'.

It is further accepted that the NSW Government faces the difficulty of practically implementing international law because instruments such as the CRC were drafted for national state parties and not for local level governments operating within a federal system of government (Veerman and Levine 2000, 373).

Despite the apparent obstacles binding the Commonwealth, a 'rights' approach as a framework for law reform is nevertheless adopted by this article because it sets forth the internationally accepted benchmark of what all juvenile justice systems should be moving towards, whether or not Australia has ratified the instrument in question,

8 To date the CRC does not have a complaints mechanism, so the UN Committee on the Rights of the Child (UNCRC) cannot receive or consider complaints. However, the NGO initiative to establish a complaints mechanism was discussed as part of the UNCRC informal meetings during its 47th session. See UN Press Release of 1 February 2008 at <www.unhchr.ch/hurricane/hurricane.nsf/NewsRoom?OpenFrameSet> [2008, February 2].

and irrespective of whether it has been incorporated in domestic law. The use of international law is based on the premise that it is a valuable tool for those seeking to improve the lives of children (Van Bueren 1995, xix).

Consequently, international law requires that countries implement policies and practices according to their resources (Freeman 1996, 4). Article 4 of the CRC places an obligation on state parties to undertake *all* appropriate reforms, declaring:

State parties are required to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, State Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

The Beijing Rules reinforce the state's obligations with respect to the administration of juvenile justice, placing an emphasis on personal development and education, among other things. Both the CRC and the Beijing Rules create a serviceable onus on all state parties to make their juvenile justice policy and practice consistent with international law.

For affluent countries such as Australia, there is an even greater duty of compliance with the principles espoused in the CRC (Hammarberg 1995, xi). In fact, HREOC (1998, 19) submitted to the Joint Standing Committee on treaties that Australia's full compliance with the CRC is both 'realistic and attainable and need not entail a large increase in Government funding'.

Status of children's rights in the context of international law

Embedded in international law is the importance of the rule of law, which has benefits for all people, of all ages. All people are equal before the law. All people have inherent rights and children, as human beings, enjoy the same rights. Therefore, children's rights must be considered in all decision making and be given equal weight to those of adults.

The United Nations General Assembly adopted the CRC in 1989 and it is the most widely ratified human rights treaty in the world, with only two countries — the United States of America and Somalia — declining to ratify it. The CRC includes a whole range of human rights, including civil, political, economic, social and cultural. Articles 37 to 40 of the CRC⁹ set forth specific safeguards for children involved in the juvenile justice system. McDougall and Lam (2005, 39) have observed:

9 Adopted by General Assembly resolution 45/113 of 14 December 1990.

It [the CRC] also places juvenile justice in the context of a comprehensive statement of the place that children should have in all human society — as valued autonomous human beings that require special protections but are also deserving of the same basic human rights and dignities that adults deserve.

Article 1 of the CRC defines a child as ‘every human being below the age of eighteen’. Yet this article adopts the practice that when the word ‘child’ is used, it refers to the age group between 10 and 18. This is because the NSW juvenile justice system applies to persons between the ages of 10 and 18 alleged to have committed an offence.¹⁰ Some external references use the words ‘juvenile, young person, adolescent, youth and minor interchangeably with the word child’ (Van Bueren 1995, 32).

Children in conflict with the law also have access to special protections and rights, as outlined in specific international instruments such as the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh),¹¹ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules),¹² United Nations Economic and Social Council Guidelines for Action on Children in the Criminal Justice System,¹³ United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules)¹⁴ and United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (Rules for Protection of Juveniles in Custody).¹⁵

This article relies on five general international principles that arguably provide for an optimal framework and reform of any juvenile justice system, considered in detail below.

Best interests and evolving capacities

The two main overarching principles in the CRC are the best interests of the child and their evolving capacities, which govern *all* areas including health, education, accommodation and also juvenile justice (Van Bueren 1995, 45). Article 3.1 of the

10 Children under 10 are specifically excluded, as the criminal laws of NSW do not apply to them. This is consistent with international law. See references in Art 6(5) of the International Covenant on Civil and Political Rights and s 11(a) of the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty.

