



Discussion Paper:

Review of the *Children (Criminal Proceedings)*  
*Amendment (Adult Detainees) Act 2001*

April 2004

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## 1. Introduction

The *Children (Criminal Proceedings) Amendment (Adult Detainees) Act 2001* (the Act) commenced on 25 January 2002. The main purpose of the Act is to limit the age to which young people convicted of serious offences are able to remain in juvenile detention.

The Act also provides for the NSW Ombudsman to review the operation and effect of the legislation. Section 4 of the Act states:

- (1) For the period of 3 years after the commencement of this section, the Ombudsman is to keep under scrutiny the operation and effect of section 19 of the *Children (Criminal Proceedings) Act 1987* as substituted by this Act.
- (2) For that purpose, the Ombudsman may require the Director-General of the Attorney General's Department, the Director-General of the Department of Juvenile Justice or the Director-General of the Department of Corrective Services to provide information concerning the participation of the Department concerned in the participation of that section.
- (3) As soon as practicable after the expiration of that period of 3 years, the Ombudsman must prepare a report as to the operation and effect of that section and furnish a copy of the report to the Attorney General, the Minister for Juvenile Justice and the Minister for Corrective Services.

A review project is currently underway to facilitate our monitoring of the operation and effects of the Act. The major methods that are being used to undertake this review are:

- Interviews with detainees sentenced under section 19 before and after they transfer from juvenile detention to adult prison. Detainees and inmates are being asked a number of questions about their demographic characteristics, physical and psychological health, self-harm, injuries, assaults, substance use and any personally significant events in juvenile detention and corrective services. They are also being asked about their access to courses, services, sport, work, visits, and how they spend their time.
- Ongoing monitoring of detainee/inmate data and other information provided by the Departments of Juvenile Justice and Corrective Services
- Examination of detainee and prisoner case files
- Interviews with staff in the Departments of Juvenile Justice and Corrective Services
- Examination of court transcripts particularly for sentencing comments and submissions

This discussion paper forms part of the process of consultation with community and government stakeholders. The purpose of this discussion paper is to:

- Provide some background to the legislation
- Identify some of the issues that have arisen during the course of monitoring the Act since it commenced
- Invite submissions and comments from interested parties on the operation and effects of the Act

Due date for submissions

**21 May 2004**

## 2. Background

The *Children (Criminal Proceedings) Amendment (Adult Detainees) Act 2001* commenced on 25 January 2002. It was introduced to amend section 19 of the *Children (Criminal Proceedings) Act 1987*, under which a judge could sentence a serious offender to a term of imprisonment to be served wholly or partially in a juvenile detention centre.

Under the old legislation there were no restrictions on the court's discretion and an order could be made for the offender to remain in juvenile detention after the person had turned 21 years. The amendment removed this discretion. It limits the age to which serious offenders are able to remain in juvenile detention to 21 years and six months.

### 2.1 Objectives of the Act

The major objective of the *Children (Criminal Proceedings) Amendment (Adult Detainees) Act 2001* was to separate adult from juvenile offenders within juvenile detention.

The NSW Minister for Juvenile Justice, The Hon Carmel Tebbutt MLC in her Second Reading Speech on 13 December 2001, put forward the case for the new legislation. The Minister stated that:

*The Government believes it inappropriate to hold this category of offenders (serious children's indictable offenders) in juvenile detention beyond the age of 18. To continue to do so may jeopardise the chances of rehabilitating younger, less serious offenders.<sup>1</sup>*

*On the whole the juvenile justice system was established to deal with young offenders between the age of 10 and 18 years, and that is clearly the rationale for this legislation.<sup>2</sup>*

*The approach encapsulated by the bill ensures that those who are convicted of a serious indictable offence will move to the adult system at age 18. They are the people who have been given the longer sentences, and adequate discretion has been provided for a judge to make a decision not to move a young person at age 18 if that young person is vulnerable. It also provides scope for a young person to apply to the court not to be moved.<sup>3</sup>*

### 2.2 Issues raised in the Parliamentary debate

The Opposition supported the Bill on the grounds that it would give 'some direction regarding the automatic transfer to adult prisons of young people convicted of a serious indictable offence.'<sup>4</sup> The Hon Patricia Forsythe MLC (Liberal) expressed her concern that we 'be able to identify young people with special needs so that some special circumstances may apply', particularly in considering the appropriateness of transferring young people with intellectual disabilities. She was also concerned for the 'safety' of those transferred to the adult system.<sup>5</sup>

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<sup>1</sup> The Hon. Carmel Tebbutt MLC (Minister for Juvenile Justice). Second Reading *Children (Criminal Proceedings) Amendment (Adult Detainees) Bill*. Hansard, Legislative Council, 13 December 2001, hereafter referred to as the LC Second Reading Speech. Page 20161

<sup>2</sup> Ibid. Page 20178

<sup>3</sup> Ibid. Page 20179

<sup>4</sup> The Hon. Patricia Forsythe MLC (Liberal). LC Second Reading Speech. Page 20164

<sup>5</sup> Ibid. Page 20165

The Hon Richard Jones MLC (Independent) referred to the department's 'unusual' reasoning in describing the difficulties in separating older from younger offenders within juvenile detention, arguing that:

*juvenile offenders are afforded special concessions and protections on account of their immaturity and vulnerability. Greater tolerance and leniency are the hallmark of good juvenile justice procedures in recognising that young offenders are still in the process of learning society's rules. It is considered unjust and unrealistic to hold young people to the same standards as adults. In addition, such measures do not appear to work.*<sup>6</sup>

Further, Mr Jones cited an Australia Law Reform Commission document, which reported:

