



NSW Ombudsman

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



CELEBRATING 30 YEARS OF SERVICE 1975~2005

November 2005



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Addendum

Since publication of this report, the Department of Juvenile Justice has notified the Ombudsman that the data it supplied for the years 2004 and 2005 that was relied upon and reproduced in table 1 on page 41 was inaccurate. The Department's data now indicates that 34% of all detainees in juvenile justice centres as at 30 June 2004 were 18 years and older and as at 30 June 2005 it was 33%. These corrected figures still confirm that the number of adults held in juvenile detention during the first three years of the operation of the new legislative provisions increased rather than decreased (from 27% of all detainees in 2002 to 33% in 2005). The corrected figures have no impact on any of the substantive conclusions, findings and recommendations of the report.

The Department of Juvenile Justice has provided the following data for the years 2004 and 2005 to update table 1 on page 41:

As at 30 June	Total number of detainees	18 years	19 years	20 years	21+ years	Total 18+ years	18+ years as a percentage of total
2004	298	55	29	13	3	100	34%
2005	286	48	26	16	3	93	33%

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Amendment (Adult Detainees) Act
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Executive summary

Background

The *Children (Criminal Proceedings) Amendment (Adult Detainees) Act 2001* (the Act) commenced on 25 January 2002. The objective of the Act was to limit the age to which young people can remain in juvenile custody. The Act provides that a juvenile offender convicted of a serious children's indictable offence must not remain in juvenile custody beyond the age of 18 unless the court finds special circumstances to justify otherwise, or the non-parole period expires within six months of the offender's 18th birthday. In addition, no individual may remain in juvenile custody beyond the age of 21 years and six months.

Under section 16 of the Act, 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 child¹ when the offence was committed, and*
- (c) *who was under the age of 21 years when charged before the court with the offence.*

The NSW Ombudsman was charged with monitoring the operation and effect of the Act for a period of three years from its commencement.

Our review has included gathering statistical data, examining court documentation, speaking with young people affected by the Act and examining their files, interviewing key policy and operational staff within the Departments of Juvenile Justice and Corrective Services and reviewing relevant policies and procedures.

We issued a discussion paper in April 2004 highlighting our approach and research at that time, and identifying some significant issues. In finalising this report, we have considered the responses to that paper. We have also sought comments from the Department of Juvenile Justice (DJJ), the Department of Corrective Services (DCS) and the Attorney-General's Department about our views and recommendations.

Significant findings

Application of the Act

A total of 147 juvenile offenders were convicted of an indictable or serious children's indictable offence and sentenced 'according to law' (i.e. by a court other than the Children's Court) during our review period. A total of 138 individuals were given a section 19 order to remain in juvenile detention beyond their 18th birthday because the sentencing judge made a finding of 'special circumstances'. Of this total:

- 23 were given a section 19 order although their non-parole period fell prior to their 18th birthday or they were indictable offenders (rather than serious children's indictable offenders) whose non-parole period fell before they turned 21 years and 6 months of age
- 111 were directed to complete the whole of their sentence in juvenile custody, and
- 27 were directed to complete part of their sentence in juvenile custody.

Apart from those cases in which orders were made 'unnecessarily', the effect of which is negligible, we are satisfied that the legislation was properly applied during the review period.

Practical effect of the Act

During the review period, four individuals transferred to the adult correctional system on the date ordered by the court. A further 18 individuals transferred to the adult correctional system under another provision, 16 in accordance with section 28 of the *Children (Detention Centres) Act 1987*. Of these 16, seven had been ordered by the court at the time of sentencing to complete the whole of their period of imprisonment in juvenile detention. The remaining nine individuals were moved to the adult correctional system prior to the date originally ordered by the court.

Therefore, over 10% of individuals who received a section 19 order were subsequently moved to the adult correctional system under another provision. This highlights the fact that a section 19 order can become 'void'. Furthermore, while the court makes a section 19 order, it does not play any part in the decision to move a person sentenced under section 19 to the adult correctional system under section 28(1) of the *Children (Detention Centres) Act*. While the court does have responsibility for administering section 28BA of the Act, it is unable to take into account an existing section 19 order when ordering a person to transfer to the adult correctional system in accordance with the section.

Transfer of persons sentenced under section 19 to the adult correctional system

We are satisfied that, in relation to the four individuals who transferred to the adult correctional system on their scheduled date, DJJ and DCS properly followed established procedures.

We are also satisfied that, in relation to the 18 individuals who were moved to the adult correctional system under a provision other than section 19, DJJ and DCS followed established transfer procedures. However, we noted some concerns about the application process and the lack of an independent review mechanism for overlooking orders made under section 28(1) of the Children (Detention Centres) Act.

In this report, we make several comparative observations about the experiences in adult custody of young offenders transferred under section 19 and those with section 19 orders transferred to adult custody under other legislative provisions.

Effect of the legislation

Whilst there are a very small number of people over the age of 21 years in juvenile custody, the number of persons over the age of 18 years in juvenile custody has not declined since its commencement. To the contrary, the number has significantly increased. Therefore, the legislation does not appear to be achieving its stated objective of separating young adults from juveniles.

There appear to have been no substantive effects, either positive or negative, of the legislation on the operation of juvenile justice centres.

Contextual issues

Throughout the review period, there were a number of dynamic factors affecting the juvenile justice environment that contaminated our attempts to objectively evaluate the operation and effect of the legislation, including:

- the conviction and sentencing of high-profile juvenile offenders in 2001/2002
- on-going problems at Kariong Juvenile Justice Centre
- the handover of Kariong JJC to DCS in 2004, and
- the further amendment of section 19 as a result of the *Juvenile Offenders Legislation Amendment Act 2004*.

We discuss these factors and related issues in this report and consider their impact on our review.

Future issues

The handover of Kariong JJC and the passage of the Juvenile Offenders Legislation Amendment Act that formalised it in the penultimate month of the review period have significantly altered the juvenile justice landscape in NSW. How these changes will impact on the operation and effect of section 19 remains to be seen. Nevertheless, some issues are already emerging.

A number of individuals who were sentenced under section 19 before the hand-over of Kariong remain at that centre. Offenders are effectively managed at Kariong in the same way that adult inmates are managed in the mainstream correctional system.² Therefore, for all intents and purposes, those on section 19 orders are not now detained in an environment envisioned by the court at the time of sentencing. When Kariong was proclaimed a juvenile correctional centre, it was unclear what programs, if any, the centre would run to accommodate the needs of inmates. However, DCS has recently run a 'satellite' program at Kariong based on the Specialised Program for Young Adult Male Offenders, and intends to do so on a regular basis. An Alcohol and Other Drug (A&OD) relapse prevention course has also been offered. DCS has advised its intention to implement specialised sex offender and violent offender programs at the centre. These will be based on the programs run in the mainstream adult system, but developed in consultation with DJJ. We support these initiatives.

How the hand-over of Kariong will affect the use of section 19 orders by the court is unclear. The Juvenile Offenders Legislation Amendment Act amended section 19 so that the court can now only direct that a young person serve their sentence as 'a juvenile offender' (rather than 'in a juvenile detention centre'). The amendment means that young people who have received a section 19 order can be placed at Kariong, despite the fact that Kariong is no longer a juvenile justice centre. From Kariong, they may be subsequently transferred to the mainstream adult correctional system on the order of the Commissioner for Corrective Services.

It is too early to say how the changes effected by the Juvenile Offenders Legislation Amendment Act might affect the court's application of section 19.

Endnotes

- ¹ A person under the age of 18 years.
- ² There are some differences in the way that inmates under the age of 18 are managed as a result of child protection requirements. These differences relate to the use of force and segregation.

Summary of recommendations

Recommendation 1

It is recommended that the legislation be amended to require judges to:

- (a) provide their reason/s for finding special circumstances
- (b) provide reason/s when making a time-limited section 19 order, and
- (c) provide their reason/s for declining to find special circumstances if a submission in support of such a finding has been put before the court.

Recommendation 2

It is recommended that the Department of Juvenile Justice reconsider its policy of not making a recommendation to the court in the pre-sentence background report regarding the presence of 'special circumstances'.

Recommendation 3

It is recommended that the legislation be amended to provide that a section 19 order requiring an offender to be transferred to an adult correctional centre at a specific time after having spent a period following sentence in a juvenile justice centre may be stayed on application pending the outcome of an appeal against the sentence.

Recommendation 4

It is recommended that an independent body review section 28 of the Children (Detention Centres) Act 1987 with particular attention to the operation and effect of section 28(1).

Recommendation 5

It is recommended that a program be developed to assist in providing information to judges about the specific programs and facilities offered in juvenile justice and adult correctional centres and about limitations on offender access to these programs and facilities. It is noted that the Judicial Commission, in consultation with the Departments of Juvenile Justice and Corrective Services, is the most appropriate body to deliver such a program.

Recommendation 6

It is recommended that the Department of Corrective Services prioritise the implementation of a 'satellite' version of the Specialised Young Adult Male Offenders Program across correctional centres catering for young offenders who are ineligible for placement at John Morony and/or Oberon Correctional Centres. It is further recommended that the program should include a focus on assisting offenders serving long sentences to plan an integrated, long-term developmental pathway and to improve their coping, adjustment and motivational skills.

Recommendation 7

It is recommended that the Department of Corrective Services assess the needs of inmates at Kariong on an on-going basis and utilise its OS&P staff to develop and deliver appropriate developmental and rehabilitative programs for the young offenders detained there.³

Recommendation 8

It is recommended that the Department of Juvenile Justice and Corrective Services develop a formal transition and induction program specifically for young offenders who are transferring to the adult correctional system for any reason. It is further recommended that this program specifically identify and mandate the roles and responsibilities of staff.

Endnotes

- ³ In correspondence to the Ombudsman, DCS advised on 29 August 2005 that 'once the Kariiong program staff selection processed are complete, other rehabilitative programs (in addition to satellite and A&OD Programs) will be made available at the centre'.

Glossary of terms

Case management	The process of managing offenders through individual attention to their criminogenic and developmental needs.
CCA	Court of Criminal Appeal
Child	A person under the age of 18 years
CIDS	Client Information Database System – the Department of Juvenile Justice’s electronic database containing information about clients.
CST	Centre Support Team – comprises nursing, psychology, A&OD and case management coordination staff within a juvenile justice centre.
‘D’ file	The physical (paper) file that contains information about a young person held in a juvenile justice centre. Documents placed on the D file include legal warrants, misbehaviour and incident reports, records of punishment, behaviour management plans, etc.
DCS	Department of Corrective Services
DJJ	Department of Juvenile Justice
Indictable offence	An offence that can be heard before a jury, as opposed to an offence that can be heard summarily.
JJC	Juvenile Justice Centre – an institution for the detention of juvenile offenders. There are nine JJCs across metropolitan, regional and rural NSW.
JM1	John Morony 1 Correctional Centre – maximum security centre located in Windsor, north-west of Sydney. Offenders assessed as suitable for the Specialised Program for Young Male Offenders are initially placed at JM1.
Juvenile	A person under the age of 18 years.
Juvenile offender	A person who commits an offence when under the age of 18 years.
Limited association	An order that can be applied to an inmate in protective custody in an adult correctional centre. A ‘limited association’ order means that an inmate can only have contact with one or more selected inmates.
MRRC	Metropolitan Remand and Reception Centre – maximum security correctional centre located at Silverwater in Sydney. The MRRC houses approximately 900 male inmates who are on remand, in Sydney to attend court, or waiting for a vacancy to arise at their correctional centre of classification. Before Kariong Juvenile Justice Centre became a juvenile correctional centre, young people transferring from the juvenile to the adult system were initially placed at the MRRC for assessment.
MSPC	Metropolitan Special Programs Centre – maximum security centre located within the Long Bay Complex at Maroubra in Sydney. The MSPC caters for male inmates with a variety of special needs, including those participating in the Department’s violence prevention and/or sex offender programs.
Non-association	An order that can be applied to an inmate in protective custody in an adult correctional centre. A ‘non-association’ order means that an inmate cannot have contact with other inmates. Also referred to as ‘strict’ protection.
OMS	Offender Management System – the Department of Corrective Services’ electronic database containing information about persons in adult custody. A new system, the Offender Integrated Management System (OIMS) is being phased in to replace OMS.
OS&P	Offender Services and Programs – comprises clinic, welfare, psychology, A&OD and program staff in an adult correctional centre.

Protection	The separation of an inmate in an adult correctional centre on the basis that their safety is at risk from other inmates. Inmates in protective custody (or 'on protection') are housed separately from the main population.
Section 19 order	A direction made by the court to enable a young person to remain in the custody of a juvenile justice centre beyond the age of 18 years.
Section 28	Provisions for the transfer of a young person from a juvenile justice centre to a correctional centre are contained in sections 28(1), 28A, 28B and 28BA of the Children (Detention Centres) Act 2001. All sections, except s28(1), are administered by the court. s28(1) is administered by the Department of Juvenile Justice.
Segregation	The separation of an inmate in an adult correctional centre on the basis that s/he poses a risk to others, to security, or to the good order and discipline of the correctional centre.
Serious children's indictable offence	An offence which must be dealt with 'according to law', including homicide, aggravated sexual assault, aggravated assault and some robbery offences. The Children's Court cannot hear these offences.
SORC	Serious Offenders Review Council – a panel appointed by the NSW Governor and the Commissioner of Corrective Services. SORC provides advice about the classification and management of serious offenders. 'Serious offenders' are defined under section 3 of the Crimes (Administration of Sentences) Act 1999.
Special management area	An area within an adult correctional centre where inmates in protective or segregated custody are housed separately from the main population.
SPYAMO	Specialised Program for Young Adult Male Offenders – administered by the Department of Corrective Services.
SYORP	Serious Young Offenders Review Panel – a panel appointed by the Minister for Juvenile Justice. SYORP provides advice about the classification and management of serious young offenders (those convicted of a serious children's indictable offence) to the Director-General of the Department of Juvenile Justice.

Chapter 1. Introduction

1.1. Children (Criminal Proceedings) Act 1987

The *Children (Criminal Proceedings) Act 1987* provides the legislative framework governing the conduct of criminal proceedings against children and other young persons.⁴ As originally enacted, section 19 of the Act enabled the court to direct that a young person should remain in juvenile detention beyond the age of 21 years. There was no upper age limit on the court's discretion.

1.2. Background to the Children (Criminal Proceedings) Amendment (Adult Detainees) Act 2001

In 2001, the Government sought to amend section 19 to limit the upper age to which young people are able to remain in juvenile detention. The stated purpose of this objective was to separate adult from juvenile offenders within juvenile detention, with a particular emphasis on adult offenders convicted of serious children's indictable offences.⁵ In her Second Reading Speech on 13 December 2001, the then Minister for Juvenile Justice, the Hon Carmel Tebbutt MLC, stated:

*the Government believes it inappropriate to hold this category of offenders in juvenile detention beyond the age of 18. To continue to do so may jeopardise the chance of rehabilitating younger, less serious offenders.*⁶

The Children (Criminal Proceedings) Amendment (Adult Detainees) Bill 2001 sought to make a person convicted of a serious children's indictable offence ineligible to remain in juvenile detention beyond the age of 18 years unless a) the court determined that there were special circumstances to justify it or b) the release date fell within six months of the person's eighteenth birthday. In addition, it sought to limit the upper age to which all offenders could remain in juvenile detention to 21 years, or 21 years and six months if the release date fell within that period.

The Opposition supported the Bill, saying the proposed amendment responded to 'community outrage' about the number of adults serving sentences in juvenile detention. It argued, however, that the Bill 'does not go far enough as it allows a number of juvenile offenders who are over the age of 18 to remain in a juvenile detention centre'.⁷

Concern was expressed by a number of parliamentarians about the potential consequences of the Bill. The Hon Patricia Forsyth MLC (Liberal) emphasised the need for consideration of special circumstances in cases of particularly vulnerable young offenders, such as those with an intellectual disability. She also expressed concern about the safety of young people in adult correctional centres, proposing that young adult offenders be housed separately from older inmates.⁸

In opposing the Bill, Mr Richard Jones MLC (Independent) speculated on the role of 'moral panic' in prompting it. Mr Jones reported research findings 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.*⁹

Mr Jones seconded Ms Forsyth's concerns about the safety of young people in adult correctional centres. He also questioned the Government's commitment to 'good juvenile justice procedures', stating, '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.'¹⁰

The Greens also opposed the Bill, criticising it as a 'measure...being driven by the fear of tabloid headlines'.¹¹ Ms Lee Rhiannon MLC said the legislation would 'dramatically reduce the prospects of rehabilitation for countless young detainees' and subject them to 'brutalisation and rape'.¹² The Hon Ian Cohen MLC also referred to the prevalence of rape and assaults on young people in adult custody. In addition, he raised the issues of overcrowding and greater access to drugs in prison.¹³

The Australian Democrats argued likewise that there was 'no good rationale for the bill'.¹⁴ The Hon Dr Arthur Chesterfield-Evans MLC reported that 'the number of people [over 18] in juvenile detention as at 20 November 2001 were 12 aged 19, nine aged 20, two aged 21, one aged 22 and two aged 23'. He stated:

*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.*¹⁵

Dr Chesterfield-Evans said the 'likelihood of such people not re-offending after serving their gaol term must surely be very slight.'¹⁶ He reiterated concerns about the safety of young people in adult correctional centres. Dr Chesterfield-Evans also noted the NSW Law Society's 'considerable concern' about the Bill and the opposition to it expressed by the then Community Services Commissioner, Mr Robert Fitzgerald.¹⁷

Citing concerns about increased vulnerability, a number of parliamentarians argued that young offenders transferred to the adult correctional system should be housed separately from older offenders. Mr Richard Jones suggested, for instance, a 'separate wing in gaols for young offenders'¹⁸ while Reverend the Hon Fred Nile MLC (Christian Democrats) suggested that 'the Government consider halfway houses for older persons.'¹⁹

In response to this, the Minister for Juvenile Justice stated that:

*The Department of Corrective Services already has a young offender program, which operates for people who are between the ages of 18 years and 25 years. It is the Government's intention...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.*²⁰

The Minister also sought to reassure the Parliament by stating 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'.²¹

In response to the number of concerns raised in the Parliamentary discussions about the Bill, Mr Richard Jones moved an amendment that the Ombudsman be required to review the legislation and report his findings before both Houses of Parliament. This amendment was comprehensively supported and passed.

1.3. Passage of the Children (Criminal Proceedings) Amendment (Adult Detainees) Act 2001

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.*

The practical effect of the legislation is to limit the upper age to which a person can be detained in a juvenile justice facility to 21 years and six months.

1.3.1. To whom the legislation applies

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

Under section 16 of the Children (Criminal Proceedings) Act, 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 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.*

Under section 17 of the Act, a person who has pleaded guilty to or been found guilty of a serious children's indictable offence must be dealt with 'according to law'. In other words, the Children's Court cannot determine matters involving serious children's indictable offences. A person who has pleaded guilty to, or been found guilty of, an indictable offence other than a serious children's indictable offence may be dealt with, at the court's discretion, according to law or in accordance with Division 4 of Part 3 of the Act.²²

1.3.2. Definition of terms

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

child: under section 3 of the Children (Criminal Proceedings) Act, 'child' means a person who is under the age of 18 years.

indictable offence: an offence capable of being heard 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.

serious children's indictable offence: under section 3 of the Children (Criminal Proceedings) Act, 'serious children's indictable offence' means:

- homicide
- an offence punishable by imprisonment for life or for 25 years
- an offence, or an attempt to commit an offence, under section 61J (aggravated sexual assault) or section 61K (assault with intent to have sexual intercourse) of the *Crimes Act 1900*, 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,²³ the following offences are prescribed as serious children's indictable offences:

- an offence under section 66A or 66B of the *Crimes Act*,²⁴ or
- an offence under section 80A (sexual assault by forced self-manipulation) of the *Crimes Act*, but only if the victim of the offence was under the age of 10 years when the offence occurred.

A complete list of serious children's indictable offences is included at Appendix 1.

1.4. The role of the NSW Ombudsman

Section 4 of the Children (Criminal Proceedings) Amendment (Adult Detainees) 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.*

1.5. Structure of this report

This report contains eight chapters. They address, in order:

- our approach to monitoring the operation and effect of the legislation
- the timing of our review and this report in relation to other relevant events
- how offenders are managed in juvenile justice and correctional centres
- the statistical data collected throughout our review
- the courts' application of the legislation
- procedural issues relating to detention and imprisonment, and
- the impact of the legislation on young people, juvenile justice centres and adult correctional centres.

Individual case studies are included in the final chapter. The appendices contain a full list of serious children's indictable offences, a summary of comparative legislation in other Australian states and territories, a list of submissions to our review, and the correctional centre placement guide used by DCS.

Endnotes

- ⁴ Persons who committed an offence when a child but who were charged when over the age of 18 (but under the age of 21).
- ⁵ The most common serious children's indictable offences are murder, manslaughter, aggravated sexual assault and certain robbery offences. See Appendix 1 for a full list of serious children's indictable offences.
- ⁶ The Hon Carmel Tebbutt, NSW Parliamentary Debates (NSWPD), Legislative Council, 13 December 2001, p.20161.
- ⁷ The Hon John Jobling, NSWPD, Legislative Council, 13 December 2001, p.20162.
- ⁸ The Hon Patricia Forsyth, NSWPD, Legislative Council, 13 December 2001, p.20163.
- ⁹ Mr Richard Jones, NSWPD, Legislative Council, 13 December 2001, p.20169.
- ¹⁰ *Ibid.*
- ¹¹ Ms Lee Rhiannon, NSWPD, Legislative Council, 13 December 2001, p.20172. In September 2001 the *Sunday Telegraph* published a story headlined 'Adults serve their time in children's jail'.
- ¹² *Ibid.*
- ¹³ The Hon Ian Cohen, NSWPD, Legislative Council, 13 December 2001, p.20174.
- ¹⁴ The Hon Dr Arthur Chesterfield-Evans, NSWPD, Legislative Council, 13 December 2001, p.20172.
- ¹⁵ *Ibid.*
- ¹⁶ The Hon Arthur Chesterfield-Evans, NSWPD, Legislative Council, 13 December 2001, p.20173.
- ¹⁷ *Ibid.*
- ¹⁸ Mr Richard Jones, NSWPD, Legislative Council, 13 December 2001, p. 20169.
- ¹⁹ Rev the Hon Fred Nile, NSWPD, Legislative Council, 13 December 2001, p. 20170.
- ²⁰ The Hon Carmel Tebbutt, NSWPD, Legislative Council, 13 December 2001, p.20176-20177.
- ²¹ The Hon Carmel Tebbutt, NSWPD, Legislative Council, 13 December 2001, p.20162.
- ²² Division 4 Part 3 provides that a court can exercise the functions of the Children's Court.
- ²³ Section 4 of the *Children (Criminal Proceedings) Regulation 2000* commenced on 1 September 2000.
- ²⁴ 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 a 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.

Chapter 2. Scope and methodology

In this chapter, our approach to assessing the operation and effect of the legislation is outlined, and the methods we employed to carry out this assessment are summarised.

2.1. Assessing the operation and effect of the Act – our approach

We have monitored the following indicators in order to assess the operation and effect of the Children (Criminal Proceedings) Amendment (Adult Detainees) Act:

(1) the application of the legislation by the courts:

- number of matters in which a section 19 order was made
- number of matters in which a section 19 order was not made
- number of young people ordered to complete the whole of their sentence in a juvenile justice centre
- number of young people ordered to complete part of their sentence in a juvenile justice centre
- submissions to the court on 'special circumstances', and
- findings by the court of 'special circumstances'.

(2) the extent to which section 19 orders made by the court are effected in practice:

- number of young people who transferred to adult custody as and when directed, and
- number of young people sentenced under section 19 who transferred to adult custody under another provision.

(3) the impact on young people affected by the legislation:

- experiences of young people, sentenced under section 19, in juvenile and adult custody
- similarities and differences in the experiences of young people who transferred to adult custody under a section 19 order, compared with young people who were transferred to adult custody under a provision other than section 19
- impact of the legislation on the operation of juvenile justice and correctional centres
- extent to which the effective management of juvenile justice centres was compromised, prior to the amendment of section 19, by the presence of adult detainees
- extent to which the amendment of section 19 has alleviated identified problems, associated with the presence of adult detainees, concerning the management of juvenile justice centres, and
- extent to which the amendment of section 19 has impacted on the management of adult correctional centres.

DJJ has indicated that it considers inappropriate our inclusion in this report, issues and findings concerning young people sentenced under section 19 but who subsequently moved to the adult correctional system under another provision. The question of whether young people serve their sentences as the court intended them to be served is, in our view, highly relevant to an assessment of the operation and effect of section 19. Therefore, whilst we note the department's perspective, we do not consider the inclusion of this material to be inappropriate.

2.2. Data collected

A range of data collected throughout the period of review informs this report. This data is outlined below.

2.2.1. Data sourced from the Department of Juvenile Justice

DJJ directly provided or made available a large amount of data. Although it took some time to establish the nature of our information needs and the best way of meeting them, the following arrangements were in place for the majority of the review period:

- desktop access to the department's Client Information Database System (CIDS)
- provision by the department of monthly reports identifying current section 19 'clients' and recent transfers to the adult correctional system, and
- access to detainees' administration ('D' files), casework and allied health files.²⁵

The department also provided a range of information on request and on an ad-hoc basis, including copies of documentation (e.g. warrants, court background reports, section 28(1) applications) and other details pertaining to individual detainees.

2.2.2. Interviews with young people sentenced under section 19

Ombudsman staff conducted 35 interviews with young people sentenced under the amended section 19. Every young person who transferred from the juvenile justice to the adult correctional system as ordered under section 19 during the review period was interviewed after their transfer. Post-transfer interviews were also conducted with the majority of young people who were sentenced under section 19 but who subsequently moved from the juvenile justice to the adult correctional system under a provision other than section 19. In addition, a sample of individuals due to transfer to the adult correctional system under section 19 in the future was interviewed. Another, smaller sample of individuals who received a section 19 order to complete the whole of their sentence in juvenile custody was also interviewed.

All interviews were conducted individually and face-to-face. In some instances there was one interviewer and in others there were two. Participation in the interviews was voluntary. Ombudsman staff explained the purpose of the interview to each individual and provided an opportunity for the young person to ask questions. An undertaking of confidentiality and anonymity was also provided. Young people were informed that nothing they told the interviewer/s would be passed on to anyone in a juvenile justice or adult correctional centre, or at DJJ or DCS. It was explained that some material might be included in this report, but that such material would be de-identified. In addition, informed, written consent was sought by the interviewer/s prior to accessing any individual's allied health file.

Each interview was approximately 45-50 minutes' duration. The majority of interviews were conducted in a private, enclosed space within a juvenile justice or correctional centre. In a small number of cases, interviews were conducted with an open door. This arrangement occurred only when juvenile justice or corrective services staff identified a security or safety risk. One inmate was interviewed under the direct supervision of a corrective services officer due to a direction by the governor of that centre that the inmate be treated with extreme caution at all times.

The interviews were structured and sought to elicit a range of information, including each individual's personal and family background, history and experience of juvenile and/or adult custody, physical, mental and emotional wellbeing, and level of awareness and understanding of section 19. In relation to their experience in custody, individuals were directly questioned about drug use, physical and sexual assault, punishments and access to programs and services. Some interviews were audio-taped with the written consent of the individual and the approval of the relevant centre manager or governor.

The availability of information, time and resources limited the number of interviews we were able to conduct. We chose to concentrate on interviewing young people after their move to the adult correctional system. Some, but not all, of the young people were interviewed twice; once immediately after their move and again between six to twelve months later. Two individuals were not interviewed at all because they moved to the adult correctional system for a short period of time before being released to parole and it was not possible to schedule an interview in the interim. Another was not interviewed because of the travel distance involved (the young person was placed at Brewarrina). Finally, one individual was in transit without notice on the day that Ombudsman staff visited to conduct the interview.

Only one individual declined to participate, and this occurred when a second, follow-up interview was attempted. Willingness to cooperate during the interviews varied, but the vast majority of young people were keen to share their thoughts and experiences, particularly once they were informed that this report would be tabled in Parliament.

2.2.3. Interviews with staff from the Departments of Juvenile Justice and Corrective Services

A number of interviews were conducted during the review period with staff from DJJ and DCS. The purpose of the interviews was to elicit and obtain a range of information concerning policy, operational issues and individual detainees/inmates. On occasion, informal discussions were also held, particularly with operational staff at juvenile justice and adult correctional centres during visits to interview young people.