11 Adopted and proclaimed by General Assembly resolution 45/112 of 14 December 1990.

12 Adopted by General Assembly resolution 40/33 of 29 November 1985.

13 Recommended by Economic and Social Council resolution 1997/30 of 21 July 1997.

14 Adopted by General Assembly resolution 45/110 of 14 December 1990.

15 Adopted by General Assembly resolution 45/113 of 14 December 1990.

CRC states that ‘in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’. When a new policy is drafted, such as the transfer of management of a juvenile detention centre to a specialist adult service, the ‘best interests of the child’ should be a primary consideration. The ‘best interests’ principle was recognised in *Teoh*, where the High Court held that (at [34]):

Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention(18) and treat the best interests of the children as ‘a primary consideration’.

The High Court in *Teoh* had qualified this statement earlier at [31], noting that ‘the article is careful to avoid putting the best interests of the child as *the* primary consideration; it does no more than give those interests first importance along with such other considerations as may, in the circumstances of a given case, require equal, but not paramount, weight’ (emphasis added). This approach enables the decision makers to take account of and balance various considerations in a holistic way.

However, despite a holistic approach the term ‘best interests’ is not always clear. Some guidance can be obtained from the UN High Commissioner for Refugees, who developed Guidelines for the Formal Determination of Best Interests of the Child in 2008 (UNHCR 2008, Doek 2007, 34). These guidelines provide rules on how to determine the best interests of the child and who should be the decision maker.

Moreover, Art 5 of the CRC declares that ‘state parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child to provide, in a manner and consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present convention’. Article 5 is foundational to having a separate juvenile justice system, as it recognises that children have not yet reached the maturity of adulthood (Scott 2000). Developmental psychology and related research show that children before 13 years of age do not have the same capacities as adults, and that their capacities generally mature when they are 17 (Lennings 2003, 4). Reforms within the juvenile justice system in NSW should therefore be developed in a way that preserves the distinctiveness of the separate juvenile system.

Punitive and rehabilitative measures within an international law framework

Article 40 of the CRC reconciles the needs of both the child and society by focusing on their social 'reintegration'. Punitive measures are less important because the emphasis is on each child being valued as a member of society and, accordingly, each child should be treated as such (Van Bueren 1995, 72). Article 40(1) of the CRC further states:

State Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

Reintegration and rehabilitation are not exactly the same principles, yet both place significant weight on the value of the child. It has been explained that 'rehabilitation' is not used in Art 40 of the CRC because of fear of using it as an undesirable form of open-ended social control (Van Bueren 1995, 173). The international community was eager to move away from rehabilitative 'ends' justifying excessively lengthy therapeutic or rehabilitative 'means'.¹⁶ It was believed that 'reintegration' was a better term than 'rehabilitation' because it forces the state to consider the social environment of the child.

Yet, rehabilitation of the child is not a forgotten ideal altogether in international law. Article 14(4) of the International Covenant on Civil and Political Rights (ICCPR)¹⁷ places special emphasis on the role of rehabilitation, maintaining that 'in the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation'. Beijing Rules r 17 also stresses the importance of rehabilitation. Regrettably, the NSW Government has ignored the principles of reintegration and rehabilitation in the transfer of management of Kariong.

Participation of the child

The participation of the child is a common theme in international law (Sparks, Girling and Smith 2000). Article 12 of the CRC provides the most direct support for

16 Colloquially, *parens patriae* means that the state has a role in acting as the ultimate carer of the child and ensures that it enforces its 'own' principles about the development of the child.

17 On 13 August 1980, Australia ratified the convention and it remains in force.

the principle that children should be given opportunities to participate in decisions that affect them:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Articles 31, 9 and 40 of the CRC have similar sentiments. The participation principle is important, as it provides a different yet valuable perspective for policies and practices.¹⁸ There is no evidence to show that the transfer involved the views of children.

Provision of accessible legal services

It is of prime importance that children who are before the criminal justice system are afforded legal services, in order that their rights are protected. Article 37(d) of the CRC enforces this point by asserting:

Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

The NSW Government must strive to make sure that all children have easy and equal access to legal services to comply with international law. In practice, the Legal Aid Commission arranges for a solicitor to provide weekly visits to all centres where children are being detained for criminal offences. These visits are subject to the administrative procedures of each detention centre, which either encourage or dissuade juvenile detainees from speaking to their solicitors by facilitating their access to private and prompt advice. This article contends that under the new administrative regime in Kariong, children do not have ready access to their lawyers.

¹⁸ The UNCRC will publish its General Comment on Child Participation in 2008. See UN Press Release, above note 8.

gangs”, “school vandals” and “lazy teenagers” (Cunneen and White 2007, 81; Goodall and Jacobowicz 1994; Bessant and Hill 1997).