*that placing a young offender in an adult prison does little to advance the rehabilitative aims of juvenile justice, particularly as contact with adult offenders has a tendency to further criminalise young offenders. This is particularly so if there are not adequate facilities to accommodate and deal with young people separately within the adult prison, or appropriate educational and other programs necessary for that age group.*<sup>7</sup>

Mr Jones also expressed concerns about 'the prevalence of rape and assaults on young people' in prison.<sup>8</sup>

The Greens also opposed the Bill on the grounds that the legislative change would lead:

*to the brutalisation and rape of young detainees. It will also dramatically reduce the prospects of rehabilitation for countless young detainees.*<sup>9</sup>

*Juvenile Justice needs to be about providing rehabilitation, education and training to assist young detainees to build a life for themselves when they are released.*<sup>10</sup>

The Hon. Lee Rhiannon MLC expressed concern that:

*young prisoners will become hardened. They will be exposed to a violent adult world, thereby placing in jeopardy any rehabilitation that may have occurred in the juvenile justice system.*<sup>11</sup>

The Hon Ian Cohen MLC raised concerns about the young people's safety, including the high likelihood of their being 'raped and bashed', and the greater access they would have to drugs in an adult prison. He also raised the issue of overcrowding in adult prisons.<sup>12</sup>

The Australian Democrats argued that there was 'no good rationale for the bill'. The Hon. Dr Arthur Chesterfield-Evans MLC stated that:

*It seems extraordinary that today we are being asked to pass a bill to effectively move between three and 26 people from juvenile justice centres, where the number of prisoners..... has decreased dramatically, to an overcrowded prison system.*<sup>13</sup>

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<sup>6</sup> The Hon. Richard Jones MLC (Independent). LC Second Reading Speech. Page 20169

<sup>7</sup> Ibid. Page 20169

<sup>8</sup> Ibid. Page 20170

<sup>9</sup> The Hon. Lee Rhiannon MLC (The Greens). LC Second Reading Speech. Page 20172

<sup>10</sup> Ibid. Page 20172

<sup>11</sup> Ibid. Page 20173

<sup>12</sup> The Hon. Ian Cohen MLC (The Greens). LC Second Reading Speech. Page 20176

<sup>13</sup> The Hon. Dr Arthur Chesterfield-Evans MLC (Australian Democrats). LC Second Reading Speech. Page 20174

He also expressed concerns for the safety of the young people suddenly being put in 'with the most brutal people in society..... The likelihood of such people not reoffending after serving their gaol term must surely be very slight.'<sup>14</sup>

A number of parliamentarians expressed their desire for a commitment that the young offenders transferred to adult prison would be housed separately from older offenders. The Hon Richard Jones MLC also suggested a 'separate wing in gaols for young offenders'<sup>15</sup> in order to protect them. Reverend the Hon. Fred Nile MLC, while supporting the bill, suggested that 'the Government consider halfway houses for older persons. In other words, they do not go to an adult prison but are separated from the juveniles in the detention centres.'<sup>16</sup>

In response the Minister for Juvenile Justice, the Hon. Carmel Tebbutt, used the young offenders program provided at the Parklea Correctional Centre as an argument in favour of the earlier transfer of young offenders to prison, stating that:

*The Department of Corrective Services already has a young offender program [at Parklea], which operates for people who are between the ages of 18 years and 25 years. It is the Government's intention, as I mentioned earlier, that this group would be accommodated within that program whenever possible. I have visited Parklea gaol where the Young Offenders program, or part of it, is in operation. I have to say that because of the size of the adult system—and I accept that that brings with it some concerns—from what I saw it offers opportunities to older offenders that juvenile justice could never offer them.*

*The opportunities that are available for younger offenders within the adult system at Parklea to complete apprenticeships or to undertake vocational training are by far above what can be offered in the juvenile justice system—understandably, because the juvenile justice system is set up to deal with a younger group of people.<sup>17</sup>*

The Minister for Juvenile Justice, the Hon Carmel Tebbutt, also stated that:

*Juvenile Justice and Corrective Services staff will convene a case conference prior to the transfer of any person to ensure appropriate placement and programming for their rehabilitation.<sup>18</sup>*

In response to the number of concerns raised in the Parliamentary discussions about the Bill, the Hon Richard Jones MLC moved an amendment to provide that the Ombudsman review the legislation and that his report be laid before both Houses of Parliament. This amendment was supported by the Opposition and the Government.

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<sup>14</sup> Ibid. Page 20174

<sup>15</sup> The Hon. Richard Jones MLC (Independent). LC Second Reading Speech. Page 20170

<sup>16</sup> Reverend The Hon. Fred Nile MLC (Christian Democrats). LC Second Reading Speech. Page 20172

<sup>17</sup> The Hon. Carmel Tebbutt (Minister for Juvenile Justice) LC Second Reading Speech. Page 20179

<sup>18</sup> Ibid. Page 20162

## 2.3 Commencement of the Act

The Bill was assented to on 19 December 2001. The *Children (Criminal Proceedings) Amendment (Adult Detainees) Act 2001* commenced on 25 January 2002 and provides as follows:

### 19. Court may direct imprisonment to be served in a detention centre

- (1) 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.
- (2) A person is not eligible to serve a sentence of imprisonment in a detention centre after the person has attained the age of 21 years, unless:
  - (a) in the case of a sentence for which a non-parole period has been set---the non-parole period will end within 6 months after the person has attained that age, or
  - (b) in the case of a sentence for which a non-parole period has not been set---the term of the sentence of imprisonment will end within 6 months after the person has attained that age.
- (3) A person who is sentenced to imprisonment in respect of a serious children's indictable offence is not eligible to serve a sentence of imprisonment in a detention centre after the person has attained the age of 18 years, unless:
  - (a) the sentencing court is satisfied that there are special circumstances justifying detention of the person in a detention centre after that age, or
  - (b) in the case of a sentence for which a non-parole period has been set---the non-parole period will end within 6 months after the person has attained that age, or
  - (c) in the case of a sentence for which a non-parole period has not been set---the term of the sentence of imprisonment will end within 6 months after the person has attained that age.This subsection is subject to subsection (2).
- (4) In determining whether there are special circumstances for the purposes of subsection (3), the court may have regard to the following matters:
  - (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,
  - (c) any other matter that the court thinks fit.
- (5) A person who is subject to an order under this section that ceases or ceased to apply on the person attaining the age of 18 years may apply to the sentencing court for a further order under this section. Any such application requires the leave of the court.