Formal interviews were conducted with the following office bearers of DJJ:

- Assistant Director-General, Operations
- Director, Northern Region²⁶
- Director, Transport, Placements and Drug Intelligence²⁷
- Director, Psychological and Specialist Services
- Manager, Classification
- Managers, Kariong Juvenile Justice Centre²⁸
- Assistant Manager (Client Services), Kariong Juvenile Justice Centre²⁹
- Psychologists/counsellors, Kariong Juvenile Justice Centre

- Manager, Frank Baxter Juvenile Justice Centre
- Assistant Manager (Operations), Frank Baxter Juvenile Justice Centre,³⁰ and
- Juvenile Justice Officers, Community Services.³¹

In addition to formal interviews, Ombudsman staff regularly liaised with the Assistant Director-General, Operations and the Director, Transport, Placement and Drug Intelligence.

In 2004 a written invitation was extended to all staff at Cobham, Frank Baxter³² and Yasmar juvenile justice centres to provide feedback, written or oral, on the operation and effect of section 19. The invitation included a list of issues that staff might wish to address. Staff were also assured that any information they provided would be treated in confidence. No feedback was received as a result of issuing this invitation.

Formal interviews were also conducted with the following officers of DCS:

- Director (Acting), Offender Services and Programs, and
- Manager, Program Development, Implementation and Evaluation (Young Offenders).³³

Ombudsman staff liaised frequently with the Manager, Program Development, Implementation and Evaluation (Young Offenders) throughout the review period. Governors and officers from the following correctional centres also contributed valuable information:

- John Morony Correctional Centre (Windsor)
- Goulburn Correctional Centre
- Lithgow Correctional Centre
- Metropolitan Remand and Reception Centre (Silverwater), and
- Metropolitan Special Programs Centre (Long Bay).

2.2.4. Court documents

Transcripts of judges' sentencing comments in a total of 70 matters involving the application of the amended section 19 were obtained and analysed. Additional transcripts of judges' determinations in a total of 34 appellate matters involving individuals sentenced under section 19 were also obtained and analysed. Where judges referred to detailed pre-sentence submissions, further court documentation was sought. In the majority of cases involving young people who were subsequently moved or ordered to move to the adult correctional system, copies of the mandatory background reports³⁴ authored by DJJ were obtained and reviewed.

2.2.5. Other data

Some administrative information³⁵ about individual inmates was obtained on an as-needed basis via access to the DCS Offender Management System (OMS) database. The department's Sentencing Administration unit also provided administrative information about inmates.

A range of additional material was monitored, collected and analysed throughout the review period, including:

- NSW Parliamentary Debates relating to juvenile justice and corrections issues
- media relating to juvenile justice and corrections issues
- information sourced from the Ombudsman's internal enquiries and complaints database
- 2004 Parliamentary report of Inquiry into Kariong Juvenile Justice Centre,³⁶ and
- submissions to 2005 Parliamentary Inquiry into Juvenile Offenders and transcripts of hearings.³⁷

2.3. Submissions on discussion paper

A discussion paper was issued in April 2004. This was widely distributed and placed on the Ombudsman's website. Twenty-one submissions were received. An additional four responses were received indicating nil comment. A list of submissions is included at Appendix 3.

Many of the submissions indicated opposition to the legislation. Some of the reasons provided for this opposition were that:

- the legislation is 'offence' driven rather than being built on the primary consideration of the best needs of the child
- young people are at increased risk in adult custody for physical and sexual assault and drug use
- there are less rehabilitative opportunities for young people in adult custody

- housing young people in the adult correctional system contravenes international law, e.g. Convention on the Rights of the Child (CROC), Beijing Rules, and
- many young offenders are at increased vulnerability in the adult correctional system due to factors such as intellectual disability and Indigenous status.

In advancing these arguments, many of the submissions drew attention to the established juvenile justice principle that young people who commit offences as children are entitled to a range of special protections due to their vulnerability, immaturity and rehabilitative potential.

Numerous submissions argued that one of the major reasons provided by the Government in support of the legislation, the need to separate young adult from juvenile offenders, could be addressed in ways other than removing the former to the adult correctional system. The most common alternative cited was the establishment of separate units within the juvenile justice system to accommodate young adults detained for juvenile offences.³⁸ Several submissions also stated that, at a minimum, young offenders who are transferred to the adult correctional system should be housed in separate accommodation facilities, away from older inmates. (Then) Senior Children's Magistrate John Dive offered an interesting perspective on this point, commenting that 'if proper facilities existed and were used to maintain young adults of all classifications away from older inmates in the adult system, the ready use of section 19 directions would be less attractive'.³⁹

The majority of submissions noted the importance of balancing the needs of juvenile and young adult offenders in developing policies on incarceration. A small number of submissions argued that the needs of juvenile offenders, particularly in terms of duty of care, should always outweigh those of young adult offenders.

The submissions contained a number of suggestions and/or recommendations, including that:

- the presumption of the legislation should be reversed so that the court must find special circumstances in order to direct that a young person should serve part or whole of their sentence in an adult correctional centre
- section 19 orders should be made when a young person attains the age of 18 or 21 rather than at the time of sentencing, and
- section 19 orders should be subject to review as the time approaches for the young person to be transferred to the adult correctional system.

Some submissions also referred to problems with the application of section 28 of the Children (Detention Centres) Act, which enables young people to be moved from a juvenile justice to a correctional centre under certain circumstances. Section 28 is discussed in further detail in Chapter 7.

2.4. Review of relevant literature and legislation

A range of literature was examined during the review period. Where relevant, literature is referred to in the body of this report. A select bibliography is also provided at the end of the report.

A review of legislation oversighting the incarceration of juvenile and young adult offenders in other jurisdictions within Australia was also undertaken. A summary of legislation is provided at Appendix 2.

2.5. Limitations and unforeseen issues

The factors limiting or otherwise affecting our review can be grouped under two headings: procedural and contextual.

2.5.1. Procedural factors

2.5.1.1. Interviews with young people sentenced under section 19

For reasons of time and resources it was not practicable to interview every young person sentenced under section 19. Further, it is likely that at least some young people were to some extent inhibited when interviewed by Ombudsman staff. The young people were asked to disclose highly sensitive information to someone with whom they had no prior relationship. In addition, the interviewer was most often female while the vast majority of interviewees were young men. In some instances, interviews were conducted for security reasons with an open door and in seeing and/or hearing distance of juvenile justice or correctional centre staff. All of these factors may have inhibited the young people from fully disclosing personal and sensitive information concerning issues such as drug use, sexual assault, self-harm, suicidal ideation and mistreatment/abuse.

2.5.1.2. Examination of court documents

Due also to reasons of time and resources, we did not examine every piece of available court documentation relating to the application of section 19. However, the sample of documentation that we did obtain and analyse was large enough to enable us to draw several conclusions. It is nonetheless possible that we have missed some noteworthy applications of the legislation and/or comments made by the court on the amendment of section 19.

2.5.1.3. Information obtained from CIDS

In the course of conducting this review it became apparent that there is room for improvement in terms of how information is recorded on DJJ's electronic database, CIDS. We came across numerous examples of inconsistent record-keeping practices, and some of these practices made our information gathering unnecessarily laborious. For instance, when a young person is moved from one centre to another, the reason for this movement is not recorded. We are aware that the department is introducing a new electronic database and that these problems may be ameliorated as a result.

2.5.2. Contextual factors

In Chapter 3 we discuss a number of significant events that impacted on the juvenile justice environment during the review period. These events have also impacted on our review of the legislation. In 2001 and 2002 several juveniles received long sentences for aggravated sexual assault offences. Most received section 19 orders. These cases generated extraordinary political and media attention. One of the effects of this was to ratchet up public debate about serious young offenders and the appropriate treatment of them. Another was the impact on Kariong Juvenile Justice Centre, which received into custody many of the individuals in question. As a consequence, we were confronted from the outset with a somewhat skewed set of circumstances within which to evaluate the operation and effect of section 19.

The majority of serious children's indictable offenders are detained at Kariong, and on-going systemic problems at that centre over several years have also impacted on our review. Many of the problems were and continue to be attributed, both by some staff and other commentators, to the presence at the centre of serious young offenders. Inevitably, this has contaminated our attempts to objectively evaluate the operation and effect of the section 19 legislation. This limitation was further solidified when in late 2004, the Government decided to transfer responsibility of Kariong from DJJ to DCS. For instance, most officers from DJJ were not interviewed until late 2004, towards the end of the review period, when the events leading up to and flowing from this decision were unfolding. It is reasonable to assume that the views of those with whom Ombudsman staff spoke were coloured by these events. Once again, this is a factor that has influenced our review.

2.6. A note about the identification of young people in this report

In Chapter 3 we name some young people convicted of serious children's indictable offences. The names of these offenders became publicly known when the court lifted their suppression after the conclusion of sentencing proceedings relating to the relevant individuals. Elsewhere, however, we identify these young people by a generic initial only. A generic initial also identifies all other young people referred to in this report.

In order to further protect the identities of young people in this report, we have not referenced quotations sourced from interviews, court documents and official documentation relating to them.

Endnotes

²⁵ Access to allied health files required the written consent of individuals. Consent was obtained in all cases.

²⁶ The Director, Northern Region oversees the management of custodial and non-custodial services provided by DJJ in the Gosford and Newcastle area, north of Sydney. During the review period both Kariong and Frank Baxter Juvenile Justice Centres fell within this jurisdiction.

²⁷ Among other things, the Director, Transport, Placement and Drug Intelligence oversees the transfer of young people from juvenile to adult custody and is responsible for liaising with the Department of Corrective Services in this regard.

²⁸ Both individuals who occupied this position during the review period were interviewed.

²⁹ The Assistant Manager (Client Services) oversees the provision of case management and specialist services.

³⁰ The Assistant Manager (Operations) oversees the day-to-day custodial management and security of detainees.

³¹ Juvenile Justice Officers (JJO's) are based in the community. They provide case-management and supervision of young people who come into contact with DJJ, including those detained in custody.

³² The invitation was extended to Frank Baxter JJC after the handover of Kariong JJC to the Department of Corrective Services. Staff who had worked at Kariong prior to the handover and who were subsequently employed at Frank Baxter JJC therefore had an opportunity to provide feedback.

³³ The Manager, Program Development, Implementation and Evaluation (Young Offenders) is responsible for liaising with the Department of Juvenile Justice concerning the transfer of young people from juvenile to adult custody. The position also oversees the Specialised Program for Young Adult Male Offenders.

³⁴ More information about background reports is provided at 6.1.4.

³⁵ e.g. location, classification, movements.

³⁶ NSW Parliament, Legislative Council, General Purpose Standing Committee No.3, 18 November 2004.

³⁷ NSW Parliament, Legislative Council, Juvenile Offenders Committee, 2005.

³⁸ The Australian Law Reform Commission made such a recommendation in its 1997 report, *Seen and Heard: Priority for Children in the Legal Process* (rec. 272). Victoria has a dual-track system of Youth Residential Centres and Youth Training Centres. Juvenile offenders aged 15 years or over are placed in Youth Training Centres. See Appendix 2.

³⁹ J.R. Dive, submission to Ombudsman, 9 June 2004, p.2.

Chapter 3. The review period in context

During the review period, a number of significant events occurred that impacted on the juvenile justice environment. In evaluating the operation and effect of the Act, it is important to account for these events and their influence.

3.1. Conviction of high profile juvenile offenders

In August 2001 and again in August 2002, several juveniles were convicted for their participation in a series of gang-related sexual assaults that took place in Sydney during 2000. These events and the court proceedings that followed were subject to extraordinary reportage and commentary in the media.⁴⁰ The juveniles in question and their adult co-offenders were of Lebanese-Australian extraction and much of the media coverage debated the relevance of this fact. It was alleged, for example, that the sexual assaults were racially motivated crimes directed against young Anglo-Australian women. The intense scrutiny to which these events were subjected is highlighted by the fact that the Premier, Opposition Leader and the Prime Minister all contributed to the ensuing public debate.

3.1.1. Regina v AEM (jnr) & AEM (snr) & KEM

The first sentences in relation to these cases were handed down in the District Court by the Hon Judge Megan Latham on 23 August 2001, in the matter of *Regina v AEM (jnr) & AEM (snr) & KEM*. KEM, a juvenile, was sentenced to a minimum of three years and six months imprisonment. Her Honour Judge Latham directed that KEM serve the whole of his term of imprisonment in a juvenile justice centre. KEM's two co-offenders, AEM (jnr) and AEM (snr) were sentenced to minimum terms of 18 months and four years respectively. By virtue of his age and the length of his sentence, AEM (jnr) who was 15 at the time of the offences, would complete the whole of his sentence in a juvenile justice centre.

While the NSW Judicial Commission noted that they were among the most severe handed down for rape in recent years,⁴¹ the sentences were met with both political and media condemnation on the grounds that they were 'ridiculously lenient'.⁴² The Premier announced that he would meet with the Chief Justice of the District Court to express his concerns and those of the NSW public in relation to the case. On 6 September 2001 it was confirmed that the Director of Public Prosecutions (DPP) would appeal the sentences handed down to AEM (snr) and KEM. At around the same time, the Government revealed that it would pass new legislation to make those convicted of aggravated sexual assault in company liable for life imprisonment.

3.1.2. Crimes Amendment (Aggravated sexual assault in company) Bill

On 4 September 2001 the Government introduced the Crimes Amendment (Aggravated Sexual Assault in Company) Bill 2001 into the Legislative Assembly. The Bill sought to amend the Crimes Act to create a new offence of aggravated sexual assault in company carrying a maximum penalty of life imprisonment. A new section 61JA would be inserted into the Act for this purpose, which would operate in addition to the existing section 61J(2)(c). In the second reading speech for the Bill the Attorney-General said that the Crown Advocate was in the process of preparing an application for a sentencing guideline to the Supreme Court in relation to sexual assaults (to be heard in conjunction with the appeal in the matter of *Regina v AEM (snr) & KEM*). The Bill was assented to on 21 September 2001 and on 1 October 2001 the amendment to the Crimes Act came into effect.

On 2 November 2001 a fourth co-offender was sentenced for his involvement in the same matter for which AEM (jnr), AEM (snr) and KEM were convicted. MM, a juvenile, pleaded guilty and was sentenced to a minimum term of four years imprisonment. Her Honour Judge Latham directed that MM serve the whole of his term of imprisonment in a juvenile justice centre. The DPP announced that it would also appeal this sentence.

3.1.3. Re-sentencing in the matter of Regina v AEM (snr) & KEM & MM

The appeals by the DPP were heard in the Supreme Court. The Crown Advocate submitted, on behalf of the Attorney-General, that there was a 'trend toward judicial leniency in the cases of rape and gang rape'.⁴³ On 13 March 2002 the DPP's appeals were allowed and the original sentences were significantly increased. The two juvenile offenders KEM and MM were both sentenced to a minimum term of 10 years imprisonment while their adult co-offender, AEM (snr) was sentenced to a minimum of nine years.

The re-sentencing took place approximately six weeks after the amendment to the Children (Criminal Proceedings) Act took effect. The court no longer had discretion to direct that the juvenile offenders KEM and MM serve the whole of their sentences in a juvenile justice centre. The appellate judges directed that KEM and MM serve part of their sentences in a juvenile justice centre, until 19 and 20 years of age respectively.

3.1.4. Regina v Skaf, Ghanem & Hajeid and subsequent trials

The second and more notorious case was heard only a few months after the re-sentencing of AEM (snr), KEM and MM. An adult at the time of committing his offences, Bilal Skaf was sentenced under the new section 61JA of the Crimes Act to a minimum of 39 years imprisonment for his role as the alleged 'ring-leader' of the group of offenders involved in this case. His co-offenders, Mohammed Ghanem and Belal Hajeid, were sentenced to lesser but still lengthy terms. His Honour Judge Michael Finnane declined to make a section 19 order for Ghanem, a juvenile at the time of committing the offences, directing him to serve the whole of his sentence in an adult correctional centre.

Another adult and several juvenile co-offenders were subsequently convicted for their involvement in related matters. Of the latter, Mohammed Skaf, the brother of Bilal Skaf, was sentenced to a minimum of 20 years imprisonment, Mohamed Sanoussi, 12 years, Mahmoud Sanoussi, 11 years and three months, Tayyab Sheikh, nine years and 'H', 15 years. Skaf was directed to serve the whole of his sentence in an adult correctional centre, while the others were given section 19 orders to complete part of their sentences in a juvenile justice centre until the age of 21.⁴⁴

In contrast to the furore that erupted over the original sentences handed down in *Regina v AEM (jnr) & AEM (snr) & KEM*, those received by the Skaf brothers and their co-offenders were greeted with public approval. The *Daily Telegraph* ran the story under the headline 'True Justice',⁴⁵ while the Prime Minister commented that the sentences 'certainly would have reflected deep community feeling'.⁴⁶

There is evidence that the extraordinary political and media scrutiny generated by their cases adversely affected the experiences in juvenile custody of the offenders referred to in this section. This will be discussed in Chapter 8.

3.2. Ongoing problems at Kariong Juvenile Justice Centre

Kariong Juvenile Justice Centre was designed to accommodate the state's most serious juvenile offenders and those presenting behavioural management difficulties. It had a problematic history even prior to the commencement of the review period in January 2002.

In 1996 the then Ombudsman, Ms Irene Moss, released her *Report of Inquiry into Juvenile Detention Centres*. That report described a prevailing staff culture of low morale, intimidation and fear in the state's juvenile justice centres, which permitted inappropriate staff conduct to go unreported. Its findings were accepted by DJJ, which undertook to implement all 239 of the Ombudsman's recommendations. Kariong was one of four centres identified as requiring DJJ's urgent action to investigate allegations of harassment of women staff. Although action was taken at a senior level including the revision of the department's code of conduct and increased emphasis on departmental values and gender equity, the department did not investigate the allegations concerning Kariong.

In 1999 the Shier-Sherlock inquiry was instigated by the then Director-General of DJJ as a result of serious allegations of staff intimidation, harassment, poor supervision and misconduct at Kariong. Shortly following the inquiry's interim report, a series of riots occurred at the centre. Within days of the disturbances, the then manager of Kariong was relieved of his position and replaced temporarily by a seconded Corrective Services officer who brought with him a team of specialist DCS personnel. A number of detainees were transferred to the adult correctional system.

In 2000 Ms Moss issued a special report into Kariong based on an extensive investigation prompted by the 1999 riots.⁴⁷ That report documented a prevailing dysfunctional culture at Kariong. Deficiencies were identified in a range of areas, including management, staffing and security. In particular the report strongly criticised the attitudes and behaviours of a segment of Kariong staff. Among other things, some staff interactions with detainees were found to have reduced rather than promoted their dignity and were discouraging of detainees making positive choices. It was also found that case management was yet to be effectively implemented at Kariong, as evidenced by the absence of individualised behavioural interventions to address the specific behaviour and needs of detainees.

Following the 1999 riots, the Shier-Sherlock inquiry and the Ombudsman's report, DJJ introduced a range of measures to improve the management and operation of juvenile justice centres. One of the most significant of these measures was the attempted implementation of the Kariong Programs Framework Project, which sought to separately address the needs of the two distinct groups at Kariong, i.e. serious offenders and those presenting behavioural management difficulties. In the course of conducting the present review we have heard evidence that the successful implementation of the project was substantially impeded.

That evidence suggests a clear division between some operational staff and the Centre Support Team (CST, i.e. nurse, A&OD counsellor, psychologists, case management coordinator). This division was identified in the Ombudsman's 2000 report. CST staff claim that a small number of operational staff remained resistant to the use of intensive case management techniques designed to respond to the particular challenges associated with serious offenders and those presenting behavioural management difficulties. On the other hand, some operational staff claimed that the project perpetuated a 'welfare mentality' that allowed detainees to gain the upper hand at the centre, dictating the terms of their detention and management. These staff members allege that they were subjected to unsafe working conditions and not equipped with the necessary tools to respond to violence and insubordination. Regardless, a lack of a consistent and comprehensively supported approach to their management did not assist detainees to respond to their detention in positive and productive ways.

Kariong experienced additional difficulties with the arrival in 2001 and 2002 of the high-profile juvenile offenders referred to at 3.1. Their presence generated considerable tension within the centre. There is evidence that they were subjected to open hostility from other detainees as well as from some staff. This will be discussed further in Chapter 8. 2002 also saw several disturbances take place at Kariong. In August of that year, three detainees destroyed property in a residential unit, arming themselves with broken objects as weapons. Staff withdrew from the situation after being threatened. Several detainees were prevented from leaving the unit for the duration of the disturbance. Police charged the detainees involved and one young person serving a sentence for a serious children's indictable offence under section 19 of the Children (Criminal Proceedings) Amendment (Adult Detainees) Act was moved to the adult correctional system.

Two months later, another detainee, serving a sentence for a serious children's indictable offence under section 19, threatened staff and secured himself in a residential block refusing instructions to exit. The detainee in question insisted that he be transferred to the adult correctional system. Finally, in November 2002, three detainees armed themselves with weapons, threatening and assaulting two youth workers. Following the youth workers' retreat, the detainees yelled abuse and caused damage within a residential unit until they were finally restrained some several hours later. Once again, the three detainees involved in this incident were serving sentences for serious children's indictable offences under section 19. All were moved to the adult correctional system following the incident.

According to some people with whom Ombudsman staff spoke, certain staff members at Kariong became angry and subversive when, in 2003, local policy and procedures were belatedly introduced, monitoring of sick and recreational leave arrangements commenced, and overtime was drastically cut. It is claimed that this exacerbated tension, hostility and under-performance by some staff.

It should be noted that Mr John Newbury, in his November 2004 *Review of Department of Juvenile Justice Industrial Relations and Human Resources Practices*, concluded that the problems that existed at Kariong were specific to that centre rather than indicative of a pattern throughout the juvenile detention system.⁴⁸

3.3. Political and media attention in 2004

Problems concerning the management and operation of Kariong flared again in 2004 with juvenile justice centres receiving a considerable amount of political and media scrutiny. Most of this attention was directed at Kariong, although it was a serious riot that took place at Acmena Juvenile Justice Centre in December 2003 which re-focused attention on juvenile justice centres.

In July 2004 it was reported that staff at Kariong were taking industrial action because of detainee violence. Reports of riots at Frank Baxter and Cobham juvenile justice centres also appeared in the media. In early September it was alleged that a Kariong staff member required hospitalisation after a detainee placed a lighted pillow-case on his head. Less than two weeks later, the Opposition spokeswoman for Juvenile Justice, the Hon Catherine Cusack, MLC, publicly made a number of serious allegations about Kariong, based on information received from staff, concerning security, staffing and other management practices at the centre. Ms Cusack alleged, among other things, that in March 2004, a busload of elderly tourists had mistakenly made their way into Kariong while looking for a coffee shop. She said that this was a result of deficient security arrangements at the centre.

Reports also emerged in the media claiming that a 'soft approach' to disciplining detainees was resulting in a dangerous environment in which juvenile justice centre staff were at risk from violent and uncontrollable detainees.⁴⁹ Ms Cusack was quoted as saying Kariong was 'at boiling point' as a result.⁵⁰ The then Minister for Juvenile Justice, Ms Diane Beamer, MP, responded that she had been briefed on the matters raised by the Opposition and was 'confident that all have been handled professionally and appropriately'.⁵¹ The Minister also confirmed that the Government had introduced a new detainee classification system to 'eliminate the danger of higher-risk detainees being held in inappropriate centres'.⁵²

On 15 September Ms Cusack made a further public allegation that, some months earlier, a security camera at Kariong had captured a detainee engaging in a sexual act with his girlfriend during a visit. Video footage was leaked to the media and attention was drawn to the fact that the detainee was serving a sentence for his involvement in a gang-

related sexual assault. The Minister responded, expressing concern that her department had not advised her of the alleged incident. She said that visiting rights at Kariong would be reviewed, and that she would seek to have the detainee involved transferred to an adult prison.⁵³

3.4. The 'Dalton Report' and related developments

Following the allegations made by Ms Cusack and the media coverage they and other events generated, the Minister for Juvenile Justice announced on 17 September 2004 that she had appointed Mr Vern Dalton, a former Director-General of the Department of Community Services and Commissioner of Corrective Services, to undertake an investigation into Kariong. The following day, media reports emerged alleging there had been an outbreak of violence at Kariong.⁵⁴ It was reported that two detainees had tried to set fire to their cells and threatened youth officers with pipes, and that 'staff in riot gear were forced to move in'.⁵⁵ The Minister responded that charges would be laid against both detainees and at least one - 'possibly both' - would be moved to an adult prison. Ms Cusack claimed the riot was 'proof that Kariong is in crisis'.⁵⁶

3.4.1. Parliamentary inquiry into Kariong Juvenile Justice Centre

On 22 September 2004 the Legislative Council requested that General Purpose Standing Committee No.3 meet for the purpose of hearing evidence from youth workers and staff at Kariong. Four days later the Minister for Juvenile Justice foreshadowed an announcement about the future of Kariong, saying that it would involve a 'back-to-basics approach in dealing with hard-core young offenders'. The Minister also advised that the Government would introduce new laws to make it easier to send badly behaved older detainees to adult prisons.⁵⁷

In early October Manager at Kariong was relieved of his position. An assistant manager at the nearby Frank Baxter JJC was appointed to replace him as an interim measure.

The General Purpose Standing Committee held hearings in mid-November, with much of the evidence given in-camera. As a result of subsequent developments (see below), however, it decided to discontinue its inquiry into Kariong.⁵⁸

3.4.2. Findings and recommendations of the Dalton Report

On 5 October 2004 Mr Dalton reported his findings to the Minister, concluding, 'Kariong Juvenile Justice Centre presents as a system under pressure and lacking in consistency and standards'. Mr Dalton identified a number of problems with Kariong, including 'the criminality of [the] population' and 'lack of acknowledgment by individual staff members about the role they play in Centre events and individual accountability for procedural compliance and professional relations'. He described this lack of acknowledgement as 'disturbing and destructive to what should be a safe and productive work environment'. Mr Dalton continued:

*staff should take responsibility for their own actions or lack of action in this workplace [Kariong]. They cannot expect detainees with less life experience and skills to do the same. Some staff who quite readily expect disciplinary consequences for detainees who behave disrespectfully, abusively and dangerously, do not expect to be similarly treated when their own behaviour is in question.*⁵⁹

Mr Dalton also noted that '[m]any staff do not interact constructively with detainees; other interactions are often superficial or inappropriate in nature', reporting that '[m]anagement is concerned that some Youth Officers have acted in a way to promote disharmony and conflict with detainees'.⁶⁰ He expressed concern 'that some incidents and adverse events have been used [by some staff] to undermine management'.⁶¹ On the other hand, he found that 'youth officers feel let down, unsupported and disempowered', describing 'relationships between management and staff [as being] at an all time low'.⁶²

Referring to the detainees at Kariong, Mr Dalton said:

*[a] number of Kariong residents are physically threatening, intimidating, demanding and potentially violent. They are in custody for much more serious and violent offences than was the case say 10 years ago. There needs to be greater differentiation between those offenders who can be successfully managed and assisted in the juvenile system and those who really should be in the adult system.*⁶³

He reported that 'detainees are aggressive and lack adequate controls'⁶⁴ and that 'complacency regarding some of the most basic security procedures' had 'frequently placed the safety of staff and detainees in serious jeopardy'.⁶⁵

The Dalton report made four recommendations:

- 1) That responsibility for Kariong be transferred to DCS, and that the Government make legislative changes to 'enable the bulk of offenders usually housed at Kariong to be transferred to Correctional Centres'.
- 2) That the Government 'review the prerogative of the Judiciary in determining the period that juveniles spend in the juvenile justice system', with a view to determining the 'appropriateness of offenders of 17 years or over, who have been charged with serious crimes such as murder, rape, aggravated assault and other crimes of violence...serving their full sentence in an adult correctional centre'.⁶⁶
- 3) That 'legislative amendments be considered to enable difficult to manage offenders aged 17 years whose misconduct in a juvenile justice centre warrants such action, to be transferred to an adult correctional facility'. Mr Dalton said that the Minister for Juvenile Justice and the Minister for Justice should be authorised to consent to the transfer of those offenders 'where appropriate and subject to full and adequate reports from professional and management staff'.
- 4) That detainees aged 17 years and over with a sentence to serve time beyond their 18th birthday should be able to apply to transfer with the consent of both Ministers 'instead of waiting for them to assault a staff member to achieve transfer'.⁶⁷

Recommendations 4) and 5) were essentially redundant as section 28 of the Children (Detention Centres) Act already permits such transfers.

3.5. Handover of Kariong Juvenile Justice Centre to the Department of Corrective Services

On 3 November 2004 the Government released the Dalton report, announcing that in line with the report's key recommendation, the administration and management of Kariong would be handed over to DCS. DCS assumed responsibility for Kariong the same day. Commenting on the hand-over, the Minister for Juvenile Justice said the Dalton report confirmed that the detainees at Kariong were 'better suited to an adult jail'.⁶⁸

On 5 November 2004 a Memorandum of Understanding was signed by the Ministers for Juvenile Justice and Corrective Services and the heads of their respective departments to establish a temporary framework for the hand-over of Kariong.

The hand-over itself officially took place on 10 November 2004. An officer of DCS was installed as governor of the centre. Existing staff at Kariong were stood down; some permanent staff accepted voluntary redundancies while others were transferred to Frank Baxter JJC.