Hasty nature of decision and contraventions of international law

Decision made in a short period of time with undue influence of the media

All stages of the Juvenile Offenders Legislation Amendment Bill will be rammed through the House today.

— Jillian Skinner, MLA (NSW Parliament 2004f)

In the weeks preceding the announcement of the transfer of control over Kariong, a number of issues were raised in the media, including violence within the Centre (Benson 2004a). Pertinently, the gravest concern related to what the *Sydney Morning Herald* termed ‘Sex act prompts Kariong Review’ on 16 September 2004 (Smith 2004, 5). It would appear that while the incident occurred in May 2004, the video surveillance tape was only released to the media in September 2004 (Gibbs 2004, 3). Authorities did not see fit to take any action in the six-month period between May and November 2004. It was only after intense media attention that the authorities felt compelled to act. As Smith (2004, 5) reported:

Visiting rights at the Kariong Juvenile Detention Centre will be reviewed after it was revealed that one of Sydney’s notorious gang rapists had taken part in a sex act with his girlfriend. The detainee’s girlfriend has been banned from visiting him after an incident in May where she was caught on video masturbating the 18 year old, known only as MMK.

On 16 September 2004, Diane Beamer MLA (NSW Parliament 2004a) declared that ‘as to the specific incident involving a detainee convicted of serious sexual assault, I have suspended contact visits to the detainee, ordered a review of visiting procedures at Kariong and am seeking urgent advice as to the possible transfer of this detainee to Corrective Services’. Clearly, the specific incident provided the impetus for a review into Kariong Detention Centre.

The government’s decision to act so quickly to one incident, as distinct from the last 14 years of operations and numerous incidents, can be explained by the politics and culture of ‘law and order’ (Hogg and Brown 1998). This culture encourages the need for immediate action to a perceived crisis, rather than a thorough assessment of the situation and more comprehensive reviews. This type of incident, or other similar incidents, had occurred in Kariong’s past, as pointed out by Patricia Forsythe MLC.

The five general international principles discussed above are relied upon as being relevant to decisions regarding the management of juvenile detainees providing an optimal framework for reform.

Transfer of management and breaches of international law

Since its establishment in 1991, Kariong Juvenile Detention Centre has not had a favourable history. There were reports of two attempted suicides as early as 1993, and there were riots in March and April 1999, accompanied by allegations of institutionalised racism and brutalisation which attracted community attention (Justice Action 1999). The Many Rivers Aboriginal Legal Service referred 32 breaches of international law since its opening to HREOC, including the excessive use of isolation and allegations of assaults by workers in 1999 (Justice Action 1999, 9). Over the past 10 years, the media has continued to document disturbing incidents, including relationships between staff and detainees (Kennedy 1999, 13); female staff climbing onto the shoulders of detainees in the detention centre pool (Walker 2000, 9); and numerous allegations of mismanagement (Robinson 1999, 7).

In the middle of September 2004, the media made great mileage out of an alleged sex act between a detainee and his girlfriend.¹⁹ The media's reporting of the incident not only demonised the child allegedly involved, but also negatively stereotyped all the children at Kariong, contrary to its obligations to have more balanced images under Arts 41, 42 and 44 of Riyadh. The transfer of management from the Department of Juvenile Justice to the Department of Corrective Services was announced on 18 November 2004. This decision was surprising, given that Kariong had operated in a controversial and problematic manner since its inception, and so an alleged 'sex act' between a detainee and his girlfriend was not an extraordinary event.

Yet the decision was not remarkable, given the history of the media playing a role in driving juvenile justice policies due to their unhealthy interest in children involved in crime (Cohen 1972; Cunneen et al 1989; Yanich 2005; Collins et al 2000, 46). Since the 1970s, academics such as Cohen (1972) have identified the detrimental influence of the media in their negative stereotyping of children. Cohen discussed the stereotyping of the mods and the rockers in England in the 1960s, and how this contributed to disorder and the government's punitive response. It is widely acknowledged that 'the media is saturated with stories about "youth thugs", "hooligans", "ethnic youth

19 Tobler 2004; Benson 2004; Gibbs 2004; Smith 2004; Benson and Saleh 2004; Sofios 2004; Mercer 2004; *Daily Telegraph* 2004; and Beamer and Brogden 2004.