## Application of amendments

The amended section 19 only applies to people sentenced after the commencement of the *Children (Criminal Proceedings) Amendment (Adult Detainees) Act 2001* and does not affect any order made before the commencement of the Act.<sup>19</sup>

## To whom the legislation applies

Under section 16 of the *Children (Criminal Proceedings) Act 1987*, the legislation applies to a person:

- (a) who has pleaded guilty to an indictable offence in, or has been found guilty or convicted of an indictable offence by, a court order other than the Children's Court,
- (b) who was a child when the offence was committed, and
- (c) who was under the age of 21 years when charged before the court with the offence.

This means that the new legislation does not apply to persons dealt with by the Children's Court. Therefore, in practice, a person who was, for example, 20 years of age when charged before the Children's Court with an offence committed when a child, could be sentenced to serve two years in a detention centre with a release date after they turn 21 (and six months). It might be noted that the Children's Court must deal with indictable offences summarily and that the maximum sentence the Children's Court can impose is two years.<sup>20</sup>

Under section 17 of the Act, a person who has pleaded guilty to or been found guilty of a serious children's indictable offence shall be dealt with 'according to law'. The Children's Court cannot determine 'serious children's indictable offences'<sup>21</sup>.

## 2.4 Definition of terms

The following definitions are provided to assist in the interpretation of the legislation.

### Indictable offence

'indictable' offences are offences which are capable of being determined by a jury, in contrast to 'summary' offences which are heard without a jury. In practice, indictable offences cover the more serious range of offences

Under section 3 of the *Children (Criminal Proceedings) Act 1987*:

### Child

'child' means a person who is under the age of 18 years.

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<sup>19</sup> Section 10 Children (Criminal Proceedings) Act 1987

<sup>20</sup> See sections 20, 28, 31, 33 Children (Criminal Proceedings) Act 1987

<sup>21</sup> Section 31 Children (Criminal Proceedings) Act 1987

## Serious children's indictable offence

'serious children's indictable offence' means:

- homicide
- an offence punishable by imprisonment for life or for 25 years
- an offence, or attempt to commit an offence, under 61J (aggravated sexual assault) or 61K of the *Crimes Act 1900* (assault with intent to have sexual intercourse), except if the only 'circumstances of aggravation' were that the alleged victim was under the age of 16 years, or
- an indictable offence prescribed by the regulations as a serious children's indictable offence for the purposes of this Act.

Under the relevant regulations<sup>22</sup>, the following offences are also prescribed as serious children's indictable offences:

- an offence under section 66A or 66B of the *Crimes Act 1900*<sup>23</sup>,
- an offence under section 80A of the *Crimes Act 1900* (sexual assault by forced self-manipulation), but only if the victim of the offence was under the age of 10 years when the offence occurred.

## 2.5 Background reports

During the course of considering whether an offender should be ordered to spend all or part of their sentence within a juvenile detention centre, a court shall not sentence a person unless:

- (a) a background report, prepared in accordance with the regulations<sup>24</sup>, has been tendered in evidence with respect to the circumstances surrounding the commission of the offence, and
- (b) copies of the report have been given to the child and any other person appearing in the proceedings, and
- (c) the court has, subject to the rules of evidence, taken into account the matters contained in the report and any submissions made in relation to those matters by the persons referred to in paragraph (b).<sup>25</sup>

The Department of Juvenile Justice advises that, at the time of sentencing a young person who is being dealt with according to law, the background report is used to remind the court that it must make an order under section 19 of the Act for the young person to serve their sentence in juvenile detention. Since the enactment of the new legislation, the Department has taken the position that it will not make recommendations to the courts as to the suitability of individuals for consideration of 'special circumstances' as it was a matter for the detainee's legal representative to raise.<sup>26</sup>

<sup>22</sup> Section 4 of the *Children (Criminal Proceedings) Regulation 2000 (NSW)* commenced 1 September 2000

<sup>23</sup> 66A. Sexual intercourse---child under 10

Any person who has sexual intercourse with another person who is under the age of 10 years shall be liable to imprisonment for 25 years.

66B. Attempting, or assaulting with intent, to have sexual intercourse with child under 10

Any person who attempts to have sexual intercourse with another person who is under the age of 10 years, or assaults any such person with intent to have sexual intercourse, shall be liable to imprisonment for 25 years.

<sup>24</sup> Children (Criminal Proceedings) Regulation 2000. Background reports

For the purposes of section 25 (2) (a) of the Act, a background report must be in such form as the Attorney General may from time to time approve and must deal with such of the following matters as are relevant to the circumstances surrounding the commission of the offence concerned:

- (a) the person's family background,
- (b) the person's employment,
- (c) the person's education,
- (d) the person's friends and associates,
- (e) the nature and extent of the person's participation in the life of the community,
- (f) the person's disabilities,
- (g) the person's antecedents,
- (h) such other matters as the Children's Court may require,
- (i) such other matters as the prosecutor considers appropriate to include in the report.