3.5.1. Juvenile Offenders Legislation Amendment Bill

Following the Government's announcement concerning Kariong, the Juvenile Offenders Legislation Amendment Bill was introduced into both houses of Parliament on 18 November 2004. The object of the Bill was to amend the Children (Criminal Proceedings) Act, the Children (Detention Centres) Act and the *Crimes (Administration of Sentences) Act 1999* so as:

- (a) *to enable offenders who are dealt with under the Children (Criminal Proceedings) Act 1987 (otherwise than by the Children's Court) to be required to serve any sentence of imprisonment imposed on them either at a detention centre or at a proposed juvenile correctional centre, and*
- (b) *to modify the scheme established under the Children (Detention Centres) Act 1987 for the transfer of juvenile offenders between detention centres and correctional centres, and*
- (c) *to provide for the management of juvenile offenders within the correctional centre system under the Crimes (Administration of Sentences) Act 1999, including, in particular, the establishment of juvenile correctional centres within that system.*⁶⁹

In his second reading speech, the Hon Tony Kelly MLC stated that 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.

Mr Kelly continued:

[t]he Bill also reflects the significant changes in the profile of juvenile offenders over the past 10 years. That profile is of more sophisticated, more hardened and violent individuals, with criminal records including gang rape, aggravated assault and murder.

The detainees located at Kariong are the worst behaved in the juvenile justice system. They are there either due to the severity of their offending, or due to a history of disruption or violence in the juvenile justice system. A significant number is aged over the age of eighteen.

They belong in the adult system – however, because they offended as juveniles the Government has taken steps to introduce particular arrangements for them.⁷⁰

Among other things, the bill sought to amend section 19 of the Children (Criminal Proceedings) Amendment (Adult Detainees) Act to provide for new sentencing arrangements, according to which young people subject to a section 19 order would be required to serve their order as a 'juvenile offender' rather than 'in a detention centre'. The purpose of this amendment was to enable the detention of offenders charged with a serious children's indictable offence in a juvenile correctional centre. The Bill also sought to amend section 28 of the Children (Detention Centres) Act to enable the Director-General of DJJ, in consultation with the Commissioner of Corrective Services, to administratively transfer appropriate young offenders to a 'juvenile correctional centre'.

The Bill was assented to on 15 December 2004 and Kariong was proclaimed a 'juvenile correctional centre' for offenders between the ages of 16 and 21. As a result, the centre now operates according to the same regime as other correctional facilities, and accepts transfers from DJJ of detainees:

- who have previously served time in the adult prison system
- charged with a serious children's indictable offence, or
- whose behaviour is such that the Director-General of DJJ is satisfied that it warrants their transfer to a juvenile correctional centre.

Under the new Act:

- juvenile inmates under the age of 18 cannot be moved from a juvenile correctional centre to the mainstream prison system without the recommendation of the Serious Offenders Review Council (SORC)
- SORC is required to co-opt a person who is a current or former Children's Magistrate, or a legal practitioner of at least 7 years standing with experience as an advocate on behalf of children, to hear any application pursuant to the above, and
- all detainees, whether on remand or sentenced, must remain in the adult system to complete the entirety of their custody if they have been moved to the adult system to serve a separate sentence for an offence committed in a juvenile justice centre.

3.5.2. Select Committee on Juvenile Offenders

Prior to passing the Bill, the Legislative Council agreed to an amendment to refer it to a select committee for inquiry and report. According to the terms of reference, the committee was tasked to examine:

- (a) the reasons for, and the consequences of, the transfer of management responsibility for the Kariong Juvenile Justice Centre from the Department of Juvenile Justice to the Department of Corrective Services including the impact on staff at Kariong and Baxter detention centres,*
- (b) whether the transition of Kariong Juvenile Justice Centre into a juvenile correctional centre operated by the Department of Corrective Services is the most effective method of addressing management problems at that centre,*
- (c) the issue of adult detainees sentenced as juvenile offenders at Kariong and elsewhere in the juvenile detention centre system,*
- (d) the classification system and appropriateness of placements for detainees,*
- (e) alternatives to the establishment of a juvenile correctional centre,*
- (f) the wider social implications of incarcerating juveniles in juvenile correctional centres run by the Department of Corrective Services,*
- (g) management of staff assault issues in the juvenile justice system,*

- (h) *whether incarcerating juveniles in juvenile correctional centres achieves reduced recidivism, rehabilitation and compliance with human rights obligations.*⁷¹

The Committee received 26 public submissions and held hearings in March, April and May 2005. In its submission to the inquiry, DCS wrote:

The Dalton report noted that 'Kariong had a long history of disturbances'. Under the Department of Corrective Services, there has [sic] been no disturbances and other incidents have been minimal. The Governor of Kariong Juvenile Correctional Centre advises that there has [sic] been no incidents of staff assault or threats towards staff by inmates at any time since the hand-over.

The submission further stated that the hand-over of Kariong had resulted in inmates being 'more courteous and respectful to all staff' and willing to 'readily comply with instructions, directives and routine'.⁷²

The committee heard evidence from Mr David Sherlock, then Director-General of DJJ, about the 'significant cultural problems' that existed at Kariong prior to its hand-over.⁷³ Mr Sherlock attributed these problems to '[some] very entrenched attitudes in terms of how young people should be managed at that centre'.⁷⁴ He elaborated by saying:

*[t]here were at that centre a number of staff whose view was that control and security were the only imperatives and that rehabilitation was something that was not desirable, certainly something that they did not seek and work towards.*⁷⁵

Mr Sherlock noted that the Ombudsman and others had previously reported on this issue, including Vern Dalton in 2002.⁷⁶ He said that the hand-over of Kariong was the end product of 'an escalation of opposition from a number of staff that became very public, very political' resulting from the Department's efforts to implement 'some very significant reforms' following those reports.⁷⁷

Mr Sherlock also said that the way in which some of the incidents at Kariong were reported by the media in late 2004 was 'not consistent with the facts'.⁷⁸

In relation to the amendment of section 19 to enable a juvenile offender to be placed in a juvenile correctional centre, Mr Andrew Heasler SC of the NSW Public Defenders opined in evidence before the commission that:

*it is wrong for there to be, on the one hand, legislation which requires a court after a full and open hearing to find there are 'special circumstances' requiring young offenders [to] stay in juvenile detention until they are 21, and on the other, to allow for administrative transfer to an adult gaol on the order of the Commissioner for Corrective Services.*⁷⁹

The Committee reported its findings to Parliament on 29 July 2005, making 26 wide-ranging recommendations. Chapter 7 of the Committee's report addresses the issue of adults in juvenile detention. The Committee noted in this chapter that:

*regardless of the age of the offender at the time of sentencing, subject to the terms of the [Children (Criminal Proceedings) Act 1997], it is the age and maturity of the offender at the time of the offence that is important.*⁸⁰

The Committee continued:

*Affording some discretion to the courts in the sentencing of juveniles rightly recognises limitations of any approach that relies on age alone as the principal determinant for classification and placement. The Children (Criminal Proceedings) Act 1987 demonstrates a... thoughtful approach to sentencing that provides protection to vulnerable young offenders who, despite their age, may be unsuited to the adult penal system. It also provides discretion to allow those who committed crimes under the age of 18 a chance for rehabilitation under the supervision of the Department of Juvenile Justice. It provides for more sophisticated assessments of a wide variety of factors, including severity or nature of the crime, length of sentence, maturity, background and other risk factors.*⁸¹

In relation to the Government's decision to hand responsibility for Kariong to DCS, the Committee noted 'the widely held view expressed in evidence...that the decision...may have been a political one'.⁸² As the Committee observed, this view contradicts the principal reason for the decision espoused by the Minister for Juvenile Justice, that the detainees in Kariong, particularly 'older, more sophisticated offenders', were no longer suited, or were no longer benefiting from the juvenile justice system'.⁸³ The Committee found that:

*while...the detainees involved in the incidents [at Kariong] in 2004 were [not] blameless, the responsibility for security at the Centre and for supervision of detainees ultimately rests with the Department and its staff.*⁸⁴

Further, the Committee found that 'while Kariong may have suffered from significant disturbances at the centre, it appears that the presence of young adults should not be cited as the principal cause of those problems'.⁸⁵ The

Committee also noted that 'the influence of older detainees need not necessarily be harmful to the rehabilitative prospects of their younger counterparts'.⁸⁶

The Committee recommended:

That the NSW Government continue to develop a long-term strategy for the accommodation of serious young offenders, and in particular:

- *to further consider returning the responsibility for management of all juvenile offenders to the Department of Juvenile Justice in the longer term*
- *to further investigate the establishing of an alternative facility for 18-24 year olds, including comparative analysis of such approaches in other States, Territories and other jurisdictions, to address concerns relating to adults in the juvenile justice system.*⁸⁷

3.6. Impact on conduct and findings of this review

While it is not possible to precisely determine the impact of the above events, if any, on subsequent court proceedings involving juveniles charged with serious children's indictable offences, or on juvenile justice centres, it is important to note them as dynamic factors within the context of evaluating the operation and effect of the Act. Throughout this report they will be referred to where and as appropriate.

3.6.1. Sentencing of high profile juvenile offenders and passage of the Crimes Amendment (Aggravated sexual assault in company) Bill

It was anomalous that two such seemingly similar cases should have coincided in 2001. This coincidence alone accounts for much of the media interest that ensued. The effect of this interest on public discourse about the cases was far-reaching. Among other things, it generated a debate about how juvenile offenders who commit serious crimes should be dealt with by the criminal justice system. A prevalent view reflected in the media was that committing an 'adult crime' should lead to serving 'adult time' (i.e. a lengthy sentence served in an adult correctional centre).

It is significant that, in the cases concerning Skaf and his co-offenders, all the juvenile offenders, with the exception of 'H', were publicly named upon conviction. In addition, photographs of Bilal and Mohammed Skaf appeared regularly and prominently in the media.

All the high-profile juvenile offenders who received a section 19 order encountered difficulties in custody, many of which can be attributed to the intense public scrutiny surrounding them and their offences. As well, their presence at Kariong highlighted some of the ongoing systemic problems at that centre. These issues are discussed in Chapter 8.

3.6.2. Ongoing problems at Kariong

Regardless of the source of the problems at Kariong, the result, as one former manager admitted, was that detainees too often failed to get 'the direction, the leadership, the controls, the support [and] the casework needed to deal with [their] issues'.⁸⁸ This needs to be borne in mind when evaluating the operation and effect of the section 19 legislation, and in particular the circumstances surrounding the early transfer of young people to the adult correctional system.

3.6.3. Political and media attention in 2004

The political and media attention that emerged in 2004 drew an explicit connection between problems at juvenile justice centres, particularly Kariong, and the presence of serious offenders, especially those charged with or convicted for offences such as aggravated sexual assault and homicide. While some serious offenders were involved in incidents that occurred at juvenile justice centres throughout the review period, there is no evidence that serious offenders and those who cause management problems inherently form one and the same group. Indeed, during the course of this review, several juvenile justice centre staff provided evidence to the contrary. This issue will be further discussed in Chapter 8.

There is a clear link between the media reports of incidents in late 2004 and the decision taken by the Government to transfer the management of Kariong to DCS. While the serious nature of the offences committed by young people detained at Kariong was amply commented on by the Minister for Juvenile Justice and others, so too was the notion that their day-to-day behaviour in custody was such that juvenile justice centres could and should not be expected to encounter and manage it. This raises important questions about the mandate of the juvenile justice system. These questions are beyond the scope of the review. They are, however, important to acknowledge in the context of evaluating the operation and effect of section 19.

3.6.4. The ‘Dalton Report’ and related developments

In general, media coverage of the Dalton report focused on those aspects of it that remarked on the serious criminality of the detainees at Kariong. However, as section 3.4.2 indicates, the report commented on other factors leading to Mr Dalton’s ultimate determination that ‘[o]verall the situation at Kariong is seriously unsatisfactory’.⁸⁹

The major outcome of the Dalton report was, of course, the Government’s decision to transfer the management of Kariong to the Department of Corrective Services. The effect of that decision has been to effectively ‘contaminate’ the findings of this review, as discussed in section 3.6.5 below.

3.6.5. Handover of Kariong Juvenile Justice Centre to the Department of Corrective Services

As outlined in section 3.4.1, the decision to hand over Kariong initiated legislative changes, one of which was to amend section 19 of the Children (Criminal Proceedings) Amendment (Adult Detainees) Act. As a result of that amendment, all juvenile offenders sentenced under section 19 will now be directed to serve their sentence as a juvenile offender rather than in a juvenile detention centre, enabling those charged with a serious children’s indictable offence to be placed in a juvenile correctional centre (currently, Kariong is the only such centre). In addition, the new legislation provided for the expeditious jurisdictional ‘transfer’ of juvenile detainees already at Kariong.

In the context of this review, the most obvious outcome of the legislative changes is that several juvenile offenders in receipt of a section 19 order became, effectively overnight, inmates of a juvenile correctional centre rather than detainees residing in a juvenile justice centre. In other words, the passage of the Juvenile Offenders Legislation Act had a retrospective impact.

Notably, the hand-over of Kariong has exerted some methodological limitations for this review. For example, it undoubtedly influenced the views, in ways that cannot be distinguished, of individuals who were interviewed toward the end of the review period about the effect of the original section 19 amendment on the operation of juvenile justice centres.

Endnotes

- ⁴⁰ See Scott Poynting, Greg Noble, Paul Tabar and Jock Collins, “‘You deserve it because you are Australian’: The moral panic over ‘ethnic gang rape’”, *Bin Laden in the Suburbs: Criminalising the Arab Other*. Sydney: Institute of Criminology, 2004; Kate Gleeson, ‘From Centenary to the Olympics, Gang Rape in Sydney’, *Current Issues in Criminal Justice: Journal of the Institute of Criminology*, November 2004, Vol.16, No.2, pp.183-201.
- ⁴¹ ‘Rape terms not lenient – Judiciary’, *The Australian*, 25 August 2001, p.4.
- ⁴² Bob Carr, cited in ‘United outrage at lenient sentences – pressure to change the law’, *Daily Telegraph*, 25 August 2001, p.4. For a selection of statements arising from the judgement, see Rowena Johns, Gareth Griffith and Rachel Simpson, “Sentencing ‘Gang Rapists’: The Crimes Amendment (Aggravated Sexual Assault in Company) Bill 2001”, NSW Parliamentary Library Briefing Paper, part 5.
- ⁴³ ‘DPP to appeal on rape penalties’, *Daily Telegraph*, 7 September 2001, p.4.
- ⁴⁴ see Chapter 6 for discussion of the proceedings and sentencing remarks in these cases.
- ⁴⁵ Cited in *Race for the Headlines – Racism and Media Discourse*, Sydney: Anti-Discrimination Board of NSW, 2003, p62.
- ⁴⁶ ‘PM backs rape sentence’, *The Australian*, 19 August 2001, p.3.
- ⁴⁷ NSW Ombudsman, *Investigation into Kariong Juvenile Justice Centre*, March 2000.
- ⁴⁸ The report was commissioned by the Minister for Juvenile Justice to investigate whether problems identified by the Dalton Report (see 3.4 below) were specific to Kariong or replicated in other juvenile justice centres.
- ⁴⁹ See ‘A night out with the boys? No, it’s just another Friday at Club Kariong’, *Daily Telegraph*, 15 September 2004, p.11; ‘Inmates get their own flat-screen TVs’, www.news.com.au, 19 September 2004; Miranda Devine, ‘Social policy gone madly wrong’, *Sun-Herald*, 19 September 2004.
- ⁵⁰ ‘They wanted coffee but found themselves in jail’. *Daily Telegraph*, 14 September 2004, p.11.
- ⁵¹ The Hon Diane Beamer, NSW Parliament, Legislative Council, General Purpose Standing Committee No.3, 16 September 2004, p.4. The Hon Tony Kelly became Minister for Juvenile Justice on 3 August 2005.
- ⁵² ‘Violent class of young inmate’. *Daily Telegraph*, 13 September 2004, p.10.
- ⁵³ ‘Sex act prompts Kariong review’, *Sydney Morning Herald*, 16 September 2004, p.7. The detainee was not transferred to the adult correctional system but remains at Kariong, now a juvenile correctional centre.
- ⁵⁴ ‘Violence erupts at Kariong’, *The Weekend Australian*, 18 September 2004, www.theaustralian.news.com.au ; ‘Kariong inmates riot after searches’, *Sunday Telegraph*, 19 September 2004, p.9; ‘More violence and security lapses at Australian youth prison’, *The New Zealand Herald*, 20 September 2004, www.nzherald.co.nz
- ⁵⁵ ‘Violence erupts at Kariong’, *ibid*.
- ⁵⁶ *Ibid*.
- ⁵⁷ ‘Minister threatens to close Kariong’, *Sunday Telegraph*, 26 September 2004, pp.16-17.
- ⁵⁸ The Committee’s report was tabled on 18 November 2004.
- ⁵⁹ Vern Dalton, *Report into Kariong Juvenile Justice Centre*, 5 October 2004, p.3.
- ⁶⁰ *Ibid*. p.3.
- ⁶¹ *Ibid*. p.5.

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- 62 Ibid. p.4.
- 63 Ibid. p.2.
- 64 Ibid.
- 65 Ibid. p.3.
- 66 Ibid. p.9.
- 67 Ibid. p.10.
- 68 'Kariong moves to maximum security', *The Australian*, 3 November 2004, www.theaustralian.news.com.au
- 69 Explanatory Note, Juvenile Offenders Legislation Amendment Bill 2004.
- 70 The Hon Tony Kelly, NSWPD, Legislative Council, 9 December 2004, p.13676.
- 71 Terms of Reference, Select Committee on Juvenile Offenders, NSW Parliament, Legislative Council, 9 December 2004, Minutes No.88, Item 30, pp.1205-1210.
- 72 Department of Corrective Services, submission to Inquiry into Juvenile Offenders, 24 February 2005, p.2.
- 73 NSW Parliament, Legislative Council, Select Committee on Juvenile Offenders, *Report of Proceedings before Select Committee on Juvenile Offenders*, 9 March 2005, p.5.
- 74 Ibid.
- 75 Ibid.
- 76 Ibid.
- 77 Ibid. p.8.
- 78 Ibid. p.14
- 79 Cited in *Report on the Inquiry into Juvenile Offenders*, NSW Parliament, Legislative Council, Select Committee on Juvenile Offenders, July 2005, p.47
- 80 Ibid, p.76.
- 81 Ibid. p.18.
- 82 Ibid. p.17.
- 83 Ibid. p.20.
- 84 Ibid. p.79.
- 85 Ibid. p.78.
- 86 Recommendation 24, *ibid.* p.xvii
- 88 Interview with Ombudsman staff, 10 March 2005.
- 89 *Report of Proceedings before Select Committee on Juvenile Offenders*, 9 March 2005, p.18.

Chapter 4. Management of offenders in juvenile justice centres and correctional centres

The purpose of this chapter is to provide some contextual information about how offenders are classified and accommodated within the juvenile justice and adult correctional systems. Classification is the process whereby detainees and inmates are given a security rating that determines the custodial environment in which they will be managed.

4.1. Classification, placement and management in the Department of Juvenile Justice

Young people detained in juvenile custody are classified under the Children (Detention Centres) Regulation 2000. The Regulation prescribes two levels of classification:

- Class A: those detainees, who in the opinion of the Director-General, are potentially dangerous and who should therefore be detained within a secure physical barrier at all times.
- Class B: all other detainees.

In July 2004 DJJ approved a new Objective Detainee Classification Policy (ODCP). The policy came into effect in December 2004. However, prior to this time and therefore for the majority of the review period, a different policy was in place.

4.1.1. Classification and placement restrictions

Under the previous policy, Class A detainees effectively comprised two different groups: those charged with the serious children's indictable offences of murder or manslaughter and those presenting behavioural problems in custody. Detainees who did not fall into either of these groups were placed in the Class B category.

Class A detainees charged with murder or manslaughter offences were initially placed at Kariong if they were aged 16 years or over and at Reiby JJC if they were under 16 years. (Young women were placed at Yasmar JJC regardless of their classification or age). Detainees classified A because of their behaviour in custody were also placed at Kariong or Reiby.

In late 2001 it became Departmental policy to also automatically classify as Class A those offenders charged with sexual assault offences. At the time of this decision, a number of the high profile detainees referred to in Chapter 3 were detained at Cobham JJC.

Class A detainees held on remand could not be re-classified prior to being sentenced. All decisions to reclassify and/or to move serious children's indictable offenders required the approval of the Serious Young Offenders Review Panel (SYORP).

SYORP is an independent body that meets monthly in order to provide advice to the Director-General of DJJ. Members of the panel are appointed by the Minister for Juvenile Justice and approved by Cabinet and must include:

- an acting Magistrate
- an independent community person with expertise in dealing with youth
- a member of the Aboriginal community
- a victim of crime, and
- a delegate for the Assistant Director-General, Operations (DJJ) as ex-officio.

As a result of the above classification and placement policy, many individuals sentenced under section 19 were placed at Kariong. Several remained there on lengthy remand periods before being sentenced. Subsequently, some individuals were reclassified and placed at other centres, most frequently at Frank Baxter JJC.

4.1.2. Re-classification on the basis of behaviour

The authority to classify or to reclassify a detainee to Class A on the basis of behaviour resided with DJJ's Assistant Director-General, Operations. Re-classifications were initiated at the centre-level and our review suggests that they

often occurred on an event-driven basis, for example, after a detention centre incident or an assault. In this way, a Class A detainee who had been reclassified could subsequently become a Class A detainee once again.

The placement of Class B offenders, including those reclassified from Class A, depended on a number of factors including age, therapeutic needs (e.g. violent or sex offender counselling), risk alerts, proximity to family and bed availability.

4.1.3. Objective Detainee Classification Policy

The ODCP modified the Department's existing classification policy by further differentiating the A and B levels of classification. Each class is now separated into three sub-classes.

Detainees classed A because of their behaviour are now classified as A1(b), while those classed A because of the serious nature of their offence are classified as A1(o). There is also a new classification of A2. Detainees classed B are now classified as either B1, B2 or B3. A1(o) and A1(b) detainees are placed at Karijong Juvenile Correctional Centre or at Reiby JJC, depending on their age. All centres except Riverina and Keelong accept A2 class detainees.

Detainees are classified according to an objective 'points' system, which seeks to appropriately weight a range of dynamic risk factors. Young people entering custody for the first time are rated according to the nature of the offence for which they have been charged or convicted, risk factors such as substance use, mental illness, intellectual disability, history of behaviour, previous offences etc., and protective factors such as prior living circumstances, family support, education/work history etc. Young people entering a subsequent period of custody or already in custody are classified or re-classified taking into account the above considerations, but primarily on the basis of their record of behaviour in custody.

4.2. Classification, placement and management in the Department of Corrective Services

The classification of inmates in the adult correctional system is prescribed by the Crimes (Administration of Sentences) Regulation 2001. As no young women were transferred to the adult correctional system during the review period, only the classification and placement schedule for male inmates is provided here. The Regulation prescribes nine inmate categories:

- Category AA:* inmates who, in the opinion of the Commissioner, represent a special risk to national security (for example, because of a perceived risk that they may engage in, or incite other persons to engage in, terrorist activities) and should at all times be confined in special facilities within a secure physical barrier that includes towers or electronic surveillance equipment.
- Category A:* inmates who, in the opinion of the Commissioner, represent a special risk to good order and security and should at all times be confined in special facilities within a secure physical barrier that includes towers or electronic surveillance equipment.
- Category A2:* inmates who, in the opinion of the Commissioner, should at all times be confined by a secure physical barrier that includes towers, other highly secure perimeter structures or electronic surveillance equipment.
- Category B:* inmates who, in the opinion of the Commissioner, should at all times be confined by a secure physical barrier.
- Category C1:* inmates who, in the opinion of the Commissioner, should be confined by a physical barrier unless in the company of a correctional officer or some other person authorised by the Commissioner.
- Category C2:* inmates who, in the opinion of the Commissioner, need not be confined by a physical barrier at all times but who need some level of supervision by a correctional officer or some other person authorised by the Commissioner.
- Category C3:* inmates who, in the opinion of the Commissioner, need not be confined by a physical barrier at all times and who need not be supervised.
- Category E1:* inmates who, in the opinion of the Commissioner, represent a special risk to security and should at all times be confined in special facilities within a secure physical barrier that includes towers or electronic surveillance equipment, or by a secure physical barrier that includes towers, other highly secure perimeter structures or electronic surveillance equipment.
- Category E2:* inmates who, in the opinion of the Commissioner, should at all times be confined by a secure physical barrier.

Factors taken into account when classifying inmates include the nature of the current offence and any previous convictions, record of behaviour during custody (e.g. history of escape or violence) and dynamic risk factors (including risks posed to the inmate by others, by the inmate to others or by the inmate to himself or herself).

In the case of serious offenders, the Commissioner must not alter an inmate's classification or transfer him to another correctional centre without seeking and considering the recommendations of SORC. Serious offenders include those:

- serving a sentence for life
- serving a sentence for which a non-parole period has been set in accordance with Schedule 1 of the Crimes (Sentencing Procedure) Act
- serving a sentence or cumulative sentence of 12 years or more, or
- serving a sentence for an offence of murder.

The main function of SORC is to make recommendations to the Commissioner on the management of serious offenders. An assessment committee of SORC visits each correctional centre twice a year to interview serious offenders who are approaching 'critical dates'⁹⁰ or re-classification. The committee gathers information on the progress of these offenders and discusses management programs and case plans with members of the centre's Case Management Team. Following the assessment committee interviews, each case plan is considered at the next meeting of SORC. All serious offenders must be reviewed at least once within each six-month period.

An inmate's classification largely determines which correctional centre he will be placed in. Other considerations include protection requirements, therapeutic needs (e.g. participation in sex offenders or violent offenders treatment programs), proximity to family or community and bed availability.

Appendix 3 contains the guide used by DCS to inform their decisions about the placement of inmates.

4.3. The Specialised Program for Young Adult Male Offenders

DCS designates all inmates between the ages of 18 and 25 as 'young offenders'. In 1992, in response to the significant number of young offenders in the adult correctional system, DCS initiated the Young Adults Program, which has since evolved to become the Specialised Program for Young Adult Male Offenders (SPYAMO). The principal modification to the program since its inception has been the change of location for stage 2 of the program, from Parklea to John Morony 1 Correctional Centre (JM1).

In stage 1 of the program, young inmates are assessed for their eligibility to participate in the program. During stage 2 eligible inmates are placed at JM1 where they undertake activities to prepare them for stage 3. These activities include participation in the 'Raising Awareness for Change' program and in other relevant group-based programs such as A&OD awareness. In addition, the inmates must undertake either education or work.

Stage 3 forms the major component of the program. Conducted at Oberon Correctional Centre, inmates undertake an intensive 16- week program called the Gurnang Life Challenge.

The Gurnang Life Challenge encompasses vocational education, work ethic, personal development and self-responsibility, utilising experiential techniques and adventure based education strategies. A variety of courses are available to participants at Oberon. These are listed below.

Education	Adventure & Experiential Learning	Alcohol and other drugs	Psychology	Welfare	Miscellaneous
Basic Education	Wilderness Expeditions	Health Information Workshop	Understanding Self & Others	Pre Release Awareness	Rural Fire Service Modules 1-8
Year 10	Experiential Learning	A&OD Awareness	Alternatives to Violence		
Forklift – TAFE/ WorkCover	High Challenge Ropes Course	Life Management	Positive Lifestyle – Salvation Army		
Backhoe – TAFE/ WorkCover	Duke of Edinburgh's Award Scheme	Relapse Prevention	Addressing Offending Behaviour		

Education	Adventure & Experiential Learning	Alcohol and other drugs	Psychology	Welfare	Miscellaneous
Front End Loader – TAFE/ Work Cover		Drink Driving			
Bricklaying – TAFE		Gambling Awareness			
IT Certificate II		Alcoholics Anonymous			
Aboriginal Cultural Practice – TAFE		Narcotics Anonymous			
First Aid – WorkCover					
Job Seeking Skills					
OH&S ⁹¹ Employee Induction – WorkCover					
General Construction OH&S Induction (Green Card) – Work Cover					
Work Activity Construction OH&S Induction (Blue Card) – Work Cover					
Drivers Learners Permit – RTA					

The vocational courses offered at Oberon are based on an assessment, using Centrelink information, of vocational needs to the year 2005 in Sydney. Additionally, basic education is incorporated to reflect the needs of participants with a below functional level of literacy. All inmates must complete at least one vocational course. They must also complete a minimum of 40 days satisfactory work and complete OH&S Employee Induction and Job Seeking Skills. In addition, inmates must consistently meet expected behavioural standards throughout the duration of their time at Oberon. Each inmate in consultation with a Case Management Team selects programs. An Induction Case Plan is put in place on reception at Oberon and this is endorsed at the end of the first month. The inmates' performance is assessed on a monthly basis using established performance indicators.