She reminded the Legislative Council that the difficulties at Kariong were neither new nor unique, by emphasising that 'those who have been members of this House for a number of years will know that what is occurring in Kariong today is not unique. The Centre has undergone riots and has been the subject of allegations of mistreatment of staff and inmates since at least just prior to 1999 State election' (NSW Parliament 2004e).

As early as 2 October 2004, perhaps in response to a government 'leak', the *Sydney Morning Herald* further reported that the government would be considering a number of options after receiving the report from the former Corrective Services head. The options to be considered included the transfer of management to the Department of Corrective Services, made at the recommendation of a former Director-General of the Department of Corrective Services.

The transfer of management occurred on 18 November 2004. At the time of the decision, the final report was not made available to the public, preventing transparency in the decision and its legal basis (Nicholls 2004, 4; Cusack 2004). The objective of the transfer as stated by the Minister for Juvenile Justice, Diane Beamer (NSW Parliament 2004b), was:

The Government is pleased to introduce the *Juvenile Offenders Legislation Amendment Bill*. This Bill amends the *Children (Criminal Proceedings) Act 1987*, the *Children (Detention Centres) Act 1987* and the *Crimes (Administration of Sentences) Act 1999* to allow better management of young offenders and, where appropriate, their transfer to a juvenile correctional centre. The Bill reflects recognition by the Government that some older detainees are better suited to the environment of the Department of Corrective Services, either due to the seriousness of their offence or because of their behaviour.

The transfer of management was clearly based on the view that the adult prison system was the optimal way of *controlling* certain juveniles. The changes did not reflect in any way the comprehensive framework outlined in r 1.4 of the Beijing Rules, which maintains that 'juvenile justice shall be conceived as an integral part of the national development process of each country, within a comprehensive framework of social justice for all juveniles, thus, at the same time, contributing to the protection of the young and the maintenance of a peaceful order in society'.

The handover to a specialist adult organisation clearly created an indistinguishable form of detention between children and adults, contrary to their wellbeing and best interests. What is even more disturbing is that one of the remaining distinguishable features between the treatment of children and adults is that — in some situations — children are treated even *more* harshly than are adults.

Lack of community input and regard to past research

The decision to transfer the management was quick and its implementation was concluded within weeks. Regrettably, the government and the former Director-General of Corrective Services did not avail themselves of stakeholder and community input. Groups such as the Juvenile Justice Advisory Council (JJAC), which is comprised of community representatives, service providers and juvenile justice experts, were not consulted.²⁰ Clearly, the terms of reference for the JJAC are to assist the Minister on policy and practice in juvenile justice, including the following.

- To advise the Minister on issues relating to the preservation of the rights of young people in the NSW juvenile justice system in accordance with the United Nations conventions.
- To advise the Minister on strategies to ensure the involvement & co-ordination of other relevant key government & non-government organisations in the provisions of a continuum of services for young people in the juvenile justice system.
- To make recommendations to the Government on appropriate reform to laws, policies & programs relating to juvenile justice.

Other important stakeholders — including Youth Action Policy Association (the state's peak body on youth policies), Commission for Children and Young People, Legal Aid Commission and Community Legal Centres — were not consulted. Furthermore, those who would be most affected by the changes to management, the detainees, were also not included in the decision-making process, violating participation principles (Arts 12, 31, 9 and 40 of the CRC).

This lack of stakeholder input conflicts with r 1.3 of the Beijing Rules, which encourages active community input, stating that 'sufficient attention shall be given to positive measures that involve the full mobilisation of all possible resources, including the family, volunteers and other community groups, as well as schools and other community institutions ...'.

In addition, there was an apparent failure to have regard to the body of existing research that could have been relied upon.²¹ These past reports had the added benefit of longer periods of inquiry and wider community consultation.

20 JJAC was established on 18 September 1991 to provide the Minister of Justice with specialist advice, conduct research and promote constructive public discussion on juvenile justice matters. See <www.djj.nsw.gov.au/JJAC/whatis.htm> [2006, April 18].

21 NSW Ombudsman 2000; 1996a; 1996b; NSW Parliament, General Purpose Standing Committee 3 2004a.

Impact of decision and contraventions of international law

At the outset, it must be acknowledged that the transfer of management is in no way consistent with the child's best interests (Art 3.1 of CRC) and evolving capacities (Art 5 of CRC). In addition to the hasty nature of the handover, the consequences of the decision are not only problematic but breach specific international mandates.