<sup>25</sup> Section 25 (2) *Children (Criminal Proceedings) Act 1987*

<sup>26</sup> Director-General's Instruction No. 241/02. NSW Department of Juvenile Justice

### 3. Scrutiny of the operation and effects of the Act

In the following section, data are presented which will be used to inform the Ombudsman's scrutiny of the operation and effect of the *Children (Criminal Proceedings) Amendment (Adult Detainees) Act 2001*.

#### 3.1 Trends in the number of people in juvenile detention 18 years and over in NSW

The following table shows trends in the number of detainees in juvenile detention aged 18 years and over since 1995. Although the amended legislation was introduced in January 2002, the effects of legislatively limiting the age of detainees are not evident in the data to date as insufficient time has elapsed.

**Table 1: Trends in the number of people in juvenile detention 18 years and over in NSW** <sup>27</sup>

As at 30 June	18 yrs	19 yrs	20 yrs	21 + yrs	Total 18+yrs	18+yrs as % of total
1995	72	21	13	0	106	21.2
1996	77	25	14	0	116	25.4
1997	60	27	12	0	99	21.7
1998	68	19	9	0	96	22.2
1999	80	18	10	0	108	28.1
2000	50	24	6	4	84	23.5
2001	52	14	9	4	79	25.4
2002	52	13	3	7	75	27.0
2003	62	18	4	4	88	28.2

The total number of people in juvenile detention has steadily reduced over the last eight years, decreasing by 37.6% from 500 on 30 June 1995 to 312 on 30 June 2003.<sup>28</sup> The number of detainees aged 18 years and over has decreased less dramatically by 17% over the same period, with some fluctuations seen in the numbers over the past eight years.

<sup>27</sup> Data supplied by the Australian Institute of Criminology and the NSW Department of Juvenile Justice

<sup>28</sup> The average number of people held in NSW adult prisons was 8,017 in June 2003 (Australian Bureau of Statistics, *Corrective Services June Quarter 2003*, Cat No 4512.0)

On 30 June 2003 there were only four detainees 21 years and over in juvenile detention, constituting 1.3% of the total detainee population. Detainees aged 20 years were also a very small proportion of the total population (n = 4, 1.3%), while those aged 19 years constituted 5.8% (n = 18) of all detainees. Detainees aged 18 years represented by far the greatest proportion of adults, constituting 19.9% of the total NSW juvenile detainee population (n = 62).

From 1995 to the year 2000, there was no one in juvenile detention 21 years or over. The highest number of 21 year olds was seven, seen in the year 2002, reducing again to four in 2003.

## **3.2 The first twenty months of the legislation**

In the following sections the information collected in the first twenty months of the operation of the legislation, namely 25 January 2002 to 31 September 2003, is summarised.

### **3.2.1 Young offenders given a 'section 19 order'**

Fifty-three young offenders, sentenced between 25 January 2002 and 31 September 2003, have been made the subject of a 'section 19 order' to remain in juvenile detention for some period beyond their 18<sup>th</sup> birthday. Just over half of these were born in either the years 1984 or 1985, making the majority around 18 years of age at the time of sentence. A small number were over 18 at the time of their sentence. Only one of the 53 was a female.

Table 2 shows the most serious offence for the 53 sentenced so far under the new legislation and provides some information about whether those who have been convicted of particular types of offences are more likely to be transferred to prison or to complete their sentence in juvenile detention and be discharged into the community.

The most common offence is 'Robbery, Extortion and Related Offences' (n = 27 or 51%), followed by sexual assault offences (n = 12 or 23%). Seven had been convicted for aggravated assault offences and six for homicide offences. All of the 53 offenders, except for seven who have been convicted of offences in the category 'Robbery, Extortion and Related Offences', have been sentenced for serious children's indictable offences under section 19(2).

The majority (n = 40 or 75%) of those sentenced under the legislation have been ordered by the court to be discharged into the community from juvenile detention upon completion of their sentence. Thirteen have already been discharged into the community, while another 27 will be discharged over the next few years.

By the end of September 2003, the number of serious children's indictable offenders who have been made the subject of an order under section 19(2) to remain in juvenile detention beyond 18 years then transfer to prison was thirteen. Six are due to transfer to adult prisons over the next few years. Seven, who were due to transfer to prison at some point in time under a section 19 order, have been transferred earlier than scheduled. The circumstances surrounding these transfers will be discussed in subsequent sections.

**Table 2: The types of offences committed by those under a 'section 19 order' to transfer to prison to complete their sentences and those ordered to complete their sentences within juvenile detention**

<b>Most serious offence<sup>29</sup></b>	<b>Transfer to prison to complete sentence</b>	<b>Complete sentence within juvenile detention</b>
All Robbery, Extortion and Related Offences ( <i>not Break &amp; Enter</i> )	1	26
Aggravated Sexual Assault and other sexual assault & related offences	9	3
Aggravated Assault ( <i>eg malicious wound, assault grievous bodily harm</i> ) and Other Acts Intended To Cause Injury ( <i>eg assault, AOABH, common assault</i> )	0	7
Homicide and Related Offences	3	3
Other offences	0	1
<b>TOTAL</b>	<b>13</b>	<b>40</b>

As Table 2 shows, the vast majority of those being transferred to prison to complete their sentences are those convicted of aggravated sexual assault and other sexual assault offences. Only three young offenders convicted of an aggravated sexual assault offence were ordered to complete their sentences in juvenile detention. Half of the six people convicted of homicide offences are to be transferred to prison while the other half complete their sentences in juvenile detention. These types of offences generally attract longer sentences. [The mean sentence for all people convicted in 2002 of these offences was, 41.7 months for sexual assault and related offences and 162.6 months for murder.<sup>30</sup>]

The vast majority of those convicted of robbery-type offences and aggravated assault and related offences are completing their sentences within the juvenile detention system, irrespective of whether their offences are 'serious children's indictable offences'. Only one offender convicted of a robbery-type offence is to transfer to adult prison. The sentences handed down for these types of offences are generally shorter allowing sufficient time between sentencing and the 21 years age limit to complete their sentence within juvenile detention. [The mean sentence for all people convicted in 2002 of these offences was, 25.8 months for robbery and 20.5 months for assault.<sup>31</sup>] The ages by which these people will have completed their sentences are given below in Table 3.