To date, over 2000 young adult inmates have entered the Gurnang Life Challenge and 1400 have successfully completed it. A 2001 study undertaken by DCS found the following results in relation to recidivism:

- a 10 per cent recidivism rate for Oberon graduates 18-25 years with no prior history of incarceration, compared with the NSW average rate of 30 per cent, and
- a 30 per cent recidivism rate for Oberon graduates 18-25 years with a prior history of incarceration, compared with the NSW average rate of 46 per cent.⁹²

The National Outdoor Education and Leadership Services also conducted an external evaluation of the program between 1998 and 2000. According to DCS, it found that:

on the whole the Oberon program results compare very favourably with results in outdoor education and developmental programs elsewhere. In some cases the Oberon results are exceptionally high and in most areas they are at least above average.

The evaluation also noted that 'the greatest change in participants was in general self-concept. The results were very high by comparison to other programs and research literature'.⁹³

On successful completion of Stage 3, inmates move to the work release centre at John Morony 2 Correctional Centre or to other work release centres. During Stage 4, they may also participate in specialised programs, e.g. sex offender or violent offender treatment.

At both John Morony and Oberon, a small number of older offenders are carefully selected on a voluntary basis to act as mentors to the young adult offenders. The inmates form what is referred to as the 'adult nucleus' at each centre.

4.3.1. Restrictions on eligibility for the Specialised Program for Young Adult Male Offenders

A number of restrictions apply to eligibility for SPYAMO. Only B, C1 and C2 inmates can be placed at JM1. Oberon has a 130-bed capacity and placement there is subject to vacancies. Only C2 and C3 inmates can be admitted. In addition, inmates must have been sentenced for 4 months or more with 18 months or less left to serve. Oberon does not accept inmates with major medical problems, as the nearest hospital is almost 50 kilometres away. It also does not accept inmates with major psychological or psychiatric problems because of its limited on-site clinic service. In addition, if an inmate has been convicted for committing a violent or drug related crime, they must receive special clearance from psychology and A&OD staff before they can be placed at Oberon. Inmates who have protection needs also cannot be accommodated at Oberon.

In recognition of these barriers, DCS envisages the delivery of 'satellite' programs to young adult offenders at other correctional centres who are ineligible to participate in the SPYAMO.⁹⁴ A satellite program has already been delivered at Kariong, and another is scheduled for December 2005. Staff at Kariong are being trained in the program's delivery and, once accredited by an external assessor, will be able to conduct regular satellite programs. It is anticipated that this process of accreditation and delivery will be reflected in other correctional centres.

DCS has also begun to develop a young adult female program. In addition, it has stated its intention to develop closer liaison with the Yetta Dhinnakkal program (at Brewarrina)⁹⁵ for Indigenous offenders aged 18-30 years and to pilot a program for young adult offenders in protective custody.

In her second reading speech in 2001, the then Minister for Juvenile Justice, the Hon Carmel Tebbutt stated that 'it is the Government's intention that the group of young offenders who move across to the adult system will be accommodated within the young offender program whenever possible'.⁹⁶ As Chapter 5 will indicate, a total of 22 young people sentenced under the new section 19 were moved to the adult correctional system during the review period. Only four of these young people were transferred on their scheduled transfer date, that is, under section 19, with the remainder moving under either section 28(1) or section 28BA of the Children (Detention Centres) Act prior to their scheduled transfer date. Of the 22, only five were admitted to SPYAMO.

It is recommended that the Department of Corrective Services prioritise the implementation of a 'satellite' young offenders program across correctional centres catering for young offenders who are ineligible for placement at John Morony and/or Oberon Correctional Centres. It is further recommended that the program should include a focus on assisting offenders serving long sentences to plan an integrated, long-term developmental pathway and to improve their coping, adjustment and motivational skills.

Endnote

⁹⁰ for instance, eligibility for day leave or parole.

⁹¹ Occupational Health and Safety.

⁹² Data provided by DCS.

⁹³ Quotes provided by DCS.

⁹⁴ As at 29 August 2005, this was yet to be approved by the DCS's Board of Management.

⁹⁵ Yetta Dhinnakkal Centre is a minimum-security institution for Aboriginal males, located 70 kilometres south of Brewarrina in north-western NSW, 700 km from Sydney. According to DCS, the centre has a comprehensive education facility, with inmates receiving appropriate vocational training in the areas of Aboriginal cultural sites, shearing, fencing, animal husbandry, back-hoe, skid steer, front end loader and forklift operators course, computers, literacy, numeracy and Aboriginal art. Programs include anger management, domestic violence prevention, alcohol and other drug counselling. First time young Aboriginal offenders are targeted through culturally relevant intensive case management.

⁹⁶ The Hon Carmel Tebbutt, NSWPD, Legislative Council, 13 December 2001, p.20176.

Chapter 5. Overview of data

5.1. General overview

Data analysis by the Australian Institute of Criminology⁹⁷ indicates that the number and rate of young people in juvenile detention has declined throughout Australia over the past two decades, although this trend did not hold in the financial year 2002–2003, when both the number and rate of detainees in juvenile detention increased.

The majority of young people in juvenile detention are aged 15 years or over, and this has been the case consistently across Australia throughout the past decade.

Despite a decrease in the rates of detention for both Indigenous and non-Indigenous young people, Indigenous young people continue to be over-represented nation-wide, being 20 times more likely to be in detention than non-Indigenous young people.

On average, around 300 young people have been detained in juvenile justice centres in New South Wales at any time during the past four years. The national trends relating to age and Indigenous over-representation are reflected within this figure.

Table 1. Profile of detainees in juvenile justice centres 1995-2005

As at 30 June	Total number of detainees	18 years	19 years	20 years	21+ years	Total 18+ years	18+ years as a percentage of total
1995	505	72	21	13	0	106	21%
1996	464	77	25	14	0	116	25%
1997	471	60	27	12	0	99	21%
1998	436	68	19	9	0	96	22%
1999	386	80	18	10	0	108	28%
2000	350	50	24	6	4	84	24%
2001	311	52	14	9	4	79	25%
2002	278	52	13	3	7	75	27%
2003	310	62	18	4	4	88	28%
2004	308	80	34	20	6	140	45%
2005	289	73	38	18	8	137	47%

Source: NSW Department of Juvenile Justice and Australian Institute of Criminology. The figures for 30 June 2005 do not include young people detained at Kariong Juvenile Correctional Centre.⁹⁸

Along with Victoria, New South Wales has traditionally detained the largest number of young adults in its juvenile justice centres. It was anticipated that the passage of the Children (Criminal Proceedings) Amendment (Adult Detainees) Act would cause a decrease in these numbers in New South Wales, however, this has not occurred to date.

Table 1 shows that the number of young people detained in juvenile justice centres has steadily decreased over the past decade. Between 1999 and 2002 there was a declining trend in the number of detainees over the age of 18 years, however since 2003 the number has increased. Since 2003 the number of detainees over the age of 18 years has also significantly risen as a percentage of the total detainee population. Whilst there are considerably fewer young people in juvenile detention now as compared to a decade ago, more of those young people are over the age of 18 years.

One of the possible reasons for this is that, due to the increased use of diversionary methods, only the more serious or chronic offenders now end up in custody. These offenders are more likely to receive longer sentences, and to be in custody for greater periods of time. Conceivably, this could be producing a cumulative effect of pushing up the average age of the detainee population. However, further research and analysis is required to conclusively explain the proportional increase of young people over the age of 18 in juvenile custody.

5.2. Section 19 orders

During the review period, a total of 147 young people were sentenced following a conviction for an indictable or serious children's indictable offence.

Of these, 138 individuals (94%) were given a section 19 order.

A total of 23 (17%) were given an order despite the fact that their non-parole period would expire prior to their 18th birthday or they were indictable offenders whose sentence would expire before the age of 21 years and six months. The majority (14) of these orders were given to individuals whose non-parole period would expire after their 17th birthday. It is conceivable that in making orders in these cases, the sentencing judges were taking into account the possibility that the individuals concerned, some of whom were convicted of serious children's indictable offences, might remain in custody for some reason beyond their earliest release date.

A total of 111 (80%) individuals received a section 19 order to complete the whole of their sentence within juvenile detention. Nine of these subsequently moved to an adult correctional centre.

Twenty-seven (27) individuals (20%) received a section 19 order to transfer to the adult correctional system at some stage to complete their sentence. The majority were ordered to transfer on their 21st birthday. A total of nine of these individuals moved to prison prior to their scheduled transfer date (two at their own request), while four moved on their scheduled transfer date. Fourteen (14) individuals (50%) had not yet transferred to prison as of 25 January 2005.

One individual was ordered to remain in juvenile detention pending referral to the Mental Health Tribunal.

A total of eight individuals did not receive a section 19 order, representing 5% of the total number of juvenile offenders sentenced for indictable or serious indictable offences.⁹⁹ Four (4) of these individuals were sentenced within 10 months of the effective commencement of the amendment to section 19.

Table 2. Sentencing of indictable and serious children's indictable juvenile offenders 2002-2004

Sentence outcome/offence	2002	2003	2004	
No s19 order – complete in adult custody	5	0	3	
S19 order – complete part in juvenile custody	11	4	12	
S19 order – complete whole in juvenile custody	24	32	55	
TOTAL	40	36	70	146*
Sex offences (%)	31	8	18	
Robbery offences (%)	41	61	42	
Assault offences (%)	13	22	15	
Homicide offences (%)	13	8	13	
Other offences (%)	1	-	13	

Source: based on data obtained from DJJ's Client Information Database System (CIDS). *One individual was referred to the Mental Health Tribunal for decision in 2004, making the total number of young people sentenced at law for indictable or serious children's indictable offences 147. Individuals whose sentence and/or section 19 status changed because of an appeal are included in the figures for the year in which the appeal was finalised.

Table 2 shows a significant spike in 2004 in the number of young people sentenced at law for indictable and serious children's indictable offences.

Table 3. Individuals who received a section 19 order

Shaded rows contain information about young people required to transfer to the adult correctional system to complete part of their sentence.

Date of Birth	Gender	Ethnicity	Offence	Indictable (I) or serious children's indictable (SCI) offence	Date sentenced	Age at sentence	Earliest release date (ERD)	Discharge from DJJ (D) or transfer to DCS (T)	Appeal Status)
03/04/1985	M	Aboriginal	Agg sex assault	SCI	28/02/2002	16yrs 10mths	04/06/2004	D	
02/12/1983	M	Aust – not Aboriginal	Other sex assault	SCI	07/03/2002	19yrs 3mths	06/06/2002	D	
21/02/1984	M	Vietnamese	Robbery	SCI	08/03/2002	18yrs 1mth	17/12/2002	D	
26/12/1984	M	Vietnamese	Robbery	SCI	08/03/2002	17yrs 3mths	17/12/2002	D	
20/11/1983	M	Lebanese	Agg sex assault	SCI	13/03/2002	18 yrs 4mths	06/09/2010	T	Originally sentenced on 23/08/01 (ERD 06/03/04); sentence increased on Crown appeal
16/06/1984	M	Lebanese	Agg sex assault	SCI	13/03/2002	17yrs 9mths	06/09/2010	T	Originally sentenced on 02/11/01 (ERD 06/09/04); sentence increased on Crown appeal
03/02/1985	M	Aboriginal	Agg assault	SCI	22/03/2002	17yrs 1mth	27/09/2002 (prior to 18 th birthday)	D	
01/01/1986	M	Sudanese	Robbery	SCI	11/04/2002	16yrs 3mths	18/10/2002 (prior to 18 th birthday)	D	
10/11/1984	M	East Asian	Robbery	SCI	26/04/2002	17yrs 5mths	21/03/2004	D	
20/08/1985	M	Vietnamese	Robbery	SCI	03/05/2002	16 yrs 9mths	02/05/2003 (prior to 18 th birthday)	D	
05/09/1984	M	African	Robbery	SCI	09/05/2002	17yrs 8mths	15/12/2004	D	Appeal by defendant dismissed 04/03/2003
30/11/1983	M	Middle Eastern	Illicit drug offences	SCI	23/05/2002	18yrs 6mths	27/11/2004	D	Appeal by defendant dismissed 15/09/03
13/10/1983	M	United Kingdom	Agg sex assault	SCI	24/05/2002	18yrs 7mths	06/09/04	D	

Date of Birth	Gender	Ethnicity	Offence	Indictable (I) or serious children's indictable (SCI) offence	Date sentenced	Age at sentence	Earliest release date (ERD)	Discharge from DJJ (D) or transfer to DCS (T)	Appeal Status)
03/09/1986	M	Aboriginal	Robbery	I	13/06/2002	15yrs 9mths	16/11/2002 (prior to 18 th birthday)	D	
31/10/1984	M	Aboriginal	Robbery	I	13/06/2002	17yrs 8mths	23/11/2002	D	
16/11/1983	M	Aust – not Aboriginal	Robbery	I	21/06/2002	18yrs 7mths	21/01/2005	D	
21/10/1984	M	Vietnamese	Robbery	SCI	03/07/2002	17yrs 9mths	23/06/2003	D	
16/02/1986	M	Romanian	Robbery	SCI	05/07/2002	16yrs 5mths	18/05/2003 (prior to 18 th birthday)	D	
12/11/1985	M	Cook Islander	Agg sex assault	SCI	13/08/2002	16yrs 9mths	01/03/2003 (prior to 18 th birthday)	D	
17/06/1985	M	Aust – not Aboriginal	Assault	SCI	19/08/2002	17yrs 2mths	24/09/2004	D	
21/04/1983	M	Lebanese	Agg sex assault	SCI	23/08/2002	19yrs 4mths	15/10/2015	T	
12/03/1987	M	Aust – not Aboriginal	Homicide	SCI	30/08/2002	15yrs 5mths	29/01/2011	T	Appeal by defendant dismissed 31/10/03
07/12/1983	M	Lebanese	Agg sex assault	SCI	06/09/2002	18yrs 9mths	25/06/2010	T	
13/12/1984	M	Lebanese	Agg sex assault	SCI	06/09/2002	17yrs 9mths	14/06/2007	T	
18/02/1984	M	Lebanese	Agg sex assault	SCI	06/09/2002	18yrs 7mths	26/12/2010	T	Retrial ordered on 04/04/04; had not commenced as at 31/03/05
02/09/1986	M	Aust – not Aboriginal	Agg assault	SCI	19/09/2002	16 yrs	01/04/2003 (prior to 18 th birthday)	D	
01/08/1983	M	East Asian	Robbery	I	19/09/2002	19 yrs 1mth	03/10/2003	D	
29/03/1984	M	Middle Eastern	Robbery	I	03/10/2002	18yrs 7mths	02/07/2005	D	Appeal by defendant dismissed 03/02/04
01/04/1984	M	Aust – not Aboriginal	Agg assault	SCI	04/10/2002	18 yrs 6mths	06/05/2008	T	Appeal by defendant dismissed 07/07/03
04/01/1984	M	Korean	Homicide	SCI	11/10/2002	18yrs 9mths	11/10/2006	T	Appeal by defendant dismissed 29/04/04

Date of Birth	Gender	Ethnicity	Offence	Indictable (I) or serious children's indictable (SCI) offence	Date sentenced	Age at sentence	Earliest release date (ERD)	Discharge from DJJ (D) or transfer to DCS (T)	Appeal Status)
22/02/1986	M	Pacific Islander	Robbery	SCI	17/10/2002	16yrs 8mths	26/01/2005	D	
25/02/1984	M	East Asian	Robbery	I	21/10/2002	18yrs 8mths	25/08/2007	T	Appeal by defendant dismissed 01/09/03
03/12/1985	F	East Asian	Homicide	SCI	06/11/2002	16yrs 9mths	24/07/2011	T	
27/01/1984	M	Middle Eastern	Homicide	SCI	26/11/2002	18yrs 10mths	25/02/2004	D	
26/03/1983	M	Aust – not Aboriginal	Dang drive cause death	SCI	18/12/2002	19yrs 9mths	17/12/2003	D	
22/04/1983	M	Nicaraguan	Agg sex assault	SCI	31/01/2003	19yrs 9mths	11/11/2005	T	
21/05/1985	M	Aboriginal	Robbery	I	14/02/2003	17yrs 9mths	29/11/2004	D	
28/07/1983	M	Aboriginal	Robbery	I	14/02/2003	19yrs 7mths	13/03/2004	D	Originally sentenced on 12/10/02 under Part 3, Div 4 of the Children (Criminal Proceedings) Act 1987 (ie. summarily) to suspended 18mth control order; re-sentenced at law on appeal by Crown.
15/12/1984	M	Aust – not Aboriginal	Agg sex assault	SCI	18/02/2003	18yrs 2mths	17/11/2003	D	Appeal by defendant dismissed on 01/07/03
14/05/1986	M	Aust – not Aboriginal	Robbery	SCI	04/03/2003	16yrs 10mths	10/09/2004	D	
10/02/1987	M	Aust – not Aboriginal	Robbery	SCI	26/03/2003	16yrs 1mth	25/11/2004 (prior to 18 th birthday)	D	
11/08/1985	M	Lebanese	Agg sex assault	SCI	24/04/2003	17yrs 8mths	19/02/2011	T	
26/09/1985	M	East Asian	Assault	SCI	02/05/2003	17yrs 8mths	15/11/2005	D	
13/07/1985	M	South American	Agg assault	SCI	28/05/2003	17yrs 10mths	07/12/2003	D	Originally sentenced 07/11/02 (ERD 07/04/04); sentence reduced on appeal
03/09/1985	M	Aboriginal	Agg assault	SCI	29/05/2003	17yrs 8mths	07/09/2004	D	Appeal by Crown dismissed 05/11/03
31/05/1985	M	Pacific Islander	Robbery	SCI	05/06/2003	18yrs	10/11/2003	D	Appeal by Crown dismissed on 18/03/04
23/08/1984	M	Aboriginal	Robbery	SCI	19/06/2003	18yrs 10mths	17/08/2004	D	
02/07/1985	M	Pacific Islander	Robbery	SCI	20/06/2003	17yrs 11mths	17/02/2006	D	

Date of Birth	Gender	Ethnicity	Offence	Indictable (I) or serious children's indictable (SCI) offence	Date sentenced	Age at sentence	Earliest release date (ERD)	Discharge from DJJ (D) or transfer to DCS (T)	Appeal Status)
04/03/1988	M	Pacific Islander	Robbery	SCI	07/07/2003	15yrs 4mths	06/01/2004 (prior to 18 th birthday)	D	
23/02/1984	M	Aust – not Aboriginal	Dangerous drive cause death	SCI	30/07/2003	19yrs 5mths	29/07/2004	D	
17/07/1984	M	Aboriginal	Agg assault	SCI	06/08/2003	19yrs 1mth	05/04/2005	D	Appeal by defendant dismissed on 01/07/04
06/02/1985	M	Aust – not Aboriginal	Robbery	I	12/08/2003	18yrs 6mths	16/05/2006	D	
07/11/1985	M	South American	Agg assault	SCI	12/08/2003	17yrs 9mths	20/02/2004	D	Originally sentenced on 07/11/02 (ERD 20/02/05); sentence reduced on appeal
05/06/1986	M	Aboriginal	Robbery	SCI	15/08/2003	17yrs 2mths	09/03/2005	D	
20/02/1985	M	Middle Eastern	Robbery	I	22/08/2003	18yrs 6mths	01/02/2005	D	
12/05/1985	M	Pacific Islander	Robbery	SCI	29/08/2003	18yrs 3mths	10/10/2007	T	
28/12/1984	M	Aust – not Aboriginal	Robbery	SCI	29/08/2003	18yrs 8mths	27/06/2004	D	
19/06/1985	M	Lebanese	Robbery	SCI	10/09/2003	18yrs 3mths	18/07/2004	D	
19/05/1985	M	Aust – not Aboriginal	Robbery	SCI	12/09/2003	18yrs 4mths	06/08/2009	T	
23/09/1983	M	Samoan	Robbery	I	12/09/2003	19yrs 11mths	11/12/2004	D	
02/02/1986	M	Korean	Agg assault	SCI	18/09/2003	17yrs 7mths	07/05/2004	D	
04/01/1986	M	Aust – not Aboriginal	Agg assault	SCI	25/09/2003	17yrs 8mths	24/01/2004	D	
05/11/1987	M	Aust – not Aboriginal	Robbery	SCI	29/10/2003	15yrs 11mths	25/02/2006	D	
05/04/1984	M	Aust – not Aboriginal	Agg dang drive cause death	I	03/11/2003	19yrs 7mths	02/08/2005	D	
16/10/1985	M	Middle Eastern	Robbery	SCI	13/11/2003	18yrs 1mth	30/09/2005	D	

Date of Birth	Gender	Ethnicity	Offence	Indictable (I) or serious children's indictable (SCI) offence	Date sentenced	Age at sentence	Earliest release date (ERD)	Discharge from DJJ (D) or transfer to DCS (T)	Appeal Status)
12/09/1984	M	Aboriginal	Agg assault	SCI	21/11/2003	19yrs 2mths	20/05/2006 (21 yrs and 8mths)	D (however will be transferred to prison to complete sentence)	
17/07/1986	M	Maori	Robbery	SCI	27/11/2003	17yrs 4mths	05/12/2004	D	
09/04/1986	M	Pacific Islander	Robbery	SCI	03/12/2003	17yrs 8mths	07/08/2005	D	
25/06/1985	M	Pacific Islander	Robbery	I	03/12/2003	18yrs 6mths	02/12/2004	D	
20/09/1986	M	United Kingdom	Robbery	I	15/12/2003	16yrs 9mths	29/12/2004	D	
31/03/1986	M	Aust – not Aboriginal	Dangerous drive cause death	I	19/12/2003	17yrs 9mths	19/02/2005	D	
15/01/1987	M	Aboriginal	Robbery	SCI	30/01/2004	17yrs	09/06/2004 (prior to 18 th birthday)	D	
05/11/1986	M	Aboriginal	Agg dang drive cause death	SCI	12/02/2004	18yrs 9mths	10/02/2006	D	
18/12/1985	M	Aust – not Aboriginal	Agg assault	SCI	17/02/2004	18yrs 2mths	08/04/2004	D	
15/08/1985	M	Aust – not Aboriginal	Agg dang drive cause death	I	24/02/2004	18yrs 6mths	23/05/2006	D	
01/11/1984	M	Aust – not Aboriginal	Homicide	SCI	24/02/2004	19yrs 3mths	23/02/2005	D	Appeal by defendant dismissed on 19/08/04
24/12/1985	M	East Asian	Robbery	SCI	03/03/2004	18yrs 3mths	02/09/2005	D	
31/05/1983	M	Pacific Islander	Robbery	SCI	12/03/2004	19yrs	30/04/2009	T	Originally sentenced for second group of offences on 01/05/03 (ERD 31/10/05); sentenced increased on appeal by Crown

Date of Birth	Gender	Ethnicity	Offence	Indictable (I) or serious children's indictable (SCI) offence	Date sentenced	Age at sentence	Earliest release date (ERD)	Discharge from DJJ (D) or transfer to DCS (T)	Appeal Status)
19/05/1986	M	Pacific Islander	Robbery	SCI	18/03/2004	17yrs 10mths	09/06/2006	D	
22/12/1985	M	Pacific Islander	Agg assault	SCI	18/03/2004	18yrs 3mths	16/06/2006	D	
02/05/1985	M	Middle Eastern	Robbery	I	25/03/2004	18yrs 10mths	31/12/2005	D	
17/11/1986	F	Aust – not Aboriginal	Agg assault	SCI	07/04/2004	17yrs 5mths	04/06/2005	D	
16/12/1986	M	New Zealander	Agg assault	SCI	07/04/2004	17yrs 4mths	04/06/2005	D	
31/01/1986	M	Aust – not Aboriginal	Abduction	SCI	19/04/2004	18yrs 3mths	23/04/2008	T	
09/10/1984	M	Lebanese	Robbery	I	20/04/2004	19yrs 6mths	19/10/2005	D	
17/06/1985	M	Lebanese	Robbery	I	20/04/2004	18yrs 10mths	24/09/2005	D	
09/02/1985	M	Lebanese	Robbery	I	20/04/2004	19yrs 2mths	19/10/2005	D	
19/11/1984	M	Afghani	Agg sex assault	SCI	22/04/2004	19yrs 5mths	31/07/2007	T	
18/07/1986	M	Afghani	Agg sex assault	SCI	22/04/2004	17yrs 9mths	31/07/2015	T	
22/06/1988	M	Lebanese	Robbery	SCI	22/04/2004	15yrs 10mths	15/06/2004 (prior to their 18th birthday)	D	
30/01/2004	M	Turkish	Homicide	SCI	23/04/2004	20yrs 3mths	17/04/2013	T	Originally sentenced on 31/10/03 (ERD 17/01/11); sentence increased on appeal by Crown
01/11/1986	M	Middle Eastern	Agg sex assault	SCI	29/04/2004	17yrs 5mths	29/04/2012	D	
09/03/1986	M	Syrian	Robbery	SCI	30/04/2004	18yrs 1mth	23/03/2007	D	(pending determination by Mental Health Tribunal)
23/07/1986	M	Lebanese	Robbery	SCI	30/04/2004	17yrs 9mths	23/03/2007	D	
10/09/1984	M	Aust – not Aboriginal	Homicide	SCI	14/05/2004	19yrs 8mths	08/08/2010	T	
03/07/1984	M	Aboriginal	Robbery	I	17/05/2004	19yrs 10mths	09/11/2005	D	
01/06/1987	M	Tongan	Abduction	SCI	18/05/2004	16yrs 11mths	08/05/2007	D	

Date of Birth	Gender	Ethnicity	Offence	Indictable (I) or serious children's indictable (SCI) offence	Date sentenced	Age at sentence	Earliest release date (ERD)	Discharge from DJJ (D) or transfer to DCS (T)	Appeal Status)
18/10/1988	M	Aust – not Aboriginal	Robbery	SCI	19/05/2004	15yrs 7mths	24/06/2007	D	
25/06/1986	M	Samoan	Agg assault	SCI	19/05/2004	17yrs 11mths	15/09/2004	D	
08/08/1984	M	Vietnamese	Homicide	SCI	21/05/2004	19yrs 9mths	03/12/2005	D	
11/01/1987	M	Aust – not Aboriginal	Agg assault	SCI	04/06/2004	17yrs 5mths	02/04/2008	D	
12/08/1987	M	Aboriginal	Robbery	SCI	07/06/2004	16yrs 10mths	24/04/2006	D	
15/06/1986	M	Aust – not Aboriginal	Homicide	SCI	11/06/2004	19yrs 11mths	14/12/2007	D	
01/12/1985	M	Aust – not Aboriginal	Other sex assault	I	25/06/2004	18yrs 6mths	24/06/2005	D	
07/05/1985	M	South American	Robbery	SCI	30/06/2004	19yrs 1mth	27/03/2007	T	Originally sentenced on 27/02/04 (ERD 27/03/09 and order to transfer to prison at 19yrs 2mth); sentence reduced on appeal and order made to transfer to prison at 21 yrs)
19/06/1988	M	Aboriginal	Abduction	SCI	01/07/2004	16yrs 1mth	21/05/2005 (prior to 18 th birthday)	D	
15/12/1984	M	Aust – not Aboriginal	Robbery	SCI	02/07/2004	19yrs 7mths	01/05/2006	D	
09/11/1985	M	Aboriginal	Homicide	SCI	09/08/2004	18yrs 9mths	02/09/2019	T	
11/04/1985	M	Aboriginal	Homicide	SCI	13/08/2004	19yrs 4mths	25/12/2013	T	
10/07/1989	M	Aust - not Aboriginal	Other sex assault	SCI	13/08/2004	15yrs 1mth	09/08/2005 (prior to 18 th birthday)	D	
30/03/1986	M	Aust – not Aboriginal	Robbery	SCI	13/08/2004	18yrs 5mths	21/01/2007	D	
06/04/1988	M	Middle Eastern	Agg sex assault	SCI	27/08/2004	16yrs 4mths	07/09/2006	D	

Date of Birth	Gender	Ethnicity	Offence	Indictable (I) or serious children's indictable (SCI) offence	Date sentenced	Age at sentence	Earliest release date (ERD)	Discharge from DJJ (D) or transfer to DCS (T)	Appeal Status)
29/09/1984	M	Aboriginal	Assault	SCI	03/09/2004	19yrs 11mths	02/03/2005	D	
10/07/1986	M	Aust – not Aboriginal	Robbery	SCI	10/09/2004	18yrs 2mths	13/10/2006	D	
29/01/1987	M	Aust – not Aboriginal	Other sex assault	SCI	13/09/2004	17yrs 8mths	16/10/2004	D	Originally sentenced on 17/10/03 (ERD 16/10/06); sentence reduced on appeal
21/09/1986	F	East Asian	Agg assault	SCI	17/09/2004	17yrs 11mths	02/10/2008	T	
04/01/1988	M	Aboriginal	Other sex assault	SCI	22/09/2004	16yrs 8mths	21/06/2005 (prior to 18 th birthday)	D	
27/08/1986	M	Aboriginal	Robbery	SCI	12/10/2004	18yrs 2mths	24/11/2006	D	
05/07/1988	M	Aboriginal	Assault	SCI	19/10/2004	16yrs 3mths	22/10/2005 (prior to 18 th birthday)	D	
06/02/1986	M	Middle Eastern	Robbery	SCI	22/10/2004	18yrs 8mths	20/12/2005	T	
21/04/1986	M	East Asian	Robbery	SCI	04/11/2004	18yrs 7mths	07/12/2004	D	
18/08/1987	M	Maori	Robbery	SCI	09/11/2004	17yrs 3mths	03/05/2005 (prior to 18 th birthday)	D	
05/12/1986	M	Aust – not Aboriginal	Break & Enter (Agg)	SCI	19/11/2004	17yrs 11mths	08/12/2006	D	
13/08/1986	M	South American	Robbery	SCI	19/11/2004	18yrs 3mths	26/03/2006	D	Originally sentenced on 27/02/04 (ERD 27/09/08 and order to transfer to prison at 19); sentence reduced on appeal and order made to serve sentence in juvenile detention till 21 yrs if not released on parole at ERD.
21/12/1984	M	Middle Eastern	Justice Off (breach bond – Robbery)	I	25/11/2004	19yrs 11mths	18/04/2005	D	

Date of Birth	Gender	Ethnicity	Offence	Indictable (I) or serious children's indictable (SCI) offence	Date sentenced	Age at sentence	Earliest release date (ERD)	Discharge from DJJ (D) or transfer to DCS (T)	Appeal Status)
01/12/1987	M	East Asian	Agg assault	SCI	25/11/2004	16yrs 11mths	29/11/2006	D	
28/01/1989	M	East Asian	Agg assault	SCI	25/11/2004	15yrs 10mths	02/11/2006 (prior to 18 th birthday)	D	
29/09/1987	M	East Asian	Robbery	SCI	25/11/2004	17yrs 2mths	02/07/2007	D	
25/01/1985	F	East Asian	Abduction	SCI	30/11/2004	19yrs 10mths	19/08/05	D	Originally sentenced on 20/02/04 (ERD 19/10/05); sentence reduced on appeal
19/10/1988	M	Aust – not Aboriginal	Agg sex assault	SCI	03/12/2004	16yrs 2mths	07/01/2006 (prior to 18 th birthday)	D	
08/12/1987	M	Pacific Islander	Robbery	SCI	08/12/2004	17yrs	12/07/2005 (prior to 18 th birthday)	D	
30/10/1988	M	Sth/Central Asian	Robbery	SCI	08/12/2004	16yrs 2mths	15/07/2005 (prior to 18 th birthday)	D	
06/01/1985	M	Aust – not Aboriginal	Agg sex assault	SCI	08/12/2004	19yrs 11mths	17/06/2007	T	Originally sentenced on 26/03/03 (ERD 17/12/09); sentence reduced on appeal
20/06/1986	M	Middle Eastern	Agg sex assault	SCI	09/12/2004	18yrs 6mths	05/08/2005	D	
08/03/1987	M	Aust – not Aboriginal	Robbery	SCI	10/12/2004	17yrs 9mths	30/04/2007	D	
30/05/1986	M	Aust – not Aboriginal	Break & Enter	I	17/12/2004	18yrs 7mths	22/03/2007	D	
24/03/1988	M	Middle Eastern	Agg sex assault	SCI	22/12/2004	16yrs 9mths	21/07/2005 (prior to 18 th birthday)	D	
06/05/1986	M	Aboriginal	Break & Enter (Agg)	SCI	23/12/2004	18yrs 7mths	24/01/2006	D	
29/07/1985	M	Samoan	Abduction	I	15/07/2004	18yrs 11mths	15/07/2006	D	
02/09/1987	M	Middle Eastern	Agg sex assault	SCI	22/12/2004	17yrs 3mths	21/01/2007	D	

Source: based on data obtained from DJJ's Client Information Database System (CIDS) and court transcripts.