Lack of specific philosophies for children

The Department of Juvenile Justice is a specialised government organisation dealing with children involved in the criminal justice system in NSW with juvenile-specific philosophies. As a consequence of the transfer of management, there was an inferred change in the philosophy dealing with children, since the Department of Juvenile Justice manages 'juvenile justice centres' where most children are referred to as detainees and are serving control orders.²² The Department of Corrective Services manages 'correctional centres', where most inmates (including juvenile inmates) are serving terms of imprisonment.²³ The distinction between detention and imprisonment was dealt with in the immigration case of *Al-Kateb v Godwin*, 2004, where the majority concluded that unlawful non-citizens are not imprisoned but are held or detained for the purpose of their removal, which was considered to be less punitive. McHugh J stated (at [45]) that the:

... law requiring the detention of the alien takes its character from the purpose of the detention. As long as the purpose of the detention is to make the alien available for deportation or to prevent the alien from entering Australia or the Australian community, the detention is non-punitive.

Therefore, when assessing the true nature of a detention order, it is important to look at the purpose of the detention. The purpose for detaining children in juvenile detention centres is clearly outlined on the Juvenile Justice website, with the rationale for custodial services being to 'provide age and gender appropriate programs that aim to address the offending and developmental needs of young people in custody'.²⁴ This rehabilitative purpose was confirmed by Ms Beamer (NSW Parliament 2004b) while introducing the Bill for the transfer of management, when she declared that:

22 The Children's Court only has the jurisdiction to give a control order as a maximum penalty as per s 33(1)(g) of the *Children (Criminal Proceedings) Act 1987*. Where a child has been charged with a serious indictable offence (s 3) or a decision has been made to deal with the child according to law (s 18), the District, Supreme or High Court has the power to sentence the child to terms of imprisonment.

23 Section 5 of the *Crimes (Sentencing Procedure) Act 1999*.

24 See <www.djj.nsw.gov.au/cusser_programrationale.htm> [2008, January 8].

... the bill will further protect the integrity of our system of juvenile detention centres. This is a system focused on dealing with younger offenders, who are more amenable to the rehabilitative programs it has to offer.

The Department of Corrective Services does not have specific philosophies dealing with children, let alone their rehabilitation. The department's priorities in managing correctional centres are to 'achieve safe custodial environments, meet the care needs of those in custody and promote effective participation in offender programs'²⁵ — goals which do not address the needs among different age groups, especially children.

Lack of resources focusing on juvenile offenders

The Department of Juvenile Justice has specific juvenile-orientated programs that the Department of Corrective Services lacks. The specific programs available within the Department of Juvenile Justice organisation are more consistent with r 28 of the Rules for Protection of Juveniles in Custody, requiring that 'the detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence, as well as mental and physical health, and which ensure their protection from harmful influences and risk situations ...'. An example of the Department of Juvenile Justice's specific programs is seen in the programs that focus on transition before release.²⁶ In the adult prison system, the opportunities for gradual transition into the community are limited.

The section on 'Offender Services and Programs' on the Department of Corrective Services website does not mention any juvenile offender programs. In addition, the department's *Annual Report 2006/07* does not identify any specific juvenile offender programs. The lack of regard for juvenile needs can be seen in the educational assistance provided to them. TAFE NSW provided 120 hours of educational assistance to juvenile offenders for the 2006/07 financial year, as opposed to the 18,000 hours delivered to all other inmates.²⁷ This means approximately four hours per year for each of the 32 detainees or, alternatively, two hours per week for one detainee.

25 See <www.dcs.nsw.gov.au/offender_management/offender_management_in_custody/index.asp> [2008, February 13].

26 See <www.djj.nsw.gov.au/cusser_services.htm> [2006, September 2].

27 See <www.dcs.nsw.gov.au/information/annual_reports/Annual_Report_2006-2007/annrep07web.pdf> p 21 [2008, January 8].

Yet international law and, in particular, r 32 of the Rules for the Protection of Juveniles in Custody require that juvenile detention centres should be rehabilitative, with 'due regard to the need of the juvenile for privacy, sensory stimuli, opportunities for association with peers and participation in sports, physical exercise and leisure-time activities'. It would take a large commitment of resources for the Department of Corrective Services to build up 'Kariong-specific' programs, given the lower priority such programs carry across the adult system, compared to the juvenile justice system. It is difficult to envisage that the department would introduce new and specific programs for 32 juvenile offenders when it has 9568 adults in its care.²⁸ There are major economies of scale in maintaining virtually the same system for juveniles in Kariong as for the wider adult prison population.²⁹ It would be more cost-effective to utilise the strengths of the juvenile justice system in accommodating the young detainees at Kariong.