<sup>29</sup> Offence categories based on NSW Department of Juvenile Justice database classifications

<sup>30</sup> NSW Bureau of Crime Statistics & Research (2003) *New South Wales Criminal Court Statistics 2002*

<sup>31</sup> *Ibid*

### 3.2.2 Those with section 19 orders to complete their sentences within juvenile detention

**Table 3: Ages by which those with section 19 orders to complete their sentences within juvenile detention are to be released**

Age in years	Number
< 18	9
18 – 18.9	9
19 – 19.9	8
20 – 20.9	10
21 and over	4
<b>TOTAL</b>	<b>40</b>

Table 3 shows that most of the young offenders subject to section 19 orders who are completing their sentences within juvenile detention will be released into the community between 18 and 21 years. Five detainees are completing their sentences before they turn 18 years have been given a section 19 order under the sentencing judge's discretion. Two detainees in the 21 years and over category will be released before turning 21 years and 6 months, permissible under section 19(2) of the legislation. However two detainees, who were sentenced in May and August 2003, have been given section 19 orders allowing them to remain in juvenile detention beyond the age limit of 21 years and six months. One has been convicted of a robbery offence and the other of an aggravated assault offence. Both will be 22.4 years on their releases from juvenile detention in two and four years' time. The alleged inadequacy of the sentence of one of the offenders is the subject of an appeal by the Director of Public Prosecutions.

One young offender, an Aboriginal boy sentenced at the age of 16 years for an 'Aggravated Sexual Assault' offence, was ordered under section 19 to serve the whole of his sentence in juvenile detention and be released into the community at the age of 19 years. In sentencing this young person, the Judge found 'special circumstances as part of his youth, namely his intellectual and emotional disability and the dislocated childhood that he has had'. However, at the age of 17 and four months, only six months after he was sentenced, the young person was transferred to prison under section 28 (1) *Children (Detention Centres) Act 1987*<sup>32</sup>, in response to a report of his involvement in an incident in juvenile detention and his history of threatening serious violence against staff. Incident reports from the juvenile detention centre and interviews with centre staff and the detainee suggest that his role in the incident was a minor one, and that the other participants involved were not also transferred to prison as a result of the incident. The Department of Juvenile Justice has recently indicated that they they will investigate the circumstances regarding this transfer.

<sup>32</sup> Under s. 28 (1) (b) of the *Children (Detention Centres) Act 1987* if the Minister for Juvenile Justice is satisfied that the person is either not profiting from the discipline and instruction in the detention centre, or is not, for any other reason, a suitable person for detention in a detention centre, the Minister may, by order in writing made with the consent of the Minister administering the *Crimes (Administration of Sentences) Act 1999*, direct the transfer of the person from the detention centre to a prison, there to be detained according to law.

### 3.2.3 Those with section 19 orders to transfer to prison to complete their sentences

Table 4 shows further details regarding the thirteen serious children's indictable offenders who have been ordered by the court to transfer to prison under section 19.

**Table 4: Those transferring to prison to complete their sentence: age specified on their section 19 order**

Age in years	Number
18 - 18.9	1
19-19.9	3
20-20.9	2
21 and over	7
<b>TOTAL</b>	<b>13</b>

As can be seen from the above table, most of the 'special circumstances' orders granted to the serious children's indictable offenders tend to be towards the maximum age permissible under the legislation: seven of the thirteen are or were due to transfer to prison at the age of 21, two at 20, and three at 19 years. All of these twelve have been convicted of sexual assault or homicide offences and most received long sentences. However, one person has been granted 'special circumstances' to remain in juvenile detention for a very short period: a young man convicted of 'aggravated assault' who was granted time to complete his school certificate before transferring to prison at the age of eighteen years and four months.

The factors considered by the court in deciding at what age this category of offender should be transferred to prison will be discussed in the subsequent sections.

Seven of the 13 had been moved to prison by the end of September 2003 and another six are due to transfer over the next few years to complete their sentences in prison. The seven who have already moved to prison did so prior to the age specified on their section 19 order, for reasons which will be described in subsequent section. Table 5 details some characteristics of the seven who have transferred to prison already.

**Table 5: Characteristics of serious children's indictable offenders subject to section 19 orders to remain in juvenile detention beyond 18 years: detainees already in prison**

Person	Age specified on s.19 order to transfer to prison (years/months)	Actual age at transfer to prison (years/months)	Time between order & actual transfer (months)
A	21	17/11	37
B	21	18/8	28
C	21	18/9	27
D	20	18/4	20
E	21	19/5	19
F	19/6	18	18
G	19	19	2 days

The seven juvenile detainees listed above, all of whom were Lebanese and had been convicted of sexual assault offences, were moved from the same juvenile detention centre within a ten-month period. All went to prison prior to the date specified on their section 19 order. Two groups of young men were involved in separate incidents in juvenile detention in October and November 2002, both of which involved the detainees arming themselves with weapons and keeping staff as hostages, according to the reports and interviews conducted with staff and the detainees. Four of the five were then charged with criminal offences committed as adults<sup>33</sup>. At interview, four of these five offenders reported that they had deliberately committed these offences in order to be moved to prison. One of the five (A) was under 18 years at the time of the incident so was transferred to prison under section 28 (1) *Children (Detention Centres) Act 1987*.