Table 3 shows that the largest group (25%) of individuals sentenced under section 19 were of Australian (not Aboriginal) origin. Individuals of Middle Eastern origin made up the next largest group (19%) followed by those of Aboriginal (16%), South-East Asian (14%) and Pacific Islander/Maori (13%) and South American (4%) origin. This gives an indication of the cultural diversity which juvenile justice detention centres must accommodate.

It should be noted that the age at sentence does not reflect the age at which the individual committed the offence for which they were convicted. A young offender can spend a considerable period of time on remand, particularly if s/he has been charged with a serious children's indictable offence and if the Supreme Court is hearing his/her case.

Table 4. Section 19 orders by offence

Most serious offence	Transfer to prison to complete sentence	Complete sentence within juvenile detention	Total	Total as % of all offences
All Robbery, Extortion and Related Offences	6	63	69	50%
Aggravated Sexual Assault and Other Sexual Assault and Related Offences	11	13	24	18%
Aggravated Assault (eg. malicious wound, assault grievous bodily harm) and Other Acts Intended to Cause Injury (eg. assault, AOABH, common assault)	2	21	23	16%
Homicide and Related Offences (incl. Agg dangerous driving offences)	7	8	15	11%
Abduction and Related offences	1	4	5	4%
Other Offences	0	2	2	1%
TOTAL	27	111	138	

Source: based on data obtained from DJJ's Client Information Database System (CIDS).

Table 4 shows that the majority of section 19 orders were made for individuals convicted of robbery offences. Aggravated assault and aggravated sexual assault were the next most common offences for which individuals subject to section 19 orders were convicted.

Table 5. Anticipated age at earliest release date – individuals receiving a section 19 order to complete the whole of their sentence in a juvenile justice centre

Age	Number
15 yrs	2
16 yrs	5
17 yrs	16
18 yrs	25
19 yrs	22
20yrs	28
21 yrs	13
TOTAL	111

Source: based on data obtained from DJJ's Client Information Database System (CIDS).

Table 5 shows that the majority of individuals who received a section 19 order to complete the whole of their sentence in a juvenile justice centre were aged 20 years at their earliest release date (i.e. date at which eligible for parole).

Table 6. Anticipated age at transfer to correctional centre – individuals receiving a section 19 order to complete part of their sentence in a correctional centre

Age	Number
18 yrs	1
19 yrs	4
20 yrs	2
21 yrs	20
TOTAL	27

Source: based on data obtained from DJJ's Client Information Database System (CIDS).

Table 6 shows that the majority of individuals who received a section 19 order to complete part of their sentence in a juvenile justice centre were directed to transfer to the adult correctional system at 21 years (i.e. they were ordered to remain in juvenile detention for the maximum period possible).

Table 7. Individuals who did not receive a section 19 order

DOB	Gender	Ethnicity	Offence	Indictable (I) or serious children's indictable offence (SCI)	Date sentenced	Age at sentence	Earliest release date	Appeal status
01/10/1982	M	Aust - not Aboriginal	Agg assault	I	13/02/2002	19yrs 3mths	10/09/2002	Originally sentenced on 20/07/01 under Pt 3 Div 4 of the Children (Criminal Proceedings) Act 1987 (ie. summarily) to suspended control orders totalling 3yrs. DPP appeal allowed 03/10/01 by CCA on grounds that respondent should have been sentenced at law. Subsequently re-sentenced by District Court.
04/09/1984	M	Aboriginal	Robbery	SCI	10/04/2002	17yrs 7mths	03/11/2003	
08/08/1980	M	Vietnamese	Homicide	SCI	26/08/2002	22 years	25/02/2013	The offender was aged 17 years of age at the time of the offence in 1997 but was not charged until 2001. When convicted he was aged 21 yrs and 6mths. Prior to his conviction, the offender was on bail. Although the offender was a juvenile at the time of the offence and under 21yrs when charged, it was not open to the court to make a section 19 order due to his age at the time of sentencing.
07/05/1983	M	Lebanese	Agg sex assault	SCI	10/10/2002	19yrs 5mths	02/01/2021	Retrial on one indictment ordered on 06/05/04. On 03/02/05 the DPP announced that there would be no further proceedings on the indictment because the victim was unwilling to give further evidence. The offender is still serving a lengthy sentence in relation to other indictments for which he was convicted.
24/05/1983	M	Lebanese	Agg sex assault	SCI	11/10/2002	19yrs 5mths	14/05/2029	Retrial ordered on 07/04/2004; had not commenced as at 31/03/05.

DOB	Gender	Ethnicity	Offence	Indictable (I) or serious children's indictable offence (SCI)	Date sentenced	Age at sentence	Earliest release date	Appeal status
09/04/1982	M	Vietnamese	Homicide	SCI	22/03/2004	21yrs 11mths	24/01/2007	Originally sentenced on 26/08/02 (ERD 24/01/08). The offender was originally remanded in juvenile custody in relation to the offence but was discharged at committal on 23/10/98. On 06/04/01 while on remand for a separate offence committed as an adult, an ex-officio indictment was presented charging the applicant with the original juvenile offence. He was sentenced for the adult offence on 22/06/01 (ERD 21/11/02). Following his conviction, the offender was sentenced for the juvenile offence on 26/08/02 (ERD 24/01/08). No section 19 order was made. The offender appealed this sentence on the grounds of failure to comply with s25 of the Children (Criminal Proceedings) Act 1987, namely the failure of the court to obtain a juvenile justice background report. On 28/08/03 the CCA upheld the appeal. The offender was re-sentenced on 22/03/04.
26/11/1983	M	New Zealander	Agg assault	SCI	08/12/2004	21yrs 1mth	29/11/2011	Originally sentenced 19/08/03 (ERD: 29/11/14); sentence reduced on appeal.
20/12/1983	M	Aust – not Aboriginal	Agg assault	SCI	08/12/2004	20yrs 11mths	17/08/2012	Originally sentenced 19/08/03 (ERD: 17/08/15); sentence reduced on appeal.

Source: based on monthly client reports provided by DJJ and court transcripts.

Table 7 shows that five of the eight individuals who did not receive a section 19 order were sentenced within the first eight months of the operation of the amended legislation.

5.3. Movements from juvenile justice to correctional centres of individuals who received a section 19 order

5.3.1. Individuals who moved to a correctional centre on their scheduled transfer date

A total of four individuals (all males) moved to the adult correctional system on their scheduled transfer date.

Table 8. Individuals who received a section 19 order and who moved to a correctional centre on their scheduled transfer date

ID	Offence	Date sentenced	Earliest release date	Scheduled transfer date	Detention centre transferred from	Correctional centre of classification	Age at transfer
19/05/1985	Robbery	12/09/03	06/08/09	31/12/03	Baxter	John Morony 1	18yrs 6mths
04/01/1984	Homicide	11/10/02	10/10/06	04/01/05	Keelong	John Morony 1	21yrs
31/05/1983	Robbery	12/03/2004	30/04/09	31/05/04	Baxter	John Morony 1	21yrs
22/04/1983	Agg sex assault	31/01/03	11/11/05	22/04/04	Baxter	John Morony 1 (subsequently transferred to MSPC)	21yrs

Source: based on data obtained from DJJ's Client Information Database System (CIDS) and DCS's Offender Management System (OMS).

5.3.2. Individuals who moved to a correctional centre before their scheduled transfer date

A total of nine individuals (all males) moved to the adult correctional system before their scheduled transfer date.

Table 9. Individuals who received a section 19 order and who moved to a correctional centre before their scheduled transfer date

Date of Birth	Ethnicity	Offence	Date sentenced	Age at sentence	Earliest release date	Scheduled transfer date	Date moved	Age specified in s.19 order for transfer to prison	Age at which moved to prison	Detention centre from which moved	Reason for move	CC of Classo
16/06/84	Lebanese	Agg sexual assault	13/03/02 (c)	17yrs 9mths	06/09/10	16/06/04	21/10/02	20 yrs	18 yrs 4mths	Kariong	s.28(1)	Goulburn
18/02/84	Lebanese	Agg sexual assault	6/09/02 (a)	18yrs 7mths	26/12/10	18/02/05	22/10/02	21 yrs	18 yrs 8 mths	Kariong	s.28BA after charged as adult (detention centre offence)	Goulburn
20/11/83	Lebanese	Agg sexual assault	13/03/02 (b)	18yrs 4mths	06/09/10	20/11/02	18/11/02	19 yrs	18yrs 11mths	Kariong	s.28BA after charged as adult (detention centre offence)	Goulburn
07/12/83	Lebanese	Agg sexual assault	6/09/02	18yrs 9mths	25/06/10	07/12/04	18/11/02	21 yrs	18 yrs 11mths	Kariong	s.28BA after charged as adult (detention centre offence)	Goulburn
13/12/84	Lebanese	Agg sexual assault	6/9/02	17yrs 9mths	14/06/07	13/12/05	05/12/02	21 yrs	17 yrs 11 mths	Kariong	s.28(1)	Goulburn
21/04/83	Lebanese	Agg sexual assault	23/08/02	19yrs 4mths	15/10/15	21/04/04	24/04/03	21 yrs	20 yrs 3 days	Kariong	s.28BA after charged as adult (detention centre offence)	Goulburn
11/08/85	Lebanese	Agg sexual assault	24/04/03	17yrs 8mths	19/02/11	20/02/05	21/08/03	19 yrs 6 mths	18 yrs	Kariong	s.28BA after charged as adult (detention centre offence)	Lithgow
30/01/84	Turkish	Homicide	31/10/03	19yrs 9mths	17/04/13	30/01/05	29/10/04	21 yrs	20yrs 9mths	Kariong	s.28(1) – self initiated	Goulburn
12/03/87	Aust – not Aboriginal	Homicide	30/08/02	15yrs 5mths	29/01/11	12/03/08	06/01/05	19 yrs	17 yrs 9 mths	Kariong	s.28(1) – self initiated	Goulburn

Source: based on data obtained from DJJ's Client Information Database System (CIDS), DCS's Offender Management System (OMS) and information provided by DJJ.

- (a) On 04/03/04 the CCA allowed this individual's appeal and ordered a new trial. This had not taken place at the conclusion of the review period.
- (b) Originally sentenced 23/08/01. Sentence increased on appeal by DPP.
- (c) Originally sentenced 2/11/01. Sentence increased on appeal by DPP.

5.3.3. Individuals due to complete the whole of their sentence in a juvenile justice centre who moved to a correctional centre

Nine individuals (all males) who received a section 19 order to complete the whole of their sentence in a juvenile justice centre were subsequently moved to a correctional centre.

Table 10. Individuals who received a section 19 order to complete the whole of their sentence in a juvenile justice centre who moved to a correctional centre

DOB	Ethnicity	Offence	Date sentenced	Age at sentence	Earliest release date	Age at earliest release date	Date moved	Age at which moved	Detention centre from which moved	CC of Classo	Reason for move
03/04/85	Aboriginal	Agg sexual assault	28/02/02	16yrs 10mths	05/06/05	19 yrs 2mths	14/08/02	17 yrs 4mths	Kariong	Junee; MSPC (Long Bay)	s.28(1)
23/09/83	Samoan	Robbery	12/09/03	19yrs 11mths	11/12/04	21 yrs 3mths	15/09/03	20 yrs 2mths	Cobham	Goulburn	Taken into juvenile custody after being sentenced. Check of legal mandate found he was actually an adult when he committed offences and warrant of commitment was to correctional centre. Moved to adult custody on 18/09/03.
03/09/85	Aboriginal	Aggravated assault	29/05/03	17yrs 8mths	07/09/04	19 yrs 4 days	24/02/04	18 yrs 5mths	Baxter	Brewarrina (Yetta Dhinnaakal)	s.28BA after charged as adult (detention centre offence)

DOB	Ethnicity	Offence	Date sentenced	Age at sentence	Earliest release date	Age at earliest release date	Date moved	Age at which moved	Detention centre from which moved	CC of Classo	Reason for move
01/12/85	Aust – not Aboriginal	Other sexual assault	25/06/04	18yrs 6mths	24/06/05	19 yrs 6mths	20/07/04	18 yrs 7mths	Baxter	Goulburn	Charged & sentenced on 29/7/04 for separate offence committed in community as an adult. Sentenced to 6mths (backdated to June 04). Re-entered juvenile custody at completion of sentence on 28/12/04.
20/09/86	United Kingdom	Robbery	15/12/03	17yrs 3mths	29/12/04 *	18 yrs 3mths	04/08/04	17 yrs 11mths	Baxter	John Morony 1	s.28(1)
22/02/86	Pacific Islander	Robbery	17/10/02	16yrs 8mths	26/01/05 *	18 yrs 11 mths	04/08/04	18 yrs 6mths	Cobham (on transit - previously Baxter)	John Morony 1	s.28(1)
23/07/86	Lebanese	Robbery	30/04/04	17yrs 9mths	23/03/07	20 yrs 8mths	15/10/04	18 yrs 3mths	Kariong	Lithgow	s.28(1)
05/09/84	African	Robbery	09/05/02	17yrs 8mths	15/12/04	20 yrs 3mths	18/11/04	20 yrs 2mths	Baxter	Bathurst	s.28BA after charged as adult (detention centre offence)
29/07/1985	Samoan	Abduction	09/08/2004	19yrs 1mth	15/07/2006	20 years 11mths	24/11/2004	19 years 4mths	Cobham	Goulburn	s.28(1)

Source: based on data obtained from DJJ's Client Information Database System (CIDS), DCS's Offender Management System (OMS) and information provided by DJJ. * Parole was eventually granted a number of months after this date.

Endnotes

⁹⁷ Kate Charlton and Marissa McCall, *Statistics on Juvenile Detention in Australia: 1981-2003* (Technical and Background Paper No. 10), Australian Institute of Criminology, 2004.

⁹⁸ At 30 June 2005 there were 41 young people detained at Kariiong, of which 26 were aged 18 years or over.

⁹⁹ It is possible that we were unable to identify additional individuals in this category. See 6.4.

Chapter 6. Issues relating to court proceedings

In this chapter, issues relating to the application of section 19 during court proceedings are discussed.

6.1. Factors taken into account by the court

6.1.1. Aggravating and mitigating features

In determining a sentence, the court generally takes into account two categories of matter, the objective seriousness of the offence, and the subjective circumstances relating to the offender (these are referred to as 'aggravating' and 'mitigating' features under section 21A of the Crimes (Sentencing Procedure) Act). The objective seriousness of an offence depends on factors such as whether it was premeditated, whether the defendant was the ringleader or a follower, the reasons why the offence was committed, the involvement of weapons, and the extent of injury to the victim or damage to property. Subjective circumstances relating to the offender may include details such as prior criminal record, evidence of remorse, prospects of rehabilitation, family background etc.¹⁰⁰

6.1.2. Deterrence versus rehabilitation

In NSW, case law has established that the court will give less weight to deterrence and more to rehabilitation in determining matters involving young offenders.¹⁰¹ This rule is subject, however, to the qualification that when an offence involves extreme violence, or is considered to be a sort more commonly expected of an adult offender, the interest of rehabilitation has less significance.¹⁰² Judges in the context of the matters we reviewed frequently cited this case law.

6.1.3. Submissions

The court typically receives a range of submissions from both the Crown and counsel for the defendant. Examples of submissions include sentencing statistics, guideline judgements, victim impact statements, psychiatric and/or psychological reports, character references, criminal records, transcripts of police interviews etc. Generally speaking, submissions made by defence counsel are tendered to the court in support of the subjective circumstances of the offender, or 'mitigating features'. In the matters we reviewed, the material most commonly tendered by defence counsel consisted of psychiatric and/or psychological reports and character references. Often, defence counsel also referred to the court-mandated background report, authored by DJJ and properly tendered by the Crown.

6.1.4. Background report

Under section 25 of the Children (Criminal Proceedings) Act, a background report must be tendered to the court in relation to all individuals who were juveniles when they committed an offence and under the age of 21 years when they were charged with that offence. The court is required to take into account the contents of this report. Regulation 6 specifies that the background report must deal with the following matters:

- (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.*

DJJ prepares background reports, which are usually authored by forensic psychologists or other specialist clinicians employed by it. These officers are usually based in the community rather than at juvenile justice centres. Depending on the nature of the offence committed by the young person in question, the psychologist who writes the report may be employed as a psychologist within the Department's sex offender or violent offender program. The report typically will draw on a range of information, including interviews with the young person and his or her family, senior staff from the juvenile justice centre where the young person is held, the young person's departmental file and his or her prior court history, if relevant.

Depending on the particular individual in question, background reports generally range between eight to ten pages in length. The report provides information about the young person's circumstances at the time of the offence and court proceedings, as well as details concerning family background, physical and mental health, education, employment, substance use and offending history. In addition, the report provides a general assessment of the young person as well as an offence-specific assessment designed to shed light on the individual's history of, and attitudes towards, for example, the use of violence or sexual behaviours. The report also contains information about the young person's risk of re-offending and receptivity to therapeutic intervention and rehabilitation.

The background report is one of the key submissions relied on by the court in matters involving juveniles. In those cases we reviewed, the court generally commented on background reports in complimentary terms, describing them as 'comprehensive', 'well-researched', 'helpful' and 'useful'. In his submission to this review, the Chief Justice of the District Court, the Hon Justice R.O. Blanch, advised that:

*the Court in sentencing juveniles is always provided with a very detailed Juvenile Justice report. The reports are far more detailed than the Probation reports provided in the sentencing of adult offenders. In my view the reports are adequate and always have been and for that reason, the sentencing judges are in a good position to assess the question of special circumstances.*¹⁰³

On a handful of occasions, the court expressed explicit disagreement or scepticism in relation to the contents of a background report.

6.1.4.1. Department of Juvenile Justice policy on making recommendations in background reports

It is the policy of DJJ not to make a recommendation to the court as to whether special circumstances exist in relation to an individual, as it 'considers that the independence of the sentencing judiciary is critical'.¹⁰⁴ In place of a recommendation, information is provided in the background report for the court's information concerning the young person's response to custody to date, and his or her suitability for participation in juvenile justice specific programs.

In its submission to the discussion paper informing this review, the Department of Community Services (DoCS) opined that DJJ's policy of not making a specific recommendation to the court 'is inconsistent with other [advocacy] work undertaken by DJJ officers'.¹⁰⁵ DoCS argued that DJJ 'is the only body with the appropriate information to provide comment on the adequacy of the information supplied to the Court at the time of sentencing and the consideration of special circumstances'.¹⁰⁶ In their submissions, The Council of Social Service of New South Wales (NCOSS), the Commission for Children and Young People, the Youth Justice Coalition, Legal Aid Commission and Shopfront Youth Legal Centre also argued that DJJ should be permitted to make recommendations in their background reports.

The major reason provided in support of this argument was that professional officers employed by DJJ are best placed to make an assessment of a young person and any special circumstances that may apply to them. The Illawarra Legal Centre, in their submission to our review, summarised well the concerns that many stakeholders expressed:

*The Department of Juvenile Justice employs specialist Forensic Psychologists and other specialist clinicians providing the Sexual Offender Program and Violent Offender Program. These practitioners often furnish the court with specialist reports pertaining to the likelihood of successful rehabilitation versus the likelihood of recidivism in light of risk to community and other relevant factors. The reports usually outline interventions most likely to contribute to successful rehabilitation and make sentencing recommendations accordingly... Certainly, 'special circumstances' often become evident in such assessments and contribute to the formulation of rehabilitative interventions. However, these clinicians' hands are tied in terms of introducing such information into the reports and thus providing the most comprehensive and suitable intervention plan due to the direction to not raise 'special circumstances in the reports. The ethical nature of such a direction when applied to this situation of providing specialist reports is dubious. We argue it is not ethically sound to employ specialist clinicians to provide reports on the successful rehabilitation of offenders and then to supply sentencing recommendations based on this, if the same clinicians are told what factors may and may not be considered in this by non-clinicians who are not educated nor experienced in such assessments. Indeed, these specialist reports are often utilised in a manner akin to 'expert testimony, however the experts are effectively being silenced with regard to certain relevant information in providing such testimony.*¹⁰⁷

In our view, while it is the sentencing judge who must determine the existence of special circumstances, the professional officers employed by DJJ are in a unique position to assess the needs of the individual and to alert the court to factors that may constitute special circumstances. These officers should not be restricted from addressing these factors in their background reports to the court.

6.2. What constitutes ‘special circumstances’?

Section 19(3) of the Children (Criminal Proceedings) Act refers to ‘special circumstances’. Under section 19(4) of the Act, the court must have regard to the following matters in determining whether there are special circumstances to justify the making of a section 19 order:

- (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.*

6.2.1. Matters cited by the court in determining special circumstances

Based on the matters we reviewed, it is apparent that the court generally relied on grounds (a) and (b) in finding there were special circumstances to justify the making of a section 19 order. The most common factors cited by judges in relation to ground (a) were the youth of the offender, first time in custody and psychological vulnerability. In relation to ground (b), the court clearly perceives that there is a stronger emphasis on rehabilitation in juvenile justice centres and that they provide more comprehensive opportunities in terms of education, counselling and therapeutic programs. This is illustrated by the extracts from judges’ sentencing comments quoted below.

It was...put to me that the best way of ensuring his rehabilitation, and ensuring the community is protected, is to require that he serve his sentence until he is twenty-one years old in a juvenile justice institution. I think there is considerable sense in that submission and I propose to accede to it..

*

...it is undesirable that he go into adult custody. He is currently in [an] environment that is structured to put him in the best possible position to return to the community to participate in the programs that will be designed for him once in the community. There is no evidence that such programs are available for him in adult custody.

*

I am satisfied that in the light of his youth, background and disrupted education, he would benefit from remaining in the juvenile system where he will be able to access the appropriate treatment programs [and] psychiatric, education and vocation services offered.

*

I am satisfied of special circumstances as set out under section 4B of section 19, in particular, the availability of appropriate programs at the place where you will serve your sentence.

*

I am aware of the altered provision of section 19...and I will order that a portion of the sentence I impose be served in a detention centre for the reason that I feel that he would be at greater risk in an adult gaol and because of the nature of the charges and the treatment available for a sexual offender of his age is superior and more suitable in a detention centre.

*

I intend to make an order... and to that end I make a finding of special circumstances, they being the fact that he was only 17 years and 2 months at the time of the offences and that the psychological and juvenile justice information furnished to me indicates that if he has access to intense professional supervision, he is very likely to have a good chance of rehabilitation. I do not think that would be available and in any event in the adult system he would be in grave danger in my opinion.

*

The youth of the offender, the fact that he has not previously been in custody and the enhancement of his prospects of rehabilitation make it appropriate that the sentence should be served in a juvenile detention centre.

*

It is clear that the offender's rehabilitation will be substantially enhanced by his continued detention in a juvenile justice centre. On the other hand, I consider that his rehabilitation will be positively handicapped by his being required to serve the balance of his non-parole period in an adult gaol, particularly having regard to the relative lack of rehabilitative programs available in the adult goal when compared to those available in a juvenile justice centre.

*

The interests of the community require the offender to learn to recognise what has happened and to guard against any repetition. He needs access to treatment programs, psychological and psychiatric services, education and vocational services. This special need for professional services is a circumstance for the purposes of section 19...

*

...I declare special circumstances, being his vulnerability (as demonstrated by his susceptibility to adult influence) and participation in programs of rehabilitation (in particular the sex offenders program).

*

I am satisfied that it would be appropriate to make an order pursuant to section 19. The offender's youth, and the need to maximise his opportunities for counselling, treatment and rehabilitation constitute, in my opinion, special circumstances warranting the making of such an order.

*

I am satisfied there are special circumstances in this case. [The offender], because of his assistance [to the authorities], would be very vulnerable if placed into full-time [adult] custody. Appropriate services and programs will be available to him in the juvenile detention centre. Only one of the offences he committed was a serious children's indictable offence. His efforts and achievements so far should be encouraged to continue. His prospects for full rehabilitation will be best promoted if he remains in the juvenile system.

*

The youth of the offender, the fact that he has not previously been in custody and the enhancement of his prospects of rehabilitation make it appropriate that the sentence should be served in a juvenile detention centre.

*

Pursuant to s19... I can order that part of the sentence be served in a detention centre until he turns 21... Because of his vulnerability and the likelihood that his access to professional help and support that he continues to need will be better met I propose to make that order.

*

In giving consideration as to where the sentences ought be served and as to whether there are special circumstances in relation to the serious children's indictable offence I have regard to the fact that this is the first period of custody which this offender has ever been confronted with. I do consider that for that reason there is a degree of vulnerability but it is more the appropriate services within a detention centre that would be available to him that I consider constitute the special circumstances.

*

I direct that the first portion of his sentence, until he attains the age of 21, be served in a detention centre and I find special circumstances under s19... in that the facilities for the treatment he, on the evidence requires, are superior in the juvenile justice system to any obtainable in an adult prison...