Lack of experienced staff

The Department of Juvenile Justice employs people on the basis of their experience of working with children and young people. The selection criteria for working in advertised positions within the department include 'demonstrated casework experience in working with adolescents and/or their families, sound negotiation, oral and written communication skills, understanding of issues relevant to juvenile offenders and relating to juvenile justice ...'.³⁰ Moreover, Juvenile Justice Centres provide specific programs and training for staff dealing with young offenders. For example, 'it has a 27 day induction training for new staff entering the profession. It has behaviour management plans for young people whose behaviour threatens staff and there is a program to help improve staff knowledge of that' (NSW Parliament, General Purpose Standing Committee 3 2004b). The Department of Corrective Services does not have specific employment criteria in relation to working with children.³¹

Moving children into the care of officers lacking specialised training in juvenile corrections is a clear breach of rr 81 and 82 of the Rules for the Protection of Juveniles in Custody. Rule 82 mandates that 'the administration should provide for the careful selection and recruitment of every grade and type of personnel, since the proper

28 NSW Department of Corrective Services 2007.

29 For example, the Young Adults Offenders Program was 'modified for the 16 to 21 year old age group at Kariong Juvenile Correctional Centre' (NSW Department of Corrective Services 2005, 24).

30 See <<https://jobs.nsw.gov.au/JobDetails.asp?JobAdvertId=35027>> [2006, April 18].

31 See <www.dcs.nsw.gov.au/careers/index.asp> [2006, September 1].

management of detention facilities depends on their integrity, humanity, ability and professional capacity to deal with juveniles, as well as personal suitability for the work'. Rules 22.1 and 22.2 of the Beijing Rules have similar provisions.

Lack of caseworkers to help assist children with their rehabilitation

The support of children in detention is an important objective of detention centres (Thorley-Smith 1991; Trivisono 1989). Since the transfer, the children have limited contact with the Department of Juvenile Justice. Under that department, each young person was assigned a juvenile justice caseworker, which allowed for day-to-day contact. Under the new regime, each young person is assigned a Welfare Officer. It is unclear whether these officers are trained to deal with children.

Young people have said that welfare officers do not visit or have contact with them regularly. They need to fill in a form and hand it to a guard before they can see the welfare officer. The form requires the young person to cite the reason for the contact. If no reason is given, contact is declined. This system is obviously problematic if the young person wishes to discuss something in confidence with the welfare officer.

Lawyers working with children at Kariong have complained of the difficulty of contacting their clients as a result of the new regime's rules because of lockdown periods or over-burdensome administrative procedures. Lawyers are not even permitted to take pens into Kariong. This limit to accessing legal counsel is in direct contravention of the principles espoused in Art 37(d) of the CRC.

Punitive practices dealing with juvenile detainees

This article argues that the Department of Corrective Services utilises inappropriate techniques to manage the children, with lengthy lockdown periods in violation of international principles and domestic laws. In practice, lockdown involves the detainee being locked alone in their room, often without material to occupy them. Even when they are allowed out, many young people (especially those within Unit 4) are still not allowed outdoors. Young people are allowed out of their rooms for only up to five and a half hours each day. These lockdown conditions are longer than in some adult jails.

Regulation 153 of the *Crimes (Administration of Sentences) Regulation 2001* states that lockdown should not happen if it is adverse to the physical or mental health of the inmate, and provision should be made for a certain number of hours of exercise in the open air each day. Regulation 60 creates a positive obligation on the Department of Corrective Services to provide appropriate programs. Rule 47 of the Rules for

the Protection of Juveniles in Custody affirms that 'every juvenile should have the right to a suitable amount of time for daily free exercise, in the open air whenever weather permits, during which time appropriate recreational and physical training should normally be provided. Adequate space, installations and equipment should be provided for these activities'.

The government's attitude to complying with its obligations to provide suitable programs is clearly epitomised by its act of filling the swimming pool at Kariong with sand in December 2004. Another pertinent example of this defiant attitude to recreation is the record of a 16-year-old child held at Kariong under the new management regime.