The other two detainees instigated assaults, were subsequently charged with offences, and then were sent to prison on remand. A staff member reported that one of the two had assaulted a detainee just seriously enough so as to be charged with an adult offence, after previous applications to the Department of Juvenile Justice to transfer to Corrective Services had failed. The other had allegedly thrown a tennis ball at a staff member for no apparent reason and been charged with an assault offence.

Both centre staff and detainees interviewed as part of this review suggested that a number of detainees serving longer sentences were encouraged by some staff to consider moving to prison at an earlier date than specified on their section 19 order. Detainees were also aware that if they wanted to go to prison once they were over the age of 18 years they could commit an offence in detention, be charged as an adult, and were likely to be remanded to adult prison, where they would serve their sentence for this offence.

<sup>33</sup> When a detainee is charged with a criminal offence committed in juvenile detention when they are over 18 years, it is dealt with by the Local Court, who may remand them in custody- prison - and, if sentenced to a period of imprisonment, will have to serve it in an adult prison. There are a number of offences of which detainees may be convicted in detention. They commonly include 'maliciously destroying or damaging property' (section 195 Crimes Act 1900), 'assault occasioning actual bodily harm' (section 59 Crimes Act 1900), and a new offence introduced in July 2002, section 60A (1) Crimes Act 1900:

A person who assaults, stalks, harasses or intimidates a law enforcement officer (other than a police officer) while in the execution of the officer's duty, although no actual bodily harm is occasioned to the officer, is liable to imprisonment for 5 years.

### 3.2.4 Reasons the courts gave for imposing section 19 orders on serious children's indictable offenders

In the sentencing comments for the seven on the list of young men who were moved to prison prior to the time specified in their section 19 order, four were assessed as having moderate to severe intellectual disabilities. In one case, the judge directed that the offender serve his sentence in a detention centre until the age of twenty-one, because his mental and intellectual disabilities could not be catered for in an adult prison for at least two years. The other three were assessed as being vulnerable emotionally and physically, and as lacking the maturity to cope in adult prison until they were older.

### 3.2.5 Serious children's indictable offenders who were not granted section 19 orders under the Act to remain in juvenile detention beyond 18 years

Three people have been identified as proceeding from remand in juvenile detention to adult prison where their entire sentence is to be served. These offenders were not granted section 19 orders to remain in juvenile detention, even though they committed their offences when children and were under the age of 21 at the time of sentencing. Some characteristics of these offenders are given in Table 6 below.

**Table 6: Offenders sentenced to serve entire sentence in prison**

ID	Age at sentence	Ethnic origin	Offence	Earliest release date
A	19.4	Lebanese	Aggravated Sexual Assault	14/05/2029
B	19.4	Lebanese	Aggravated Sexual Assault	02/01/2021
C	19.4	Aust - not Aboriginal	Aggravated Assault	10/09/2002
D	17.6 *	Aboriginal	Aggravated Robbery	03/11/2003

\* Transferred to prison on 18<sup>th</sup> birthday

Two of the above offenders received very long sentences. The reasons given by the judge for not allowing one of these two to remain in juvenile detention until the age of 21 included the fact that he had pleaded 'not guilty' and showed no remorse, and that it was not considered to be 'good for' his co-offenders for him to be housed with them when they had already pleaded 'guilty'.<sup>34</sup> The other offender was considered to be a leader in the commission of the offences and it was inappropriate for him to be housed with juveniles. Both were considered to be of average intelligence.

The third offender for whom no 'special circumstances' were found for him to remain in juvenile detention was sentenced to a relatively short period of imprisonment: he had only seven months to serve from the date he was sentenced and was just short of 20 years of age at the completion of his sentence.

Only one offender to date has been ordered to transfer to prison at the age of 18 years, an Aboriginal male convicted of 'Robbery, Extortion and Related Offences (not Break & Enter)', who was under 18 years at the time of sentencing and would have been under 21 years of age at the time he completed his sentence. In sentencing this offender in April 2002, the judge commented that he did 'not identify in this young man any particularly high level of vulnerability, other than that which is exhibited by all 18 year olds as they come into adult custody'.<sup>35</sup>

<sup>34</sup> This judgement is unreferenced to protect the identity of the offenders who were children at the time of the offence

<sup>35</sup> This judgement is unreferenced to protect the identity of the offenders who were children at the time of the offence

### 3.2.6 Appeals

A number of offenders sentenced to serve long periods of imprisonment for 'Aggravated sexual assault' offences are appealing the severity of their sentences. The young man convicted of 'aggravated assault' and sentenced to transfer to prison at eighteen years and four months is also appealing the severity of his sentence and the section 19 order. However, it is unlikely that his appeal will be heard before the appointed date of his transfer to prison.

The outcomes of these appeals will be monitored.

### 3.2.7 How did the transfers to prison of those on section 19 orders take place?

In July 2002, a Memorandum of Understanding (MOU) was signed by the Director-General of the Department of Juvenile Justice, the Commissioner of Corrective Services and the Chief Executive Officer of Corrections Health Service to facilitate the exchange of information between the organisations when detainees are transferred between juvenile detention and prison under section 19 *Children (Criminal Proceedings) Act 1987* and sections 10<sup>36</sup> and 28 *Children (Detention Centres) Act 1987*.

Under the MOU, a Joint Advisory Committee, comprising representatives from all these departments, is convened to 'provide advice and recommendations relating to the transfer', including the future inmate's classification, any protection issues, and recommendations for prison placement for those transferring. Members generally meet with the detainee prior to their transfer to discuss some of these issues and to describe the procedures for transferring and what it will be like for them in prison.