*

In terms of s19... I am satisfied that there are special circumstances justifying that order. They are that [the offender] has already demonstrated an ability and willingness to be rehabilitated. The facilities which are available to him in a detention centre will promote the rehabilitation much more so than if he were to be sent to an adult prison and it is in the community's interest as well as [his own] that he be rehabilitated.

Ground (c) was less frequently relied upon by the court, but in those matters in which it was cited during the review period, the sentencing judges tended to be very specific about their reason/s for finding special circumstances. Some examples are included below:

In my view, there are no special circumstances in the present case with this exception: that this young man is studying for his school certificate which he expects to sit in November this year. In my view that is a special circumstance under section 19. For that reason I will make an order which will see him kept at a juvenile facility until 31 December 2003 following which he is to be transferred to an adult correctional facility.

*

You are presently serving a sentence in a juvenile justice centre. I can direct that you remain in that centre until you reach the age of 21 but I need to be satisfied that there are special circumstances in your case to direct that you serve that additional sentence after that age in that centre. I have given this matter some considerable thought. In my view, there are special circumstances in this case. I have reached that view having regard, in particular, to the evidence of [the chaplain at Kariong], who has indicated that he uses your services as a mentor to other sentenced juveniles. It seems to me that you could be in a position to provide guidance to the young juveniles, both by leading by example and by assisting [the chaplain] with his pastoral work. In my view, that provides a special circumstance in your case and I therefore direct that the whole of your sentence be served in a juvenile detention centre.

*

The Department of Corrective Services at present do not have sufficient beds for intellectually disabled prisoners, but will have more in two years time. In my view, [the offender's] intellectual and mental problems are of such severity that he should not be housed in the main part of an adult prison. I recommend to that Department that he be placed in a unit for intellectually disabled prisoners when he is admitted into the prison system. In the meantime, I direct that he serve his sentence in a detention centre until he reaches the age of twenty-one years. I make this order because I am satisfied that there are special circumstances in his case, namely his mental and intellectual disabilities, which cannot be catered for at least two years.

*

It is unfortunate [that the offender] has not received the very specialised counselling people coming from the trauma and turmoil of civil war desperately need, particularly when they experience those conditions at a very young age... There is no evidence before me about services or programs in adult gaols suited to a person of his age, background and past experiences. It is clear, from the juvenile justice reports, that the offender is very vulnerable. He feels a strong sense of alienation. This has made it difficult for him to make the adjustment to this country and to being in custody. A plan has been outlined for him in the detention centre. To move into an adult prison now or in the near future would involve an extraordinary degree of further dislocation and alienation. I accept, on the evidence, that he is vulnerable to negative influences. He would be at great risk of adverse response to such influences if he were to serve his sentence in an adult prison. I propose to order that the sentence be served in a detention centre.

In her submission to our review, the then Minister for Juvenile Justice, Ms Diane Beamer, stated that 'further clarification on what qualifies as 'special circumstances' should be provided in the legislation'.¹⁰⁸ In particular, the Minister suggested that intellectual and/or mental impairment should be included within the section 19(3)(a) provision along with a statutory definition similar to that proposed by the Law Reform Commission of New South Wales.¹⁰⁹ The Minister conceded that young people with intellectual and/or mental impairment would be 'particularly vulnerable if transferred under section 19 orders'¹¹⁰ and argued there was a risk their disabilities would go unrecognised by the court.

Our review suggests that in relation to section 19 matters, the court does in fact identify intellectual and/or mental impairment as a special circumstance, based on information included in the DJJ background report and often, in additional specialist reports tendered before it. We note, however, that at least two young offenders with an intellectual impairment who were given a section 19 order were subsequently ordered by the court to transfer to adult custody after committing separate offences in juvenile detention. Under section 28BA of the Children (Detention Centres) Act, the court had no other choice because the individuals were over the age of 18 when they committed the offences.

6.3. How the court applies section 19

Based on the matters we reviewed, the majority of judges took a pro-active approach to making section 19 orders. Several, however, were prompted by counsel to consider making an order. Additionally, not all judges provided their reasons for finding special circumstances. In many of the matters we reviewed, the order was made without elaboration at the conclusion of sentencing remarks. The extent to which judges cited the provisions of section 19 in detail also varied. Some recited the whole section before making their order, whilst others mentioned it by shorthand only.

'Special circumstances' are defined broadly by section 19. As noted in Chapter 5, during the review period the court found special circumstances in the overwhelming majority of matters involving young people sentenced at law for indictable or serious indictable offences.

It is clear that the court is loath to order that a young person complete his or her sentence in adult custody if there is an alternative. During the review period, with the notable exception of two individuals, all the offenders who were in a position to complete their sentence before turning 21 years and six months were given a section 19 order to enable them to do so in juvenile custody.

Furthermore, for those young people sentenced to a lengthy term of imprisonment that would require them to transfer to the adult correctional system at some stage, the court has apparently taken the view, with some exceptions, that serving a period of time in juvenile custody is likely to be beneficial to them. In most such instances, the court directed that the offender in question remain in juvenile custody for the maximum time possible, that is, until the age of 21 years. However, in a handful of cases, the court placed a limitation on the period of time to be spent in juvenile custody. Extracts from the judges sentencing comments in these cases are included below.

...[the offender's] immaturity, her need for specialist education and vocational training and counselling can be far better catered for within the juvenile justice system, than within the adult correctional system. However, given the time which [the offender] will be expected to serve a custodial sentence, and given the additional maturity which she may be expected to have acquired by the age of twenty years, I am of the view that it is only until such age that a section 19 order should be made. My reason for this lies in the circumstance that it is not in the interests of other younger prisoners, or of the person standing for sentence, to be held too long within the juvenile justice system, unless they are close to potential release. The boredom and maturity that can come as such offenders age, and their confinement in an institution designed principally for young offenders, can lead to difficulties, and it is better, once they have received the benefits of the programs which are there available, that they move on to the next phase of their custody, and in particular to training and rehabilitation opportunities which are more relevant for adults.

*

I am satisfied, by reference to [the offender's] age at the time of the offence, his early childhood trauma, his intellectual impairment, the fact that he has not yet matured either intellectually or emotionally, and the special treatment which can be provided initially within the juvenile justice system, and later within the adult system, that these constitute special circumstances... additionally they justify permitting [the offender] to remain in a detention centre for a limited period after attaining the age of 18 years. However, in view of the fact that he is physically well-developed, has limited empathy and a record of bullying and domination of younger children, as well as one of disruptive and aggressive behaviour over the past 8 months while held in custody, I consider that it would be inappropriate for him to remain in a detention centre beyond the age of 19 years. I say that having regard to the interests of the other detainees who are likely to be exposed to the kind of aggressive behaviour and poor example which he has set so far, but also having regard to his own interests since there is a risk that experience, age and superior physical strength will only entrench any tendency he has to dominate other more vulnerable persons. The period between now and the age of 19 years I regard as sufficient for him to gain at least the school certificate, as well as to establish the basis for readjustment and socialisation, and to prepare him for vocational training more relevant to an adult.

*

In giving consideration as to where the sentences ought be served and as to whether there are special circumstances in relation to the serious children's indictable offence I have regard to the fact that this is the first period of custody which this offender has ever been confronted with. I do consider that for that reason there is a degree of vulnerability but it is more the appropriate services within a detention centre that would be available to him that I consider constitute the special circumstances. Having said that, however, I do not consider that he should remain in a detention centre until he reaches 21 years of age for his progress thus far in a detention centre will need to be greatly improved and I do consider that he should have the benefit of that for a period. [Offender directed to transfer to the adult correctional system at the age of 19 years and 6 months].

*

[The offender] turned 18 last November. A transfer to an adult gaol will involve considerable dislocation. Given that last year saw considerable improvement in his behaviour and maturity, the court should, at least to the extent that it is able, encourage that. It is far preferable, and in the end works towards the greater protection of the community, if an offender can complete a term of imprisonment with insight into the wrongdoing which placed him or her there, with increased maturity and with skills. He should be given an opportunity to further develop both personally and educationally and we consider that some further period in a juvenile justice centre will better assist that process. Accordingly, we direct that [the offender] serve part of his sentence in a juvenile justice centre until he turns 19 years of age.

*

[The offender] will turn 18 on 16 June this year. The evidence which is available to the court indicates that he is a suggestible personality. The programs available to him in the juvenile justice centre are, in our opinion, more likely at his present stage of development to provide him with the emotional support and physical skills he needs to maximally assist his rehabilitation. The evidence before the court indicates that progress is being made in that regard but that more is required. We consider that it is important that he have as much assistance as possible to acquire the personal strengths necessary to function independently and not be led by his peers. For those reasons we propose to direct that after he turns 18 he serves a further two years in a juvenile justice centre.

From the above extracts, it is evident that the court usually provides reasons for placing a limitation on the period of time to be spent in juvenile custody. However, this is not always the case. Time-limited section 19 orders have been challenged in the Court of Criminal Appeal (CCA) in two related matters involving co-offenders. The offenders were originally ordered to remain in juvenile detention until 19 years and 2 months and 19 years respectively. In relation to the first offender, the court found that the sentencing judge:

provided no reasons for the limitation he imposed beyond saying that the period prior to [the offender] attaining the specified age would 'provide a buffer period before his transfer to jail and will help to deal with the concerns expressed [in the psychiatric report tendered to the court]'.

The court quashed the order and directed the offender to remain in juvenile custody until the age of 21 years. In the case of the second offender, the sentencing judge stated that by the age of 19 years and two months, 'he will have had an opportunity to make use of the services [in juvenile custody] and to become better prepared for adult gaol'. The CCA found that the judge 'gave limited reasons for [his] ruling'. It quashed the order and directed that the offender remain in juvenile custody until the age of 21 years if he was not earlier released on parole (the offender's earliest release date was determined to occur prior to his 21st birthday).

It is worth noting that, during the review period, the CCA did not on any occasion quash a section 19 order outright or place a limitation on its applicability.

We are aware of three cases in which judges explicitly commented on the amendment of section 19. In two of these cases, the sentencing judges made it clear that, but for the amendment, they would have directed the offenders before them to complete the whole of the term of imprisonment in a juvenile justice centre. When one of these cases was subsequently remitted to the CCA on appeal, the Hon Justice Wood stated:

This amendment has, in my respectful review, regrettable consequences for young offenders who possess the personal characteristics and the rehabilitation potential which are displayed by the applicant. Transfer to an adult correctional centre is more likely to have a negative impact than a positive impact for that kind of offender. It would, in my considered view, have been far preferable to retain the discretion which previously existed. The existence of a limitation upon the period in which young offenders can be detained within the juvenile justice system would be far better served by empowering sentencing judges to decline the opportunity of extended juvenile detention for those offenders who are judged to be serious recidivists, or to be given to violence; and also by permitting the transfer, at any stage, to adult correctional centres, of those offenders who do not respond to that opportunity.

6.4. Individuals who did not receive a section 19 order

We are aware of eight individuals who did not receive a section 19 order during the review period. There may be others of whom we are unaware because they have not shown up in the DJJ records we have used to consolidate our data. This would occur if an individual was on bail until the time of their conviction and entered adult custody directly from court, or was already in prison serving a sentence for a separate, adult offence when charged and convicted for an indictable or serious children's indictable offence committed as a juvenile. We are aware of three such individuals who fall into this category only because their cases showed up in a search of matters heard by the CCA.

Of the eight individuals known to us, four were sentenced in the first eight months of the amendment's operation. All eight cases are summarised on pages 68–72.

6.4.1. Case study

'G' was 19 when he was sentenced in October 2002 for aggravated sexual assault offences. As a result of the sentence imposed, G will be eligible for parole in 2021. G was 17 years and three months of age at the time of committing the offences for which he was convicted at trial after pleading not guilty. At the time of being sentenced, he had been remanded in juvenile custody for a total period of one year and nine months. G's counsel submitted that the court should find special circumstances under section 19 to enable him to remain in juvenile custody until the age of 21 years. Counsel argued:

This prisoner may very well need all the time he can get to prepare himself for adult gaol, and to develop skills which will assist him in adult gaol. Now those skills, and that preparation, will not occur if he is sent there immediately. Clearly he is able to conform, your honour, to areas of learning, not only in terms of his academic areas but also in terms of his woodwork and other skills that will hold him in good stead when he gets to an adult prison.

[H]e is going to be in protective custody of the worst kind when he does get there, and...his opportunity to do very much with his skills, with his education, will be non-existent. He has an opportunity to continue what he's been doing for almost two years. That's how long he's been there...it is vital that he continue, otherwise we are going to release him into the adult system unprepared, unskilled, and what's going to be left at the end when he does get released? He will have nothing available to him, or very little available to him, to then utilise in the community.

In support of this submission, G's counsel tendered a report authored by a clinical psychologist suggesting that remaining in juvenile custody would enable G to develop 'maturity'. In addition, counsel tendered various certificates and awards received by G at Kariong JJC as evidence that he was benefiting from juvenile custody. Counsel referred to 'the various counselling, the various programs, that are available to him at juvenile justice'. Counsel also submitted that G would be at great risk in the adult prison system, suggesting that if he was to remain in juvenile custody he would have the opportunity 'to undertake a weight program to develop himself such that he can at least be given an even chance when he gets there'. Counsel conceded that the mandatory background report authored by DJJ and tendered to the court by the Crown contained evidence of poor behaviour in juvenile custody on the part of G, but argued that he should remain there as long as possible in order to maximise his prospects of rehabilitation.

The Crown actively argued against a finding of special circumstances under section 19, describing G as 'a grievous and long term danger to our community'. Extrapolating from the DJJ background report, the Crown emphasised G's 'medium to high risk' likelihood of re-offending and 'total...lack of insight into the seriousness of [his] offending behaviour'. The Crown also referred to comments in the report concerning G's 'rudeness and inappropriate sexual comments and attitudes towards female teachers and staff members [at Kariong]'

The court found that G had been 'troublesome and, at times, violent, whilst in [juvenile] detention' and declined to make an order under section 19 permitting G to remain in juvenile detention for a further period. His Honour Judge Finnane explained the reasons for his decision as follows:

In my view, it would be completely inappropriate for him to continue to be housed with juveniles. Not only was he a leading light in [the offences], but he has proved himself to be an arrogant and nasty individual whilst in custody, even descending to threatening police officers in February this year. He will serve his sentence in adult prisons.

Judge Finnane concluded his remarks by recommending to DCS that G 'be given the advantage of programs designed for young offenders, if that is possible'. G has served the majority of his sentence so far at Goulburn Correctional Centre.

6.4.2. Case study

'Y' was 19 years and six months of age when he was sentenced in October 2002 for aggravated sexual assault offences. As a result of the sentence imposed, Y's earliest release date was determined as being 2029. Y was aged 17 years and three months at the time of committing the offences for which he was convicted at trial after pleading not guilty. At the time of being sentenced, he had been in remand for a total period of 11 months. For the first six months of this period, Y was held in an adult correctional centre, the MRRC. This was the result of an error by the court.

Y's counsel submitted that the court should find special circumstances under section 19 to enable him to remain in juvenile custody until the age of 21 years. Counsel argued:

there are many... programs available to him [in juvenile custody], programs from which he will benefit, including counselling and psychological assessments and help, other programs in terms of work, school programs, things like that that would be of benefit to him not only in...having to...acknowledge an involvement, perhaps, in these offences to a certain degree, but also in coping to remain in the prison system which on the face of it, all indications are it will be a lengthy period, and that the majority of his life, as it stands at the moment anyway, is likely to be spent in custody.

The Crown actively argued against a finding of special circumstances under section 19. During cross-examination of the author of the DJJ background report on Y, the Crown suggested that while in adult custody, The offender 'developed methods of coping which would be inappropriate to [a] juvenile justice centre'. The witness agreed that Y had picked up some aggressive ways of coping with the tougher environment of an adult system, but stated that, at Kariong, '[he] is compliant and is not considered to be a significant management problem'. She conceded that there had been some instances of fighting on Y's part, but told the court, 'we expect that the detainees have some incidents and all of [Y's] have been dealt with as minor misbehaviour which means they are on the minor end of the spectrum'.

The Crown submitted that Y was 'clearly unsuitable' for juvenile detention, arguing:

He has already developed coping mechanisms which...work better in the adult system than they do in juvenile justice... concerns reported by [juvenile justice] staff include 'aggressive language, persistent negative comments about staff, and concerns about him exerting a negative influence on more immature and less sophisticated detainees in the centre'. He has clearly outlasted his time. Perhaps in fact he was unsuitable ever since your Honour extended to him the concession of him returning to juvenile justice. He took no advantage of the concession your Honour extended to him earlier this year, he has not kept his nose clean, he has obviously been a trouble-maker, he is obviously way beyond, in terms of criminal sophistication and misbehaviour, the level of the other detainees in that centre, and it would be very deleterious to those other 24 or so young men [at Kariong] to keep in their company.

Counsel responded to the Crown's suggestion by saying that Y should not be disadvantaged as a result of being erroneously remanded in adult custody whilst on remand.

His Honour Judge Finnane asked the author of DJJ background report to comment on the benefits of juvenile custody. She responded:

I think that remaining in a juvenile justice system can be good in terms of assisting young people in developing skills to manage in prison given that it is a much more different environment and certainly [Y] will have access to a range of psychological assistance and working in educational programs, so I think that is an advantage... and I guess it depends on [Y]'s use of those, if it is going to be of benefit and that is going to be through him utilising what is available and behaving himself and participating in programs whilst he is there.

She acknowledged, however, that Y would be unable to participate in sex-offender specific counselling whilst he maintained his innocence in relation to the offences for which he was convicted, and whilst court matters in relation to his likely appeal against conviction were ongoing. In relation to this, counsel for Y argued that he would nonetheless benefit from counselling to assist 'in some of the other issues...[such as] aggressive behaviour'. Counsel stated that such assistance 'would not be available to him if he was sent directly to an adult prison'.

Handing down his judgement, Judge Finnane stated:

I had the benefit of oral evidence from...the author of the juvenile justice report. Her evidence convinces me that his continued imprisonment in a juvenile justice detention centre is inappropriate. He is associating there with four other offenders who I directed should remain there. Three of them pleaded guilty and all of them have expressed some remorse and a willingness to do something positive about rehabilitation. His continued close association with them cannot be good for them since he continues to deny any involvement of himself or anyone else in any crimes associated with these incidents and clearly, that must be an attitude which is detrimental to their rehabilitation. In addition, because of this attitude, he cannot be given the advantage of the sex offenders program. It is difficult for me to see how his remaining at Kariong is in his interests or the interests of anyone else. I am unable to find special circumstances. He will serve his sentence in adult prisons.

Judge Finnane concluded his comments by recommending to DCS that Y 'be given the advantage of programs designed for young offenders, if that is possible'. Y has spent the majority of his sentence so far at Goulburn Correctional Centre. In April 2004 the CCA quashed Y's conviction and ordered a retrial.

6.4.3. Case study

'W', an Aboriginal male, was aged 17 years and seven months when he was sentenced in April 2002 for an offence of robbery. As a result of the sentence imposed, W was determined to be eligible for parole in November 2003. W was aged 16 years and ten months at the time of committing his offence, for which he pleaded guilty. At the time of his sentencing, W had been remanded in juvenile custody for a total period of nine months.

Counsel for W argued that the court should find special circumstances to enable him to remain in juvenile custody until the age of 21. Counsel pointed to evidence given by W's mother concerning his background. Her evidence was that W had gone 'off the rails' following the death of a close relative. W's mother also gave evidence that her son had engaged in self-harm on a number of occasions. (During sentence proceedings, counsel explained that it had been

unable to obtain a psychiatric report on W because 'we haven't been able to get anyone who works for Legal Aid rates'.) Counsel also suggested that W would be at possible risk in adult custody as a result of providing assistance to the authorities.

His Honour Judge Freeman commented that W's background was 'not wholly helpful to [him]', citing his prior record before the Children's Court for break and enter and driving offences. Judge Freeman stated that he could detect no contrition on the part of the offender. In handing down his sentence, his Honour addressed the issue of section 19, stating:

the prisoner's performance in a juvenile institution...has not been such as to attract overwhelming praise or admiration. He has been apparently a fractious prisoner, his attempts at rehabilitation have not been striking, although he says he has done a small motors program, he has done some work towards endeavouring to address his lack of academic qualifications, he is enrolling in yr 10 but that has been interrupted perhaps due to factors beyond his control, although it seems to me that there's been an extraordinary long delay in him applying himself again to that task, and he is part way through a five week bricklaying course which he hopes will equip him to obtain ultimately a scholarship to get an apprenticeship in that trade. He remains however a person whose prospects of rehabilitation need to be approached with considerable caution...[T]he recent legislative amendments to which assent was given only in January this year tend to indicate that unless there is some special footing upon which [a section 19] order should be made, the normal course of events will see these young people transferred to adult custody when they reach 18 and it's in this regard as well that the performance of the prisoner to date is not encouraging. Section 19 of the amended act speaks of special vulnerability, the availability of programs in juvenile custody which are not available in adult custody and any other reason which the court thinks fit. Apart from the possible presence in prison of the alleged co-offender... I do not identify in this young man any particularly high level of vulnerability other than that which is exhibited by all 18 year olds when they come into adult custody. He does not seem to have made aggressive successful use of the facilities in juvenile custody, and there is no evidence that there is any special course available to him there which would not be available to him in adult custody. I do not propose therefore to direct that he be kept amongst juveniles beyond his 18th birthday. It seems to me the presence of [the co-offender] if he is convicted and sentenced can be addressed by the corrective services commissioner simply by keeping the two in separate institutions. But that possibility, that he will be perhaps at some remote risk I have also taken into account in shortening the term of full time custody and extending the period of parole.

W remained in juvenile custody until his 18th birthday, on which date he was transferred into adult custody. He served his sentence at Cessnock Correctional Centre.

6.4.4. Case study

'J' was aged 19 years and nine months when he was sentenced in August 2003 for an offence of aggravated assault. As a result of the sentence imposed, J was determined to be eligible for parole in 2014. J was 17 years and 11 months of age at the time of committing the offence for which he was convicted at trial after pleading not-guilty. J spent a total period of nine months in juvenile custody on remand before being bailed.

Counsel for J argued that the court should find special circumstances to enable him to remain in juvenile custody until the age of 21. Tendered to the court in support of this submission were a psychiatric report, a psychological report and a number of character references. The reports referred to J's below-average intelligence, dysfunctional upbringing and circumstances of instability at the time of the offences. It was put to the court that, during his time in custody, J had demonstrated 'exemplary behaviour'. There was also evidence that he had demonstrated stability and good behaviour while on bail, and that he had reduced his use of drugs and alcohol during this time. Concerns were expressed about his vulnerability in adult custody.

His Honour Judge Dodd was critical of aspects of all the reports tendered on J's behalf. In particular, he disagreed with their finding that J was remorseful. In handing down his sentence, his Honour said:

You will be twenty this coming November. Most of your sentence will have to be served in an adult institution. In my view, the concerns about spending your time in an adult institution are not more than apply to most prisoners, unfortunately. I see little point in making [a section 19] order.

J subsequently appealed his conviction and sentence. The CCA upheld the conviction, but reduced J's sentence. In addressing one of the grounds of appeal, namely that 'his Honour should have found special circumstances within section 44 of the Crimes Sentencing Procedure Act', the Court referred to Judge Dodd's decision not to make a section 19 order. The Court dismissed the ground, and did not alter his Honour's finding in relation to section 19.

6.4.5. Case study

A co-offender of J, 'Q' was aged 19 years and eight months when he was sentenced in August 2003 for an offence of aggravated assault. As a result of the sentence imposed, Q was determined to be eligible for parole in 2014. Q was 17 years and 11 months of age at the time of committing the offence for which he was convicted at trial after pleading not guilty. Q spent one day in juvenile custody before being granted bail.

Counsel for Q argued that the court should find special circumstances to enable him to remain in juvenile custody until the age of 21. Tendered to the court in support of this submission were a psychiatric report, a psychological report and a number of character references. Evidence was given concerning Q's prior excellent character, history of employment, involvement in the community and bright career prospects. Concerns were expressed about his vulnerability in adult custody. His Honour Judge Dodd accepted the favourable subjective circumstances of Q but determined that 'this aspect plays little significant role in the ultimate sentence'. In handing down his sentence, his Honour said:

You are twenty now. Most of your time in custody will be in an adult prison. The concerns expressed about you are general, and apply to many prisoners. Accordingly, I see no real reason to make [a section 19] order.

Q subsequently appealed his conviction and sentence. The CCA upheld the conviction, but reduced Q's sentence. Among other things, Q argued at appeal that the court failed to take into account his youth and good character, and the fact that he was a juvenile at the time of the offence. It was also submitted that the court was in error not to have found special circumstances under section 44 of the Crimes Sentencing Procedure Act. The court found that Judge Dodd had 'not...allowed sufficient weight to be attached to the favourable subjective circumstances of the Appellant', and reduced Q's sentence accordingly.

6.4.6. Case study

'U' was 18 years and nine months of age when he was sentenced in July 2001 for assault related offences. The court dealt with U under Part 3 Division 4 of the Children (Criminal Proceedings) Act, and imposed two control orders, suspended to good behaviour bonds for periods of two years and 12 months respectively. U was 17 years and eight months of age at the time of committing the offences for which he was convicted after pleading guilty.

The Crown subsequently appealed the sentences. The CCA found that His Honour Judge Goldring erred in determining that U's was an appropriate case for the application of Part 3 Division 4, on the grounds that 'the offences which [U] committed were very serious...because they each involved serious violence to a very young infant'. The matter was remitted back to the District Court and U was subsequently sentenced in February 2002 to two years imprisonment. As a result of this sentence, U was determined to be eligible for parole in December 2003. No order was made as to where the sentence should be served. U served his sentence at Bathurst Correctional Centre.

6.4.7. Case study

'Z' was 20 years and four months of age when he was sentenced in August 2002 for an offence of manslaughter. As a result of the sentence imposed, Z was determined to be eligible for parole in 2008. Z was 15 years of age at the time of committing the offence for which he was convicted at trial after pleading not guilty. Z spent a period of ten months in juvenile custody before being discharged at committal in October 1998. Following an ex-officio indictment in April 2001, Z was once again charged with manslaughter. At this time, Z was on remand in adult custody for a drug offence. He was sentenced for that offence two months after being charged for the manslaughter offence. At the time of being sentenced for the manslaughter offence, Z was serving his sentence on the drug offence and was due for parole in November 2002.

Z subsequently appealed his sentence on the grounds that the sentencing proceedings did not comply with section 25 of the Children (Criminal Proceedings) Act. Section 25 requires that, in the case of a person who was a child when the offence was committed and under the age of 21 years when charged, a background report, prepared in accordance with Regulation 6 under the Act, must be tendered to the court and its contents taken into account. In Z's case, a pre-sentence report applicable for an adult was tendered to the court. Although it 'covered most of the matters which would be contained in [a background] report', it did not strictly comply with Regulation 6. Counsel for Z pointed out that:

reports under section 25 of the Act are prepared by juvenile justice officers specially trained for dealing with juvenile offenders and [an adult] pre-sentence report does not...comply with the protective and special purposes of the Act to protect children.

The CCA upheld the ground and Z was re-sentenced in March 2004. His sentence was reduced such that Z is eligible for parole in 2007. Z is serving his sentence at John Morony Correctional Centre.

6.4.8. Case study

'X', a co-offender of Z, was 22 years of age when he was sentenced in August 2002 for an offence of murder. As a result of the sentence imposed, X will be eligible for parole in 2013. The offence was committed in 1997 when X was aged 17 years. X was charged for the offence in 2001 aged 20 years and six months and was 21 years and six months of age when convicted. Prior to his conviction, X was on bail. Although X was a juvenile when he committed his offence and under 21 years when charged, it was not open to the court to make a section 19 order because of his age at the time of sentencing.

6.5. Procedural issues

6.5.1. Interpretation and application

Our review indicates that, generally speaking, section 19 was correctly interpreted and applied by the courts. The most common anomaly we came across concerns judges making 'unnecessary' orders. As we noted in Chapter 5, section 19 orders were made in relation to some 23 young people even though their earliest release date was determined to occur prior to their 18th birthday or they were an indictable offender whose sentence would expire before the age of 21 years and six months. In six cases, the earliest release date was determined to occur within five months of the young person's 18th birthday, suggesting circumspection on judges' parts should the young person be deemed ineligible for parole at that time. In the remaining cases, it is not clear why judges proceeded to make an order.

Another issue of interest concerns the extent to which judges deliberately structure sentences to enable young people to serve their entire sentence in juvenile detention. There is no evidence to suggest that this routinely occurs. However, we are aware of at least one case in which this was clearly the intention of the sentencing judge. The extract below illustrates this.

His Honour: 'I'm very concerned about where he goes...

Counsel: Yes, well, the new section 19 changes the rule book in a sense. [It] starts with a presumption that when the offender, a juvenile offender dealt with according to law...reaches the age of 18 it is to be presumed that they transfer to an adult institution...