The child was involved in a number of 'incidents' at Kariong. Marrickville Legal Centre is aware that for at least 14 days in December, the child was placed in segregation for 23 hours per day. He was not given anything to occupy himself with. His segregation was reviewed after a few days and he was told he had to serve another week under the same conditions. The reason he was given for the continued segregation was that he had a 'bad attitude'. The child had made several requests to see a counsellor or psychologist to deal with the trauma of segregation however he was not provided any assistance.³²

This child's treatment is in breach of numerous international protocols. At the time that this child was segregated for 23 hours per day, Kariong was still operating under a delegation to the Department of Corrective Services from the Department of Juvenile Justice.³³ The delegation did not allow for the imposition of such punishments and it is contended that such punishments were in contravention of ss 4, 14 and 19 of the *Children (Detention Centres) Act 1987*, the Australasian Standards for Juvenile Custodial Facilities and the CRC.

Removal of judicial discretion

Previously, the court had the discretion to sentence a child to a facility governed by the Department of Juvenile Justice or the Department of Corrective Services, according to s 19(1) of the *Children (Criminal Proceedings) Act 1987* (CCPA), which states:

32 Submission by Marrickville Legal Centre.

33 The legal status has now changed. Under the *Juvenile Offenders Legislation Amendment Act 2004*, which commenced on 20 December 2004 and in the Government Gazette of 17 December 2004, Kariong Correctional Centre came into being. Since this time, Kariong has been operating under the management of the Department of Corrective Services as per the *Crimes (Administration of Sentences) Act 1999*.

If a court sentences a person under 21 years of age to whom this Division applies to imprisonment in respect of an indictable offence, the court may, subject to this section, make an order directing that the whole or any part of the term of the sentence of imprisonment be served in a detention centre.

The court could refer to s 19(4) of the CCPA, which takes into account '(a) the degree of vulnerability of the person, (b) the availability of appropriate services or programs at the place the person will serve the sentence of imprisonment and (c) any other matter that the court thinks fit'.

It is contended that the sentencing court is in the best position to make its decision about where a particular child should serve their sentence. They alone are aware of the objective and subjective facts of the case. With the change in management, a sentencing court will be imposing a sentence under s 19 of the CCPA without being aware of whether the term will be spent in a juvenile justice centre or a juvenile correctional centre. The determination as to the location where the sentence will be served will be made subsequently by the Director-General of the Department of Juvenile Justice, in consultation with the Commission for the Department of Corrective Services, under a revised s 28 of the *Children (Detention Centres) Act 1987*.

Arguably, a juvenile correctional centre will be a much harsher environment, and to allow this aggravating sentencing impact to be determined by an administrative process can be viewed in terms of contravening international law. Previously, a child had the opportunity to appeal to a higher court if they were not satisfied with the judicial decision as to where they should stay. The higher courts were asked on appeal to make s 19 orders, and this process was more consistent with r 7.1 of the Beijing Rules. However, where a child serves their sentence has now become an *internal* decision of the Department of Juvenile Justice, and there are no rights of appeal for the child.

Possible reform and revised detention regimes consistent with international law

In its General Comments on Juvenile Justice in 2007, the United Nations Committee on the Rights of the Child stated that 'State Parties should establish separate facilities for children deprived of their liberty, which include distinct, child-centred staff, personnel, policies and practices',³⁴ goals which should form the basis of reform for Kariong.

34 The Committee on the Rights of the Child publishes its interpretation of the content of human rights provisions in the form of General Comments on thematic issues. See <www2.ohchr.org/english/bodies/crc/comments.htm> [2008, January 11].

Reversal of transfer of management

The central law reform proposal raised by the analysis in this article must be to return the management of Kariiong back to the Department of Juvenile Justice, an organisation that specialises in dealing with children and which has better resources to deal with children in compliance with international law principles.

International law requires that children's specific needs be met; that staff with specialised training be employed; and that appropriate recreation time be provided. As argued above, the Department of Juvenile Justice has both the policies and the practices to comply with these standards, whereas the Department of Correctives Services does not. The Department of Correctives Services is an organisation that, due to the size of the adult prison population, operates a mass approach to the problem of adult offending. There are 26 correctional centres, 11 periodic detention centres, one transitional centre for female inmates and 69 probation and parole offices. There can be little attention or resources left for one correctional centre that houses approximately 32 juvenile detainees, as compared to almost 9500 adults.