Additional guidance to Department of Juvenile Justice staff is provided through a departmental instruction which states that six months prior to the proposed transfer date, staff should bring to the attention of the young person that he or she should seek legal advice as to whether to make an application to the court to avoid being transferred to prison. At the same time a case conference must be held. The case conference must address casework, programming, education and treatment issues.<sup>37</sup>

However, this MOU, and therefore the case conference, does not cover detainees charged with an offence committed in juvenile detention when they were over the age of 18 years. These detainees will generally be taken from juvenile detention to police cells, and then to adult prison with no formal case conference or exchange of information between the Department of Juvenile Justice and the Department of Corrective Services, as was the situation with five detainees moved prior to their section 19 orders. Juvenile justice centre managers are, however, advised to provide a discharge summary to the Department of Corrective Services when they are aware that a detainee is to be moved to the adult system. The Department of Corrective Services also has access to the Department of Juvenile Justice's database, which provides information regarding 'alerts' for admissions from juvenile justice.

<sup>36</sup> *Children (Detention Centres) Act 1987. Section 10. Transfers from prisons to detention centres*

- (1) The Minister administering the *Crimes (Administration of Sentences) Act 1999* may, by order in writing made with the consent of the Minister administering this Act, direct the transfer of a person who is under the age of 21 years, and who is a prisoner, from a prison to a detention centre, there to be detained in accordance with this Act until the person ceases to be a person on remand or a person subject to control, as the case may be.
- (2) When a person is transferred from a prison to a detention centre:
  - (a) the person ceases to be a prisoner and becomes a person on remand or a person subject to control, as the case requires, within the meaning of this Act, and
  - (b) in the case of a person who becomes a person subject to control—the period for which the person would, immediately before the making of the order referred to in subsection (1), have been required to be detained in prison had that order not been made shall be deemed to be the period for which the person is required, under that order, to be detained in a detention centre.
- (3) The consent of the Minister is not required to an order under subsection (1) if the Minister, in the same Ministry, also administers the *Crimes (Administration of Sentences) Act 1999*.

<sup>37</sup> Director-General's Instruction No. 241/02. NSW Department of Juvenile Justice

### **3.2.8 Security classifications and placements of those transferred to prison**

All seven detainees who moved to prison prior to their section 19 orders were, as at late 2003, classified as maximum security, and five are currently imprisoned at the maximum security Goulburn Correctional Centre. Those who were moved because they committed an assault-type offence in juvenile detention, particularly if it involved staff to any extent, generally had additional 'alerts' or warnings placed on their records in Corrective Services in addition to a higher security rating. They were mostly initially placed on 'protection non-association'<sup>38</sup> orders at the Metropolitan Remand and Reception Centre (MRRC) because of the publicity surrounding their offences.

One young man who was moved to prison two days earlier than scheduled, had been involved in a classification meeting for his planned transfer and had been classified as medium security to be housed at the Junee Correctional Centre. However he and the staff of the juvenile detention centre reported that he was unhappy with his placement. After his requests for an alternate placement were denied he became involved in an incident, with the stated intention of having his placement changed. He was reclassified to maximum security at the Goulburn Correctional Centre.

The young man who was transferred at 17 and 4 months was sent to the Malabar Special Programs Centre (MSPC), a maximum-security correctional centre catering for inmates with a variety of problems. The one young man who moved at 18 years as planned under a section 19 order, was given a lower security rating than those who were moved following incidents in juvenile detention, and was, as at late 2003, in the minimum security section at Cessnock Correctional Centre, soon to be released.

As outlined above, none of the detainees who was subject to a section 19 order to transfer to corrective services to complete their sentence and had been moved by the end of September 2003 has been placed in the Parklea Correctional Centre, as envisaged when the legislation was proposed, apart from one young offender who was placed there for a short period while awaiting his more permanent placement.

### **3.2.9 How are those who have been transferred to corrective services faring?**

Interviews have been conducted with all nine young offenders who had moved to the adult system by the end of September 2003, to determine how well they were faring in their new environment. All were interviewed either soon after they transferred and/or after they had spent approximately six months in an adult prison.

Four had been held on 'protection non-association' orders at a remand institution for a number of months following their transfer. At the time of initial interview, all were unsettled and bored, and complained about being placed on 'non-association' orders which meant they were only allowed a very limited amount of time outside their cells. These four, plus another two young offenders, were later interviewed at a maximum-security institution where they were associating together and much more settled. Most complained about having 'nothing to do', except for the one who was working. All six reported smoking more cigarettes in prison, not using any illicit drugs, and not having been assaulted. All reported that the rules were more straightforward in adult prison and that 'you know where you stand with the workers'; several said that they were 'treated like a kid' in juvenile detention but that in prison you needed to 'treat the screws with respect'. However, most of these interviewees reported that they thought it was preferable to move to corrective services at an older age than 18 years.

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<sup>38</sup> A single cell or a group of cells used to accommodate an inmate/s who cannot, for the time being, associate with any other inmate

<sup>39</sup> The Hon. Patricia Forsythe MLC (Liberal) Hansard Legislative Council 16 November 1999.

Another young offender transferred to prison on his 18<sup>th</sup> birthday under a section 19 order was interviewed at a medium security institution. He reported being 'scared' when he arrived in prison but had found friends and relatives when he got there, which had helped him significantly.

Another was interviewed at a different maximum security facility soon after his arrival. He was on remand for a detention centre offence. He expressed dismay at his being sent to prison early and appeared somewhat depressed when interviewed. He said that he was frightened to leave his cell because 'I could walk out of my cell and have done nothing and get in a fight'.

The young man transferred as a 17 year old under section 28(1) *Children Detention Centres Act 1987* reported in his interview that he had been sexually harassed and had been suicidal. He commented that 'it was too hard for little fellows' and 'not safe' as the inmates 'stand over you'. He reported that he had been prescribed anti-depressant medication in custody, but appeared depressed at interview. He also reported that he had 'someone here looking after me'.