His Honour: Yes, well that's what I've been worried about.

Counsel: ...Unless one of two things occurs. Unless they have six months or less on their non-parole period or your Honour finds special circumstances and orders that he cannot be transferred...

His Honour: So I can find special circumstances that he be held in a detention centre, is that the wording?...If, at the end of the day, I decide that he should only be kept in a juvenile justice centre I must do it in such a way that he has finished it by the age of 21...

The judge subsequently structured the young person's sentence so that he would be eligible for parole prior to his 21st birthday.¹¹¹ It is clear from our review that it is also not uncommon for defence counsel to urge judges to structure sentences to enable their clients to serve the whole of their imprisonment in juvenile custody.

A further issue to which our attention has been drawn is the extent to which judges and legal representatives are aware of the specific programs, services and facilities available at different juvenile justice and adult correctional centres. The availability of programs, services and facilities varies throughout both systems, as does the ability of individuals to access them. An individual's classification and/or sentence length, for instance, will affect the opportunities available to him/her. This is particularly the case in the adult correctional system. For example, while DCS administers a special treatment program for sex offenders, the program is only available at Long Bay and offenders must be towards the end of their sentence in order to participate. On the other hand, an individual who is placed in a juvenile justice centre for a lengthy period of time may be placed in the situation whereby he/she has completed all the available programs at that centre but still has a considerable period of his/her sentence to serve. Our review indicates that whilst judges and legal representatives possess general awareness of these issues, there is scope to improve their specific knowledge.

6.5.2. Problematic cases involving the application of section 19

Various problematic cases involving the application of section 19 have come to our attention. For example, in September 2003, a young person who was actually 18 years of age at the time of committing the offence for which he was convicted was ordered by the sentencing judge in his case to complete the whole of his sentence in juvenile custody. That the court had no authority to make such an order was not identified during sentencing proceedings,

despite the judge commenting that 'the sentencing regime under which the offender is being dealt with may have been significantly different had these offences occurred prior to his eighteenth birthday'. The young person's status as an adult offender was confirmed on his arrival at a juvenile justice centre. He was appropriately transferred to the adult correctional system three days later.

Another case concerned a young person simultaneously convicted of three offences in April 2004. Only one of the offences was committed when he was under the age of 18 years. Prior to being sentenced, the young person was remanded in adult custody in strict protection. The sentencing judge heard evidence that the offender was highly vulnerable in adult custody, and, as a result of his protective status, was unable to participate in any courses or programs there. Accordingly, the judge ordered that the young person complete his sentence in juvenile custody.

The court re-convened a month later to address the fact that it was not open to the judge to have made an order that the two adult offences should be served in juvenile custody. Counsel for the offender submitted to the court that Division 4 of the Children (Criminal Proceedings) Act applied to a 'person' and not an 'offence'. She argued that once the young person had been sentenced as a juvenile, as he was entitled to be in relation to one offence, he could not cease to be subject to such description as a result of being dealt with at the same time in relation to the two adult offences. The sentencing judge responded to this submission by saying, 'it seems to me that the risk to be run by adopting such a construction is that the matter might need to go up to the... Court of Criminal Appeal, and I think it is desirable to try and terminate the matter now'.

The judge invoked the court's power to re-sentence the offender 'in order to produce the result which [was] originally intended to be achieved'. Declaring his view that the offender would be in 'grave danger' if he was to return to the adult system, he restructured the sentences so that those for the adult convictions would expire prior to those for the juvenile offence. The three sentences were made concurrent. As a result, the young person in question will serve the whole of his term of imprisonment in juvenile custody.

In a third case, a young Aboriginal male was sentenced in November 2003 following his conviction for a serious children's indictable offence. The judge directed the young person to complete the whole of his sentence in juvenile custody, stating:

[he] has already demonstrated an ability and willingness to be rehabilitated. The facilities which are available to him in a detention centre will promote the rehabilitation much more so than if he were to be sent to an adult prison.

However, the young person's sentence was structured so that he will be eligible for parole in 2006, at the age of 21 years and eight months. Evidently, neither the young person's counsel nor the Crown picked up on this fact. Indeed, its significance was not identified until 2005. As a result of the sentence imposed, the young person will have to transfer to the adult correctional system to serve the final two months of his sentence, contrary to the original intentions of the judge.

Ombudsman staff, prior to becoming aware that he would have to transfer to the adult correctional system, interviewed the young person. He reported that he was very glad he did not have to go to prison, as his brother died there a few years previously. Indeed, at the time of committing his offence, a coronial inquiry was underway concerning his brother's death. The young person said he had himself been in prison for a period of three weeks on an adult matter prior to being convicted and sentenced for his juvenile offence. He stated that there was 'no way' he wanted 'to go back there'. When the young person was sentenced for the juvenile offence, his Honour Judge Berman heard evidence that while in prison for the previous offence, he had presented as 'a very frightened boy'. Judge Berman concluded that 'if [the offender] were to serve his sentence [for the juvenile offence] in an adult prison he would be victimised'.

Shortly after the young person was made aware that he would have to transfer to the adult correctional system to complete the final two months of his sentence, his urine tested positive for amphetamine. When questioned by the manager of the juvenile justice centre where he is held, the young person, previously a well-behaved detainee, reported that as he was going to prison anyway, there wasn't much point in continuing 'to do the right thing'. However, since this time, the young person has resumed his positive behaviour. At the time of writing, the manager of the juvenile justice centre reports that the young person has commenced weight training, and that staff are working to assist him to prepare for transferring into adult custody.

6.5.3. Other issues

An issue that requires further consideration concerns whether a section 19 order involving a transfer to the adult correctional system should be enforced while the individual subject to that order is appealing his or her sentence. This situation occurred on one occasion during the review period.¹¹² In her submission to the discussion paper informing this review, the then Minister for Juvenile Justice stated that her department was 'recommending that consideration be

given to amending the Act so that an appeal would operate to stay the section 19 order until it is heard'. The Minister noted that a successful appeal could result in a detainee who had commenced his or her sentence in a juvenile facility and later transferred into the adult system, being subsequently returned to juvenile detention. In the words of the Minister, such an outcome would be undesirable 'as the lack of continuity of service for the transferred detainee would make participation in programs and rehabilitation measures difficult.' The Minister also noted that, 'due to contamination concerns, 'it is...undesirable to have the detention centre detainees mixing with someone who has spent time in the adult system'.¹¹³

To date no such amendment to the legislation has taken place. In our view this should occur.

It is recommended that the legislation be amended to require judges to:

- a) provide their reason/s for finding special circumstances**
- b) provide reason/s when making a time-limited section 19 order**
- c) provide their reason/s for declining to find special circumstances if a submission in support of such a finding has been put before the court.**

It is recommended that a program be developed to assist in providing information to judges about the specific programs and facilities offered in juvenile justice and adult correctional centres and about limitations on offender access to these programs and facilities. It is noted that the Judicial Commission, in consultation with the Departments of Juvenile Justice and Corrective Services, is the most appropriate body to deliver such a program.

It is recommended that the Department of Juvenile Justice reconsider its policy of not making a recommendation to the court in the pre-sentence background report regarding the presence of 'special circumstances'.

It is recommended that the legislation be amended to provide that a section 19 order requiring an offender to be transferred to an adult correctional centre at a specific time after having spent a period following sentence in a juvenile justice centre may be stayed on application pending the outcome of an appeal against the sentence.

Endnotes

¹⁰⁰ This summary has been adapted from the Shopfront Youth Legal Centre's factsheet, 'Criminal Procedure – an overview'. www.theshopfront.org/documents/CriminalProcedure/Overview.pdf. Accessed 22 August 2004.

¹⁰¹ R v GDP (1991) 53A Crim R 112; RvC, RvS, RvT, NSWCCA 12 October 1989.

¹⁰² R v Tran (1999) NSWCCA 109; R v Hearne (2001) 124 A Crim R 451; R v Voss (2003) NSWCCA 182.

¹⁰³ Hon Justice R.O. Blanch, submission to Ombudsman, 8 April 2004. p.1.

¹⁰⁴ Correspondence, 9 September 2005.

¹⁰⁵ Department of Community Services, submission to Ombudsman, 16 June 2004. p.2.

¹⁰⁶ Ibid. p.3.

¹⁰⁷ Illawarra Legal Centre, submission to Ombudsman, 26 May 2004, p.1.

¹⁰⁸ Ms Diane Beamer, Minister for Juvenile Justice, submission to Ombudsman, 6 July 2004. p.4.

¹⁰⁹ Ms Diane Beamer, Minister for JJ, sub to Ombo, 6 July 2004. p.4.

¹¹⁰ Law Reform Commission NSW, *Issues Paper 19, Sentencing: Young Offenders*, 2001.

¹¹¹ However the young person, 'N' was later transferred to the adult correctional system under section 28(1) of the Children (Detention Centres) Act. N's case is summarised at 8.2.1.

¹¹² However, the young person reported that he was happy to be in adult custody and had no desire to return to juvenile custody.

¹¹³ Ms Diane Beamer, Minister for Juvenile Justice, submission to Ombudsman, 6 July 2004, p.5.

Chapter 7. Issues relating to custody – procedural issues

In this chapter, the outcomes in custody for individuals who were sentenced under section 19 will be discussed.

7.1. Comparison of juvenile justice and correctional centres

7.1.1. Underlying philosophy

In order to appreciate some of the key differences between juvenile justice and adult correctional centres, it is important to understand the broader contexts in which they operate. The juvenile justice model places a primary emphasis on the rehabilitation of offenders. This emphasis is reflected in DJJ's corporate Statement of Purpose, 'Working together to provide services and opportunities for juvenile offenders to meet their responsibilities and lead a life free of further offending'.¹¹⁴ In contrast, the adult correctional model, whilst acknowledging the importance of rehabilitation, places primary emphasis on deterrence and the protection of the community.

The difference in emphasis is reflected in the roles of staff in juvenile justice and adult correctional centres. The primary responsibility of corrective services officers is to ensure that inmates are managed securely. In juvenile justice centres, custodial staff are expected to manage detainees securely but also to interact closely with them in a way that facilitates individual case management needs. Known as youth workers, they spend a considerable amount of time engaging with detainees throughout the day. Among other things, youth workers are involved in supervising routines and activities. They may also assist CST staff to oversee group work in the centre, and often participate in pro-social activities such as sport or other games with detainees.

7.1.2. Centre environment and facilities

The comparative size of the juvenile and adult correctional systems also impacts significantly on the environment and operation of centres. Across New South Wales, there are nine juvenile justice centres housing approximately 300 detainees,¹¹⁵ whereas there are 30¹¹⁶ correctional centres housing over 9 000 inmates. The design and physical layout of juvenile justice and adult correctional centres are therefore quite different. In juvenile justice centres, detainees are accommodated in small residential units. Depending on the centre, the units have a mix of single, double and multiple occupancy rooms. Residential units also have common areas where detainees participate in recreational and other activities such as group work and programs. Every juvenile justice centre has an education and training unit attached to it, staffed by employees of the Department of Education and Training. The units provide secondary schooling as well as various vocational programs run through the Institute of Technical and Further Education (TAFE). Juvenile justice centres also have areas where detainees can play sport. Some centres have tennis or basketball courts, and at Frank Baxter, there is a gymnasium. All juvenile justice centres also have a clinic staffed by employees of Justice Health.

Adult correctional centres are larger and tend to be divided into more areas. Inmates may be broadly grouped according to their classification, protection status, ethnicity or other factors such as enrolment in a specialised treatment program. Each area can contain a number of further sub-divisions. Some centres, such as Goulburn, Bathurst and parts of Long Bay are relatively old, and this affects both their physical lay-out and living conditions for inmates. Individual accommodation areas are called cells. Depending on the centre and the area, cells can be single, double or multiple occupancy. Correctional centres have secure common areas or 'yards' where inmates congregate when they are not in their cells or attending work or programs. At larger correctional centres there may be several yards to keep certain groups of inmates separate from others. Sporting and recreational facilities vary from centre to centre. Inmates of adult correctional centres generally have less access to such facilities than do detainees in juvenile justice centres. All correctional centres have a clinic staffed by employees of Justice Health. Correctional centres also have designated education and programs areas. Again, these facilities differ between centres.

7.1.3. Programs and services

Both DJJ and DCS run a number of programs aimed at meeting the developmental and rehabilitative needs of offenders. Such programs target areas including the offending cycle, anger management, A&OD relapse-prevention, violent offender and sex offender intervention and prevention treatment. In the juvenile system, programs are especially tailored to meet the needs of children and young people. Both the adult and juvenile systems employ specialist staff to deliver programs and to provide related services such as counselling and welfare support. In

juvenile justice centres the ratio of detainees to specialist staff is much lower, reflecting their focus on intensive case management.

In the adult system, some programs, like anger management and A&OD relapse-prevention, are run at the local centre level, while more specialised programs, like the CUBIT Sex Offenders Program and Violent Offenders Treatment Program, are run centrally at the Long Bay Complex. Access to programs in the adult system is dependent on a range of factors including availability, waiting lists, protection status and in some cases, eligibility on the basis of classification and length of sentence. No inmate can be compelled to participate in any developmental or rehabilitative program.

Of particular relevance to serious young offenders placed in the adult correctional system are restrictions on access to programs on the basis of classification and sentence length. For example, in order to be eligible for the Sex Offenders Program, an offender must have a C classification (or be expected to receive one at least 12 months prior to his earliest release date). A young person serving a relatively long sentence for a sex offence is likely to have spent several years in custody before attaining such a classification. During this period, the young person may not have undertaken any intensive offence-specific counselling. As we commented in Chapter 4, eligibility for SPYAMO is also restricted on the basis of classification and sentence length, which effectively excludes some serious young offenders. Additionally, individuals needing protection in custody also have restricted access to programs (as well as work opportunities). Young offenders often fall into this category, usually during the early stage of their incarceration.

The needs of the large number of inmates for which DCS is responsible must be balanced alongside the availability of resources. In correctional centres, long waiting lists often apply for access to counselling and programs, and sometimes to education and work opportunities. Many young people with whom we spoke during our review, particularly in the larger centres like Goulburn and Lithgow, said that frustration with lengthy waiting periods had discouraged them from accessing services.

7.1.4. Daily living

While routines are important in both systems, daily life for detainees differs considerably between juvenile justice and adult correctional centres. Following attendance at work, education or programs, inmates in adult centres generally spend a greater proportion of time during the day (usually from early to mid afternoon onwards) locked in their cells, whereas detainees in juvenile centres are involved in education, programs and activities throughout the day and are generally not confined to their rooms until evening lock-down. Access to sport and other recreational activities is greater in juvenile justice centres than in correctional centres. Generally speaking, inmates in adult correctional centres have more un-structured time to occupy than do juvenile detainees.

Different disciplinary rules can also affect the daily life of detainees within centres. For example, adult inmates can be segregated under certain circumstances for much lengthier periods of time than can juveniles. Another factor that frequently impacts on adult correctional centres is staffing shortages. Staffing shortages occur for a number of reasons and the most significant ways they affect the running of centres on certain days is by limiting inmates' access to programs and facilities and/or increasing the amount of time that inmates are 'locked-in' their cells. This occurs more frequently at some centres than at others.

Generally speaking, juveniles are able to receive more visits than adult inmates. In terms of other privileges, one of the main differences between adult and juvenile centres is the 'buy-up' system that operates in the former. This system enables inmates to purchase grocery, toiletry and other items for personal use. Many inmates prepare their own meals in their cells using appliances such as rice-cookers and sandwich toasters that they have purchased from their own funds. Another 'privilege' mentioned by several of the young people with whom we spoke is that inmates in adult correctional centres can smoke tobacco. Smoking is banned in juvenile justice centres.

7.1.5. Summary

This section provides a very general comparison of juvenile justice and adult correctional centres. Every centre, whether juvenile or adult, has aspects unique to it. There is particular variation between adult correctional centres. The day-to-day life and experiences of inmates can vary considerably depending on the centre in which they are placed. Classification is an especially important factor in determining the custodial environment of adult inmates. This factor arguably does not have as much impact on juvenile detainees, although they are also subject to classification and this affects the way they are managed within juvenile justice centres.

There is no doubt that one of the most significant differences between the two systems is their relative size and capacity for responding to offenders on an individual basis. Alongside the juvenile justice model's more pronounced focus on the rehabilitation of offenders, this is a critical distinguishing factor.

7.2. Provisions for the transfer of persons between juvenile justice and correctional centres

Prior to the commencement of the Juvenile Offenders Legislation Amendment Act, there were three legal provisions that allowed for the transfer of a person, aged up to 21 years and sentenced to a term of imprisonment, between a juvenile justice and adult correctional centres. In addition to section 19, these provisions were contained within sections 10 and 28 of the Children (Detention Centres) Act. All three provisions still exist, but in relation to section 28(1), juveniles are now transferred to Kariiong Juvenile Correctional Centre in the first instance. The Children (Detention Centres) Act was amended by the Juvenile Offenders Legislation Amendment Act to provide for this.

Prior to its amendment, section 10 provided for the transfer of a person under the age of 21 years from an adult correctional centre to a juvenile justice centre.¹¹⁷ No individuals who received a section 19 order and who moved to the adult correctional system during the review period were subsequently moved back to the juvenile justice centre under section 10. However, several individuals who received a section 19 order were moved to the adult correctional system during the review period under section 28. Section 28, as it existed prior to its amendment, is summarised below.

7.2.1. Section 28 prior to its amendment

Section 28(1)

- (1) *If:*
 - (a) *a classified person is being detained in a detention centre, and*
 - (b) *the Minister is satisfied that the person:*
 - (i) *is not profiting from the discipline and instruction in the detention centre, or*
 - (ii) *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.
- (2) *When a person is transferred from a detention centre to a prison, the person ceases to be a person on remand or a person subject to control, as the case may be, within the meaning of this Act and becomes a prisoner.*
- (3) *The consent of the Minister administering the Crimes (Administration of Sentences) Act 1999 is not required to an order under subsection (1) if the Minister, in the same Ministry, also administers that Act.*

Section 28A

- (1) *This section applies to a child of or above the age of 16 years who is:*
 - (a) *a child (including a detainee) charged with an indictable offence, or*
 - (b) *a detainee subject to a detention order relating to an indictable offence and is charged with a detention centre offence (as defined in section 28C) or an indictable offence.*
- (2) *In any criminal proceedings against a child to whom this section applies a court may remand the child to a prison pending the commencement of the hearing of the proceedings or during any adjournment of the hearing, but only if:*
 - (a) *the person by whom the proceedings were commenced or the Director-General applies for such a remand, and*
 - (b) *the child is not released on bail under the Bail Act 1978, and*
 - (c) *the court is of the opinion that the child is not a suitable person for detention in a detention centre.*
- (3) *The Children's Court may at any time on the application of the Director-General remand a child as referred to in subsection (2), subject to the requirements of paragraphs (b) and (c) of that subsection.*
- (4) *Section 28E makes provision for the matters to be taken into account in deciding whether a person is suitable for detention in a detention centre.*

Section 28B

- (1) *This section applies to a person of or above the age of 16 years who:*
 - (a) *is subject to a detention order relating to an indictable offence, and*
 - (b) *is subject to a further detention order (being an order under section 33 (1) (g) of the Children (Criminal Proceedings) Act 1987) in relation to a detention centre offence (as defined in section 28C) committed while the person was a detainee in relation to the offence referred to in paragraph (a).*
- (2) *The Children's Court may order that a person to whom this section applies be committed to prison for the whole or any part of the period specified in that further detention order, but only if:*
 - (a) *an application for the order is made by the Director-General or the person who commenced the proceedings which resulted in the making of that further detention order, and*
 - (b) *the Children's Court is of the opinion that the person is not a suitable person for detention in a detention centre.*
- (3) *Section 28E makes provision for the matters to be taken into account in deciding whether a person is suitable for detention in a detention centre.*
- (4) *On the coming into operation under section 28F of an order under this section, the detention order concerned becomes a sentence of imprisonment for a term equivalent to the period specified in the order of the Children's Court under this section.*

Section 28BA

- (1) *This section applies to a person who is sentenced to a term of imprisonment in respect of a detention centre offence that was committed when the person was of or above the age of 18 years.*
- (2) *A person to whom this section applies must, after serving the term of imprisonment, serve the balance of any unexpired term of a detention order to which the person is subject in prison.*
- (3) *The balance of the unexpired term of a detention order to which subsection (2) relates becomes the term of a sentence of imprisonment.*
- (4) *Despite subsections (2) and (3), the Children's Court may, on application by a person to whom this section applies, direct that the person be returned to a detention centre for the balance of that unexpired term if it is of the opinion that the person is suitable for detention in a detention centre.*
- (5) *In any proceedings on an application under subsection (4), the Director-General and a person to whom this section applies are entitled:*
 - (a) *to appear in the proceedings and be heard, and*
 - (b) *to be represented by a barrister or solicitor or, by leave of the Children's Court, by an agent.*
- (6) *Section 28E makes provision for the matters to be taken into account in deciding whether a person is suitable for detention in a detention centre.*
- (7) *This section extends to a person sentenced to a term of imprisonment for a detention centre offence before the commencement of this section, but does not apply if the person has served the whole of that sentence before that commencement.*

7.2.2. What is a 'detention centre offence'?

Section 28C of the Children (Detention Centres) Act defines a detention centre offence as:

- (a) *an offence under section 33 (escaping or attempting to escape from lawful custody), or*
- (b) *an offence under section 37A (failing to comply with condition of leave or failing to return after leave expires or after medical treatment), or*
- (c) *any other offence (except misbehaviour) committed within a detention centre.*¹¹⁸

7.3. Procedures for the transfer of persons and information between juvenile justice and correctional centres

In July 2002 a Memorandum of Understanding (MoU) was signed by DCS, DJJ and the then Corrections Health Service (now Justice Health) formalising their agreement to certain protocols and procedures for the transfer of individuals between juvenile justice and correctional centres, including the transfer of health and casework information. The MoU set out procedures in relation to the three provisions that existed prior to the Juvenile Offenders Legislation Amendment Act allowing the transfer of a person between juvenile justice and correctional centres.¹¹⁹ As there were no movements of section 19 detainees under section 10 during the review period, it is only necessary to outline the procedures in relation to section 19 and section 28. For each provision, there were two separate procedures, one for the transfer of persons and another for the transfer of information.

7.3.1. Procedures in relation to section 19

7.3.1.1. Procedure for the transfer of persons

Three months prior to the specified date of transfer to the adult correctional system, the manager of the juvenile justice centre where the detainee was being held was required to forward to the Manager, Juvenile Placements (DJJ) relevant information about the detainee, including:

- a report by the detention centre manager
- a current psychologist's report including comments on risks (physical and psychological) associated with the transfer
- a health report
- a school assessment report
- copies of legal mandates
- a casework summary, including response to custody, program participation and options
- information about family contact/supports, and
- any other relevant information.

The Manager, Juvenile Placements then liaised with the Manager, Program Development, Implementation and Evaluation (Young Offenders) (DCS) to convene a Case Management Committee (CMC) to determine, prior to the transfer, the detainee's classification and placement in the adult correctional system. The CMC would normally comprise the Manager, Juvenile Placements (DJJ); Manager, Program Development, Implementation and Evaluation (Young Offenders) (DCS); the manager of the juvenile justice centre where the detainee was placed; an officer from the DCS region where the detainee was likely to be classified; and anyone else DCS considered appropriate. In the case of an Indigenous detainee, an Indigenous officer from DCS would also attend. The detainee and, where possible, their parent/s, also attended the CMC meeting.

The CMC informed the Director, Classification and Case Management (DCS) of its decision in writing prior to the transfer. The Manager, Juvenile Placements organised the actual transport of the detainee to a designated correctional centre, usually the Metropolitan Reception and Remand Centre (MRRC) at Silverwater.

Although the MoU did not state so, the Manager, Program Development, Implementation and Evaluation (Young Offenders) visited each detainee prior to their transfer to discuss what they could expect once they arrived in the adult correctional system. The detainee was also provided with an opportunity to watch an information video produced by DCS and to ask any questions they may have had. DJJ also reports that centres worked closely with detainees as they approached their transfer date in an effort to ensure that the move was as smooth and anxiety-free as possible.

7.3.1.2. Procedure for the transfer of information

When an individual transferred to the adult correctional system under section 19, DJJ completed a discharge summary and forwarded it to DCS. The discharge summary contained a range of information about the individual, including offence history, behaviour in custody, mental and physical health, intellectual or physical disability, history and risk of self-harm and history of substance abuse. Information about the individual's participation in education and/or programs in juvenile custody was also included. The individual's case manager was responsible for completing the discharge summary and ensuring it was forwarded to DCS.

Justice Health staff at the juvenile justice centre where the detainee was held prepared a separate discharge summary. The summary contained information about the individual's mental and physical health history, history and risk of self-harm, medications and current health issues. It supplemented the detainee's Allied Health File, which was also forwarded to DCS for copying. It was the responsibility of Justice Health staff to ensure the discharge summary

and Allied Health File were forwarded to DCS. The Allied Health File was transferred directly with the detainee.

Once received by DCS, copies of both discharge summaries and relevant sections of the Allied Health File were placed on the individual's case management and health files and the originals returned to DJJ.

Designated DCS staff were also provided with access to the DJJ client information database, CIDS, which contains detailed information about detainees, including risk alerts.

7.3.2. Procedures in relation to section 28

Section 28 contains a number of sub-sections and prior to its amendment in late 2004, different procedures pertained to each. During the review period, all but two of the section 19 individuals who moved to the adult correctional system under section 28 did so under section 28(1) or section 28BA.

7.3.2.1. Procedure in relation to section 28(1) – transfer of persons

It was the responsibility of the manager of the juvenile justice centre where the detainee was held to initiate a transfer application under section 28(1). DJJ's operational procedures state that section 28(1) should be utilised as a last resort after all alternative strategies to maintain the young person in juvenile custody have been exhausted. Evidence to this effect must be contained in the application.

A section 28(1) application may be prepared because a detainee has requested to move to the adult correctional system, or because DJJ considers that they are not a suitable person for detention in a juvenile justice centre. Prior to the passage of the Juvenile Offenders Legislation Amendment Act, the manager of the juvenile justice centre was required to forward a section 28(1) application to the relevant DJJ Regional Director, along with:

- a report by the detention centre manager
- a current psychologist's report including comments on risks (physical and psychological) associated with the transfer
- a health report
- a school assessment report
- copies of legal mandates
- a casework summary, including response to custody, program participation and options
- information about family contact/supports, and
- any other relevant material.

The Regional Director assessed the application and included any comments he or she considered appropriate. The application was then forwarded, along with the above information, to the Manager, Juvenile Placements (DJJ), who in turn sought a recommendation from the Director-General (DJJ). If the Director-General recommended a transfer, the Manager, Juvenile Placements arranged a Joint Advisory Committee (JAC) and forwarded the application and supporting information to the committee members.

Membership of the JAC usually comprised the Manager, Juvenile Placements; Manager, Program Development, Implementation and Evaluation (Young Offenders); a representative of the Probation and Parole Service; and other representatives from DJJ, DCS and SORC as required. In the case of an Indigenous detainee, Indigenous officers from both Departments were also part of the JAC.

The JAC met for the purpose of making a recommendation, through the Director-General and Commissioner, to the Ministers for Juvenile Justice and Justice. The JAC could make its recommendations 'in the form of a unanimous decision about the transfer or in the form of dissenting advice if members fail to reach agreement'. Where a unanimous decision could not be reached, a decision was made at the level of the Director-General and Commissioner.¹²⁰

If both Ministers gave their consent, the Manager, Program Development, Implementation and Evaluation (Young Offenders) advised the Manager, Juvenile Placements, who then arranged the actual transport of the individual to a determined correctional centre, usually the MRRC.

Prior to the transfer taking place, the Manager, Program Development, Implementation and Evaluation (Young Offenders) forwarded the relevant documentation to the Governor of the receiving correctional centre, while the Manager, Juvenile Placements forwarded it to the juvenile justice centre that had custody of the individual.

A detainee who transferred to the adult correctional system under section 28(1) was admitted at the receiving correctional centre as a new reception and normal procedures applied.

A section 28(1) application could take some time to go through the appropriate channels. On the other hand,

particularly when an application was driven by a serious incident in which the detainee had been involved, the application may have been expedited. Either way, the individual to whom the application applied was usually unaware of whether the transfer had been approved and if so, when it would occur, until it became imminent. This was equally the case for both those who 'self selected' to move to the adult correctional system and those who were considered unsuitable for detention in a juvenile justice centre.

In the case of the latter group, DJJ reports that where possible, the young person was informed well before a section 28(1) application was made that they were being considered for this action. This provided the young person with an opportunity to modify their behaviour. If there was no change, the young person was to be informed once an application was under way. Where a section 28(1) application was prompted by a detainee's involvement in a serious incident, this forewarning was generally not possible.