Independent evaluation and participation of children

The government should have employed independent investigators to proffer suggestions to address the problems at Kariiong, rather than relying on the former Director of Corrective Services. This would have been consistent with the United Nations Guideline 21, which encourages the use of independent bodies to monitor detention centres.³⁵ For an ideal independent evaluation, children should be encouraged to participate in the decisions affecting them. The participation of children in local schemes can be relatively easily implemented (Veerman and Levine 2000; Ahnen 2001). In NSW, this could involve accessing children from the detention centre themselves or from local youth groups and youth advisory councils, which would be more consistent with international law.³⁶

Appropriate accommodation

It is suggested that appropriate protection for children and young offenders can be provided by accommodating young adult detainees in separate units or facilities from children while still retaining them within the juvenile justice system.

35 Guidelines for Action on Children in the Criminal Justice System Recommended by Economic and Social Council resolution 1997/30 of 21 July 1997.

36 Compare with the National Youth Roundtable in Australia, which 'is the centrepiece of the Australian Government's youth consultation mechanisms. It brings together young people, aged 15 to 24 years, to discuss issues that have an impact on youth'. See <www.thesource.gov.au/involve/NYR/whats_it_all_about.asp> [2006, August 8].

Section 19 of the *Children's (Criminal Proceeding) Act 1987* should therefore be amended to create a presumption that where an offence has been committed by a child, the offender should remain in juvenile detention for the duration of any custodial sentence, unless there are *exceptional* circumstances which justify a transfer to adult prison after the young offender reaches adulthood.

It is also recommended that the sentencing court regain the discretion to say whether a child or young person should serve their sentence in either a juvenile detention centre or an adult correctional centre. The sentencing court has access to medical and psychological reports and submissions by legal representatives. The decision to transfer children between correctional and detention centres should not be a purely administrative decision. An appropriate appeal process must also be put in place.

Upgrade of classification system

The internal classification system of detainees is that children charged with murder or certain sexual offences are classified as 'A' (maximum security) and immediately placed in Kariong if bail is refused. During the remand period, the child is detained at a maximum security correctional centre. There have been cases where the original charges have been dismissed and yet the child has had to spend 'dead time' in this draconian setting on remand. The authorities should have careful regard to the rigid application of these classifications and make sure that they do not fail to take into account each individual case. Children should be classified on an individual basis, having regard to their criminal antecedents, prospects for rehabilitation and safety. It is recommended that a committee be set up for appeal and/or review of classification and, during this process, the child be afforded legal representation on request.

Alternatives to the establishment of a juvenile correctional centre

It has been accepted and well documented that Kariong Detention Centre had a number of serious design flaws. The Honourable Amanda Fazio (NSW Parliament 2004d) argued that the centre was designed and built under the previous Coalition government, and it was originally built without a school or kitchen. The site has since been improved, but there is limited capacity for improvement. The school currently has room for 18 detainees only. It is recommended that the government invest money into upgrading Kariong so that these design flaws are addressed.

Another alternative could be the introduction of a dual track system, as in Victoria (Curran and Stary 2003). This unique system allows the detention of young offenders up to the age of 21 to be held in a Youth Training Centre rather than adult corrections. A Youth Training Centre sentence provides a higher level of care and supervision and,

more importantly, delays the contamination within adult correctional centres. Only the most senior trained staff should be employed in these centres.

Conclusions

The nature of the decision to transfer the management of Kariong from the Department of Juvenile Justice to the Department of Corrective Services was clearly hasty. This article argues that it was the intense media reporting of the alleged sex act, six months after the alleged incident occurred, that prompted the government to act so swiftly. It was based primarily on one individual incident, which alone was not remarkable given the historic framework of allegations of institutionalised maltreatment of juveniles and the poor management of juvenile justice staff. There was a lack of consultation with experts such as JJAC, the Legal Aid Commission, the Youth Actions and Policy Association (YAPA), other key stakeholders and, more importantly, those most affected by the decision: the children themselves.

Overall, the nature and consequences of the decision resulted in the harsher treatment of juvenile offenders and numerous breaches of international law. The conditions under the Corrective Services regime are more punitive, with lengthy lockdown periods, a lack of specialised programs and fewer trained staff. The situation must be addressed promptly. The management must be returned to the Department of Juvenile Justice to better comply with our obligations under international law and, most importantly, to minimise the contemptible impact of the decision on children. ●

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