### **3.2.10 Once moved to the adult system under these provisions is a detainee able to return to juvenile detention?**

In February 2000, section 28BA *Children (Detention Centre) Act 1987* was enacted. This new section provided that young offenders who have completed their term of imprisonment for an offence committed when over 18 years, must serve the balance of any unexpired term of a detention order in prison. The prisoner may, however, apply to the Children's Court to return to juvenile detention. This means that a detainee, for example, who commits an offence in detention, is convicted and sentenced to a three-month prison sentence, is unable to return to juvenile detention to serve the remainder of his control order under section 19, unless ordered by the Children's Court.

During Parliamentary discussions about the introduction of section 28BA in late 1999, concerns were raised that the Department of Juvenile Justice 'may prefer charges as a way of getting rid of unwanted detainees'<sup>39</sup>, a point that was also raised in the 1996 Ombudsman's report of the *Inquiry into Juvenile Detention Centres*.

There is no specific guidance provided in the *Children (Detention Centres) Act 1987* about the procedures to be used to reverse the Ministers' decision to transfer a detainee to prison under section 28(1). However, the detainee could write requesting a reconsideration of the decision. It is also open to the person to seek an administrative review of the Ministers' decision in the Supreme Court on the basis that the Ministers have ignored relevant considerations or taken into account irrelevant considerations.

It has come to the attention of the Ombudsman that one young offender transferred to prison prior to his section 19 order because of an incident in juvenile detention has applied to return to juvenile detention. The outcome of this application will be monitored.

## 4. Issues raised in the review to date

The information presented in this discussion paper represents the findings from the first twenty months of the NSW Ombudsman's scrutiny of the operation and effect of section 19 *Children (Criminal Proceedings) Act 1987*.

The major issues raised to date and possible discussion questions are outlined below.

- The *Children (Criminal Proceedings) Amendment (Adult Detainees) Act 2001* was introduced to remove all serious offenders from juvenile detention by the age of 21 years and six months, and most serious children's indictable offenders by the age of 18 years. Historically, however, very small numbers of people remain in juvenile detention beyond twenty-one years. The legislation has not yet been in operation long enough for the removal of all over 21 year-olds to be evident, as its application was not retrospective.

### Key questions:

1. Have there been any noticeable effects on juvenile detention centres as a result of the removal of older detainees who are subject to section 19 orders?
2. What have been the effects on the adult correctional system of receiving detainees the subject of section 19 orders?
3. What are the impacts on the lives of detainees effected by the 2001 amendments to section 19 and those transferred early under other provisions?
4. What programs and services are provided to detainees the subject of section 19 orders when in juvenile detention and when in the adult correctional system?

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- The *Children (Criminal Proceedings) Amendment (Adult Detainees) Act 2001* was also introduced to remove all serious children's indictable offenders by the age of 18 years. In relation to most of those sentenced for serious children's indictable offences since the 25 January 2002, the courts have recognised 'special circumstances' justifying the person remaining in juvenile detention beyond 18 years. Most then complete their sentences between 18 and 21 years and are discharged into the community. In relation to thirteen serious children's indictable offenders, the courts have recognised 'special circumstances' justifying the person remaining in juvenile detention for some period prior to being transferred to adult prison to complete their sentence, generally at the older end of the scale. A very small number (two) have been ordered by the sentencing court to transfer to prison at the age of 18 years.

### Key issues for comment:

5. We invite your views on the operation of the 'special circumstances' provisions. Please provide details of any relevant case and any issues raised by the application of the 'special circumstances' provisions.
  6. We invite your comments on the adequacy of the information supplied to the court at the time of sentencing and the consideration of 'special circumstances'.
  7. We invite your submissions on the scope of the opportunity for the Department of Juvenile Justice and others to make appropriate representations and recommendations to the court regarding the consideration of 'special circumstances'.
  8. At the moment, a transfer to prison occurs even if an appeal against the severity of a sentence has been lodged. We invite your submissions on any issues arising from this situation.
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- A number of detainees (seven) have been moved to prison prior to the dates specified on their section 19 orders. Another detainee who had been ordered by the court to serve his entire sentence in juvenile detention was transferred to prison at the age of 17. These detainees were either charged with offences committed in detention and remanded to prison, or, if they were under 18 years of age, transferred under section 28(1) of the *Children (Detention Centres) Act 1987*. Since the enactment of section 28BA *Children (Detention Centres) Act 1987* in 2000, returning to juvenile justice centres after time spent in the adult system has become more difficult.

### Key question:

9. What safeguards should be in place to ensure that detainees the subject of section 19 orders are not inappropriately transferred to prison under other provisions?
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- To date, detainees transferred under a section 19 order (and those charged with an offence committed in detention) have generally been housed in maximum security prisons, rather than in the young offenders program as contemplated in the Parliamentary debates.

### Key question:

10. We invite your comments on any issues arising from such placements including comments on the safeguards that are or should be put in place to ensure their safety and appropriate management in the adult correctional environment?
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## 5. Submissions and comments

We welcome submissions and comments on any of the issues raised in this discussion paper, or any other aspect of the *Children (Criminal Proceedings) Amendment (Adult Detainees) Act 2001*.

Material from the submissions may be referred to in the final report to Parliament. If you do not want all or some aspects of your submission to be attributed to you or your organisation, please advise us accordingly.

Submissions and comments, which can be in the form of a letter or email, may be forwarded to the NSW Ombudsman as follows:

Adult Detainees Project  
NSW Ombudsman  
Level 24, 580 George Street  
Sydney NSW 2000

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Web: [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)

Due date for submissions

**21 May 2004**