7.3.2.2. Procedure in relation to section 28(1) – transfer of information

The procedure set out at 7.3.1.2 also applied to the transfer of information in relation to section 28(1).

7.3.2.3. Procedure in relation to section 28BA – transfer of persons

The MoU did not specifically state the procedures that should be followed in the case of a detainee who was transferred to the adult correctional system under section 28BA. However, it did contain procedures in relation to transfers under sections 28A or 28B.

The consent of the Minister for Justice was required to enforce an order under sections 28A or 28B. The centre manager of the juvenile justice centre initiated the process of obtaining an order where the young person was held. The manager was responsible for preparing an application for the Director-General's signature. Once signed, the Manager, Legal and Investigations Unit (DJJ) prepared the application for the court. The Manager, Legal and Investigations Unit also liaised with the Police Prosecutor in relation to the presentation of the application before the court.

The Manager, Juvenile Placements advised the Manager, Program Development, Implementation and Evaluation (Young Offenders) who in turn prepared a submission for the Minister for Justice in anticipation of an order being made.

If the court subsequently made an order, the Manager, Juvenile Placements arranged the transport of the detainee to the receiving correctional centre, usually the MRRC. A detainee who was transferred to the adult correctional system under section 28BA was admitted by the receiving correctional centre as a new admission and normal procedures applied.

7.3.2.4. Procedure in relation to section 28BA – transfer of information

Where a detainee was transferred to the adult correctional system on the basis of a court order, it was the responsibility of the manager of the juvenile justice centre where the detainee was held to notify the senior officer in charge of the receiving correctional centre within two hours of being notified of the transfer. At this time, all risk alerts relating to the detainee were required to be brought to the senior officer's attention.

The manager was responsible for then ensuring that casework and nursing staff at the centre each completed a discharge summary, which was then faxed to the Officer in Charge, Reception of the receiving correctional centre. Once received, the summaries were filed on the relevant case management and allied health files. Additionally, the detainee's Allied Health File was required to be transferred as soon as practicable to the receiving centre. Once copied, this file was returned to DJJ.

7.3.3. Were the correct procedures followed?

Our review found that in relation to the four individuals who transferred to the adult correctional system under section 19, i.e. on their scheduled transfer date, the correct procedures were followed. It is clear that the DJJ and DCS have an effective and efficient working relationship in this regard. In particular, the DCS Manager, Program Development, Implementation and Evaluation (Young Offenders) performs a critical co-ordination, education and advocacy function. At the operational level, the Ombudsman has also been impressed by the level of awareness about the needs of young offenders demonstrated by management at the MRRC and at John Morony in particular.

We also found that, for the most part, the correct procedures were carried out in relation to those section 19 detainees who transferred to the adult correctional system under section 28(1) or section 28BA. However, in some cases we were not satisfied that the applications contained sufficient information detailing what strategies had been utilised to manage the individual in question. Also of concern is the extent to which section 28(1) applications accurately reflect the history of the detainee's behaviour in juvenile custody. Further details about these cases are included in Chapter 8.

7.3.4. What procedures now apply?

The passage of the Juvenile Offenders Legislation Amendment Act means that all juveniles who are moved to the adult correctional system under section 28 are now initially transferred to Kariong Juvenile Correctional Centre. The previous MoU that outlined protocols and procedures for the transfer of individuals between juvenile justice and correctional centres no longer applies. A new MoU is in place to facilitate the movement of detainees between juvenile justice centres and Kariong.

The JAC no longer has a role. Under the Juvenile Offenders Legislation Amendment Act, Ministerial approval and agreement is not required to facilitate section 28 orders. The authority to move a detainee to Kariong now rests with the Director-General of DJJ. Agreement of the Commissioner of Corrective Services is required. In relation to section 10, the authority of the Commissioner and the agreement of the Director-General are required to move a detainee from Kariong to a juvenile justice centre.¹²¹ The Objective Detainee Classification Policy is now used as the mechanism for determining transfers to and from Kariong.

There has been no change to the procedures in relation to section 19.

In relation to the transfer of information, the new MoU states that when a detainee is moved to Kariong, the detainee's file must also be transferred. Previously, a discharge summary only was required when a detainee moved to the adult correctional system.

7.4. Procedures for reception, screening and induction in correctional centres

DCS has detailed procedures for the reception, screening and induction of new inmates. The procedures differ slightly depending on the circumstances in which the individual is entering custody. However, the basic components are common.

On reception, all new inmates must be informed of:

- the name of the centre where they are located
- the procedure through the reception, screening and induction process
- what will happen after the process is completed
- the procedure for their first night in the centre
- what will happen to their property
- when a phone call can be made and to whom
- the centre's discipline regime
- routines for meals
- the centre's procedure for providing special dietary requirements, and
- the functions of the Offender Services and Programs (OS&P).¹²²

All inmates are interviewed on reception to identify their personal details, previous criminal history and current matters, health history and current status, risk of self-harm, disabilities (if any), dependents (if any) and security requirements. Any necessary alerts are recorded as a result of obtaining this information.

Following the reception interview, Justice Health screens inmates. At the MRRC, OS&P staff also screen inmates to identify any immediate welfare needs. OS&P staff must inform the inmate of:

- how to make phone contact with family
- the types of cells which can be allocated and the different wings/pods in which an inmate can be placed
- how to call for assistance whilst in a cell and under what circumstances
- the location of welfare and OS&P services in the centre
- information on protection, if required
- how to arrange legal representation
- availability of information detailing induction, classification and placement processes
- right to language assistance, if required, and
- any additional assessments that may be carried out.

In addition to the reception interview and screening by Justice Health and OS&P, all new inmates must be interviewed for a General Screening Profile within 36 hours of reception into the correctional centre or on the first working day that the inmate is present in the centre. As a result of the information gathered during this process, additional alerts may be recorded. Depending on their offender status and identified needs, the inmate may also be required to undergo additional, full assessments in relation to any or all of the following:

- A&OD
- psychology
- intellectual disability
- education
- welfare.

Correctional centres are also required to provide formal induction sessions for new inmates on a regular basis. At the induction, inmates must be informed of all information relevant to their accommodation in a correctional centre, e.g. discipline, buy-ups, phone calls, musters, meals, employment, case management, complaints, access to services and programs.

Once a new inmate has been fully screened, an Initial Case Plan must be developed as soon as practicable. The Plan outlines the inmate's classification and placement and identifies how their criminogenic and development needs will be met in custody. Case plans are reviewed every six-months.

Our review found that all the section 19 individuals who were transferred to adult custody during the review period were received, screened and inducted in accordance with established procedures. However, many of the young people reported feeling confused and/or not receiving as much information as they would have liked. It was common for individuals to report that they obtained most of their information about 'the system' in a haphazard manner, often from other inmates. It is quite likely that most young people are overwhelmed on initially arriving at adult correctional centres and that many do not retain the information provided to them during the initial reception stage. It is also possible that information is not provided in a way that is optimally sensitive to the situation and needs of young people, particularly those who find themselves unexpectedly arriving at an adult correctional centre.

Endnotes

¹¹⁴ NSW Department of Juvenile Justice, *Corporate Plan 2004-2007*.

¹¹⁵ Until the handover of Kariiong to the adult correctional system, there were ten juvenile justice centres, including an emergency short-term accommodation unit located at Broken Hill in far-western NSW.

¹¹⁶ This figure does not include Kariiong Juvenile Correctional Centre.

¹¹⁷ The agreement of the Ministers for Corrective Services and Juvenile Justice was required to effect a section 10 order. Since the Juvenile Offenders Legislation Amendment Act came into effect, a person can be moved from Kariiong Juvenile Correctional Centre to a juvenile justice centre with the agreement of the Commissioner for Corrective Services and the Director-General of Juvenile Justice. The agreement of relevant Ministers is still required for a person to move from a correctional centre to a juvenile justice centre.

¹¹⁸ Schedule 1 of the Children (Detention Centres) Regulation defines misbehaviour.

¹¹⁹ It also outlines detailed procedures for the transfer of case management and health information. See Part Two, *Memorandum of Understanding Agreement for Transfer of Inmates/Detainees between the Department of Corrective Services and the Department of Juvenile Justice and the Transfer of Health and Casework Information between the Department of Corrective Services, The Department of Juvenile Justice and the Corrections Health Service 2002/2003*.

¹²⁰ *Ibid.* paragraph 3.5.

¹²¹ The approval of the Minister for Justice and the agreement of the Minister for Juvenile Justice is still required for the transfer of an inmate from a mainstream correctional centre to a juvenile justice centre under s10.

¹²² Offender Services and Programs staff include psychologists, welfare officers, education officers and program staff.

Chapter 8. Issues relating to custody – the impact of section 19 on young offenders, juvenile justice centres and adult correctional centres

8.1. Individuals sentenced and transferred under section 19

The four individuals who were transferred to the adult correctional system under section 19 are listed at 5.3.1.

In the case of three of the four individuals, the CMC recommended placement at JM1 for participation in SPYAMO. In the fourth case, the CMC recommended that the individual be assessed for eligibility for participation in the Sex Offender Program at the Metropolitan Special Programs Centre (MSPC) and, if found ineligible, that he be placed at JM1 for participation in the SPYAMO.

All were initially admitted to the MRRC where they remained for an average period of one week for the purpose of screening and assessment. As young offenders for whom this was the first time in adult custody, all were treated as protection inmates. As a protection inmate, association with other inmates is limited and time out of cells is restricted.

A review of their screening and assessment documentation revealed that in all but one case, the young people reported feeling apprehensive about their transfer to the adult correctional system. Their emotions ranged from 'scared', 'anxious' and 'nervous' to 'confused'. When interviewed by Ombudsman staff, the young people also reported finding the conditions of their imprisonment at the MRRC uncomfortable. The most common factor mentioned in this regard was the amount of time spent in cells. However, all reported that their anxiety and/or discomfort was mitigated by their understanding that they would be at the MRRC for a short time only, and their knowledge of where they would be subsequently placed.

Three of the young people were placed, as recommended, at JM1. It was decided that the fourth young person should also be placed at JM1 pending assessment of his eligibility for the Sex Offender Program.

Despite the appropriate transfer and reception procedures being followed, all of the young people, when interviewed by Ombudsman staff, reported that they felt ill prepared for entering the adult correctional system. Two reported that they had not received sufficient information, either at the MRRC or at JM1, about the operation and rules of the centres. A review of their case files revealed that in both cases the reception checklist, which requires staff to indicate that a range of information has been provided to the inmate, was completed.

Despite their initial concerns, all of the young people reported, when interviewed, that the adult correctional system was not as bad as they had imagined. Before their transfer, they had heard negative stories concerning 'bashings', 'stabblings' and 'getting raped'. None of the young people reported having experienced sexual or physical harassment or assault in adult custody.

While stating that they would have preferred to stay in the juvenile justice system, all the young people identified positive aspects of the adult correctional system. Each reported that they now experienced greater freedom. They reported having more personal space and a greater sense of responsibility. Two of the young people said they appreciated the opportunity to mix with more mature peers. All remarked positively that they were 'not treated like a kid'. In addition, they reported less 'nagging', 'gossip' and 'politics' in the adult system. Other positive aspects identified by the young people included the 'buy-up' system, access to more phone calls, and the ability to cook one's own meals. They also commented positively on the living conditions at JM1 and their access to facilities such as the gym. Negative aspects of the adult correctional system identified included longer lock-ins and lack of variety of things to do.

All of the young people reported that the adult correctional system was more 'strict' than the juvenile system. Three commented positively that the rules are clear and the consequences for breaking them are consistent. They reported that the downside to this is that they do not experience the same level of social interaction with the correctional officers as they did with some of the youth workers in the juvenile justice system. One remarked that, 'in juvey, you could talk to them like they were your mates, but here [the officers are] just there to open doors'. Another reported that he did not feel the officers were approachable. All agreed that there were 'good and bad' officers, just as there had been 'good and bad' youth workers in the juvenile justice system.

At the MRRC, the young people all had access to psychology and welfare. Once at their centre of classification, they had reasonable access to education, psychology, welfare, work and limited program opportunities. To a large extent, however, particularly in relation to education, psychology and welfare, inmates in the adult correctional system are required to 'self-refer'. It is possible that young offenders, particularly those transferring from juvenile detention, find it difficult to adjust to this system and/or to effectively utilise it.

While all the young people were participating in regular counselling in juvenile custody, the regularity and extent of their contact with psychology appeared to have greatly diminished after their transfer to the adult system. This is especially concerning in the case of one individual with a history of depression and substance abuse. Apart from the self-referral requirement, young offenders may be discouraged from seeking psychological assistance because of the stigma identified with doing so. In juvenile custody this stigma is reduced because counselling intervention is normalised. It is also possible that young people are discouraged from seeking assistance in the adult correctional system because of the greater waiting times that tend to apply there.

It is notable that two of the four young people had not as of the time of writing continued with their secondary education since transferring into adult custody, and that a third has experienced a disruption to his TAFE studies. One young person reported to Ombudsman staff that he felt discouraged from undertaking further studies as a result of comments made by some staff concerning his abilities.

Significantly, none of the young people were reported by correctional centre staff as presenting any management difficulties in adult custody and all, with the exception of A, were described as 'quiet' inmates. When interviewed, all presented as coping reasonably well with their circumstances, although one gave the impression of being somewhat depressed and withdrawn.

More detailed information about how each of the young people fared in adult custody is presented below.

8.1.1. Case study

A, an 17 year-old male, was admitted to Cobham JJC in August 2002 on remand for an offence of robbery. He was sentenced in September 2003 to 11 years imprisonment with a non-parole period of seven years to expire in August 2009.

A was received at the MRRC in December 2003 from Frank Baxter JJC. His Initial Case Plan recommended violence prevention, anger management and A&OD intervention. It also noted A's desire to undertake study for Year 11 in adult custody. A was classified as a 'B' offender and recommended for placement at JM1.

A was interviewed on 5 February 2004, one month after his transfer to JM1. He reported that he would be commencing Year 11 and an anger management program within a month. In addition, he was due to be assessed for participation in the 'Think First' program. A had also expressed his desire for a job and reported his willingness to do 'anything'. A reported having had initial contact with the centre psychologist and A&OD counsellor. He stated that he was in good health and smoking less than in juvenile detention.

A's case plan was reviewed in June 2004. It noted that A was enrolled and participating in an anger management program and had also completed the 'Raising Awareness for Change' program. A self-referral for A&OD counselling had recently been received, although A was yet to be seen for an appointment. The review noted that A had not initiated any contact with the centre psychologist since his assessment on admission and recommended intervention 'to address [his] offending behaviour'. The review also noted that A was undertaking a welding course and working in the metal shop. He had presented no problems and appeared to have no concerns, and was receiving regular visits from his parents and girlfriend.

A was interviewed again on 3 September 2004. He stated that he was feeling positive and looking forward to going to Oberon in the future. He reported having done three welding courses since his arrival at JM1 and that he was enjoying working in the metal shop. A also reported that he had undertaken A&OD and OH&S courses. Although he was not undertaking Year 11 studies, A reported that he could do so if he wanted to. A had recently put his name on the waiting list to see the centre psychologist (a file review in early 2005 indicated that the psychologist saw A a short time after this). In addition, he had recently seen the welfare officer. Although he had waited two weeks to do so, he reported that the officer was 'very helpful'.

8.1.2. Case study

B, an 18 year-old male, was sentenced in October 2002 for an offence of manslaughter to seven years and six months imprisonment with a non-parole period of four years to expire in October 2006. He was admitted to Kariong JJC.

B was received at the MRRC in January 2005 from Keelong JJC. His Initial Case Plan recommended psychological follow-up and that he continue his HSC studies. B was classified as a 'C1' offender and recommended for placement to JM1. On arrival at JM1 in January he was immediately referred to education and psychology.

B was interviewed on 9 March 2005. He reported working in a ground maintenance position and enjoying the opportunity to do so. A review of his file indicated excellent work reports. B said he was continuing his HSC studies and participating in guitar lessons. He was also due to participate in the 'Raising Awareness for Change' program, but it had been temporarily postponed. B reported that when he was initially admitted to JM1, he was advised to put his name on the waiting list to see the centre psychologist. At the time of interview he had not yet seen the psychologist, but reported that he did not feel the need to do so and had only put his name on the waiting list because he had been instructed to do so. B also stated that he was receiving visits from his family.

B said he was keeping his head down and looking forward to going to Oberon. He said he hoped the time would pass quickly and that he couldn't wait to complete his sentence. B reported his plans for when he re-enters the community and stated his motivation and determination to reach his goals.

A file review in April 2005 indicated that B had seen the centre psychologist and ongoing contact was planned. Possible enrolment in the 'Think First' program was also foreshadowed. The review also indicated that B was in contact with the centre welfare officer and discussing restorative justice processes.¹²³

8.1.3. Case study

C, a 19 year-old male, was admitted to Cobham JJC in May 2001 and sentenced in May 2002 for offences of assault and firing a firearm to five years imprisonment with a non-parole period to expire in January 2004. He was subsequently sentenced in May 2003 for several robbery and related offences, to five years imprisonment with a non-parole period of two years and six months to expire in October 2005. Following an appeal by the DPP on the grounds of inadequacy, C was re-sentenced in March 2004 to nine years imprisonment with a non-parole period of six years to expire in April 2009.

C was admitted to the MRRC in May 2004 from Frank Baxter JJC. C was classified a 'B' offender and recommended for placement at JM1. His Initial Case Plan recommended A&OD relapse prevention counselling, ongoing contact with psychology and anger management intervention. C's enrolment in Year 11 studies was recommended.

On his arrival at JM1, access to the Intensive Learning Centre was explained to C. C participated in A&OD screening on 9 July and requested a follow-up appointment. However, a review of C's case file in September 2004 indicated that C did not keep this appointment. In addition, he missed a further follow-up appointment with the centre psychologist.

C was interviewed on 3 September 2004. He reported that he was enjoying his job sanding car bumpers. He had participated in an anger management program. C said that he had not undertaken any education since his arrival at JM1.

C said that he was getting plenty of exercise and his health was good, although he was smoking more than in juvenile detention. He was receiving regular visits from his family. C reported having recently seen the welfare officer and was pleased he did not have to wait too long to do so. C also reported that his case officer was 'very helpful'.

A review of C's file in March 2005 indicated that in December 2004, C was re-classified to C1. C was undertaking an audio-engineering course two afternoons a week. He was also working in the packing shop and had recently completed the 'Raising Awareness for Change' course. C's case officer had reminded him that he needed to self-refer for A&OD counselling.

8.1.4. Case study

D, a 19 year-old male, was admitted to Kariong JJC in November 2002 on remand for an offence of aggravated sexual assault. He was sentenced in January 2003 to six years imprisonment with a non-parole period of three years to expire in November 2005.

D was admitted to the MRRC in April 2004. He was initially classified a 'C2' offender and recommended for assessment for the Sex Offender Program (SOP) at the MSPC. Pending this assessment, D was placed at JM1.

Shortly thereafter, D was subject to threats from fellow inmates who recognised him from juvenile detention. As a result he was initially reclassified to Kirkconnell Correctional Centre. However, following the intervention of the Program Manager, Implementation and Evaluation (Young Offenders) (DCS), this placement was abandoned and D was transferred directly to the MSPC.

D was interviewed on 13 September 2004. He reported that he was working in the bakery six days a week and enjoying the opportunity to do so. D was participating in A&OD group counselling. He had seen a psychologist once since arriving at the MSPC, and a welfare officer twice, but felt he needed more help and support. D reported that the conditions at the MSPC were not as comfortable as those at JM1, citing the size of the cells and a lack of privacy. He was pleased to be receiving regular visits from his family, partner and child.

D reported that he was continuing study towards a TAFE qualification in hospitality, which he had commenced in juvenile custody. However, he was frustrated that he had been unable to continue with a second TAFE certification in kitchen operations. D said that he felt bored when not at work or studying.

D said he had gained a large amount of weight and was continually suffering with colds and flu since entering adult custody.

A file review in March 2005 revealed that D had self-referred to education in November 2004. In addition to his hospitality studies, D had undertaken courses in reading and writing and oral communication. He had recently commenced a second TAFE certificate in fine art as well as intermediate English. D was continuing to participate in A&OD counselling and a referral to the SOP was in progress.

Overall, it is clear from our review that the young people benefited from transferring to the adult correctional system in a planned manner, particularly when their outcomes are compared to those experienced by the section 19 individuals who moved under another provision (see below).

8.2. Individuals sentenced under section 19 and transferred under another provision

The 18 individuals who were sentenced under section 19 but who moved to the adult correctional system under another provision during the review period are listed at 5.2.2 and 5.2.3. The majority were moved under section 28 of the Children (Detention Centres) Act.

8.2.1. Individuals ordered to complete the whole of their sentence in a juvenile justice centre

A total of nine individuals who moved to the adult correctional system in an 'unplanned' manner were subject to a section 19 order directing that they complete the whole of their sentence in a juvenile justice centre. Of these individuals:

- five were moved under section 28(1) of the Children (Detention Centres) Act
- one was moved as a result of having been found, post-sentencing, to have been an adult when he committed the relevant offences
- one was moved after being charged and sentenced for a separate offence committed in the community as an adult; he returned to juvenile custody after serving his sentence for this offence, and
- two were moved under section 28BA after committing a detention centre offence as an adult.

The young people transferred to adult custody under section 28(1) or section 28BA were convicted of robbery or aggravated sexual assault offences. They were aged between 17 years and four months and 20 years and two months at the time of transfer. Two of the young people were Aboriginal. Immediately prior to being transferred, the young people were held either at Kariong, Baxter or Cobham juvenile justice centres. At the time of their transfer, four individuals had six months or less remaining to serve before becoming eligible for parole.

The young people were ordered by the court to complete the whole of their sentences in juvenile custody for various reasons, including emotional immaturity, the availability of specific programs, access to education and impaired cognitive and social skills. Two were warned by the court at the time they were sentenced that poor behaviour in juvenile custody might cause them to be transferred to the adult correctional system.

The two young people moved under section 28BA were charged with maliciously destroying or damaging property. One was also charged with assault. They were adults at the time of committing these offences and although the sentences they received in relation to them were relatively short, under section 28BA the court was required to order them to serve the sentence, as well as the balance of their original sentence, in adult custody.

The five young people moved under section 28(1) were considered to be unsuitable for detention in a juvenile justice centre. All had records of problematic behaviour in custody but their participation in specific incidents prompted DJJ's application to have them moved to the adult correctional system. Each had at various times demonstrated some capacity to improve their problematic behaviour and to respond positively to custody.

8.2.1.1. Outcomes in the adult correctional system

After initial assessment at the MRRC, the young people were classified variously to Junee, JM1, Brewarrina (Yetta Dhinnakkal), Lithgow, Bathurst and Goulburn correctional centres. Two were subsequently moved to Grafton and the MSPC (Long Bay). At the time of writing, only one of the young people has presented as a management problem in the adult system. That individual has been implicated in drug trafficking and standover tactics and has received punishments for a variety of disciplinary offences.

One individual, an Aboriginal male was assessed on admission to the adult correctional system as experiencing 'escalating feelings of disconnection and isolation'. He was placed on suicide watch three months later. His family was unable to visit his centre of classification because of the considerable travelling distance involved. The individual reported being threatened and 'stood-over' in prison. After being found in possession of weapons, he was placed in segregation for 14 days. The individual claimed he had made the weapons to use as protection. Following this incident, he was moved to a different correctional centre. He reported that while he remained 'nervous' and unhappy, his situation had improved somewhat as he now had 'someone looking after [him]'.¹²⁴

In comparison to others, the young people placed at JM1 and Brewarrina (Yetta Dhinnakkal) appear to have fared reasonably well in terms of access to education, programs and work. In general, our review has indicated that the young people placed at JM1 have had more positive outcomes in custody. Only one individual sentenced under section 19 has been placed at Brewarrina, so it is not possible to make a general assessment about that centre. However, as we noted in Chapter 4, Brewarrina (Yetta Dhinnakkal) is a minimum-security centre that runs a range of intensive programs targeting young Aboriginal offenders.

8.2.1.2. Issues arising

One issue of concern is the number of juvenile justice centre placements that several individuals had experienced by the time they were transferred to the adult correctional system. For instance, by the time of his admission to the adult correctional system, N had moved six times in the space of sixteen months. S moved eight times in the space of two and a half years, while T moved six times in 13 months. DJJ staff with whom Ombudsman staff have spoken concede that frequent movement between centres can be destabilising for detainees, particularly those with intensive needs. 'Throughcare' is an established principle at DJJ, however multiple placements over relatively short periods of time inevitably compromise its application. Prior to T's transfer to the adult correctional system, a DJJ psychologist noted that his constant movement had prohibited adequate engagement with therapeutic interventions. Similarly, a psychologist at the MRRC identified N's multiple placements as contributing to his anxiety, depression and erratic behaviour.

Another issue concerns the capacity of the juvenile justice system generally, and Kariong (when it was a juvenile justice centre) in particular, to meet the intensive needs of detainees with significant deficits such as intellectual, cognitive or social impairment. Such detainees require stability and consistency and it appears both were lacking at Kariong. The case of N highlights some relevant issues. It would appear that N's problems at Kariong stemmed mostly from his limited understanding of appropriate social skills and impaired coping strategies. He was identified as a 'follower', and as such, easily incited to behave poorly. As a result of the prevailing dysfunctional culture at Kariong, it is unlikely that N received the structure, stability and consistency that he required to develop pro-social behaviours and coping skills. The same might be said for several other individuals who demonstrated a propensity for inappropriate, hostile or volatile behaviour.

The case of P, an Aboriginal male, illustrates how an irresponsible and inappropriate action on the part of a detainee¹²⁵ in juvenile detention can cause him/her to be charged by police and transferred to the adult correctional system by the court to serve the remainder of his/her sentence, despite evidence that he/she is benefiting from the juvenile system. P was initially a very poorly behaved detainee. However, he was described shortly before his transfer to the adult correctional system as having 'shown a marked improvement in his behaviour and levels of maturity'. This progress was marred on one occasion when P became angry and destroyed an item of property. Following this incident P immediately resumed his good behaviour and even participated in day leave, which was reported to be successful. A short time later P was charged in relation to the earlier incident of destruction of property and as a result, he was ordered by the court to serve his sentence in relation to this offence, as well as the balance of his original sentence, in the adult correctional system. At the time of the transfer P was 18 years and five months of age and had seven months remaining to serve before becoming eligible for parole.

The case of S raises issues about the application of section 28(1). S had a mixed record of behaviour in custody. He was considered to have poor impulse control and to be prone to emotional, hostile outbursts. S was observed to at times intimidate and threaten other detainees. On three occasions he also assaulted a detainee or staff member. Despite these problems, case management staff considered S to be amenable to 'skilful intervention' techniques and his capacity for engaging in positive behaviour was noted and demonstrated on numerous occasions. At Kariong, S made sufficient progress to achieve re-classification. He was moved to Cobham JJC for what was to be a transitional period before transferring to Keelong, a centre that usually takes only well-behaved detainees. On arrival in transit at Cobham, S was reported to be settling well and his behaviour continued to attract positive reports for some time. It is alleged that S resumed his intimidatory behaviour at some point. S had relapsed on previous occasions, however, and his progress at Kariong suggested that with appropriate intervention and support, this behaviour could be modified.

S was moved to the adult correctional system after an incident involving several detainees, during which a staff member was assaulted. S was not physically present or involved but staff at Cobham suspected he had 'master-minded' the incident. We are unaware of any evidence supporting this conclusion, and understand that it was based solely on behaviour apparently exhibited by S in the past. For his part, S vehemently denied his involvement, even after his transfer to the adult correctional system. This is significant when set against evidence that in recent times, S had begun to demonstrate honesty and responsibility in confronting and addressing his negative behaviour. We understand that those detainees actively involved in the incident also denied that S played any role. It is a problem for the juvenile justice system if young people cannot 'escape' reputations achieved on the basis of past behaviour despite effort and progress on their part to rectify that behaviour. Of equal concern is information we received that indicates that some staff at Keelong actively resisted S's planned transfer to that centre, going so far as to threaten industrial action, on the basis that he was 'ex-Kariong'. We understand that there existed at Keelong a considerably wide-held view that Keelong should not have to accept detainees re-classified from Kariong.

Having viewed the section 28(1) application to move S to the adult correctional system, we are concerned that it contained insufficient acknowledgement of S's record of positive behaviour and progress. It is not clear that S was no longer benefiting from being detained in juvenile detention. Indeed, there is a considerable amount of material on record to indicate otherwise. Whilst this is not the place to undertake an in-depth examination of the section 28(1) provision and the administrative processes supporting it, it is appropriate to note our concern that section 28(1) applications may not always provide a full, objective assessment of the facts concerning a detainee's record in juvenile custody.

The case management system that operates in juvenile justice centres requires staff to identify and record positive as well as negative behaviours exhibited by detainees. However, based on the paperwork we reviewed, only negative behaviours were reported in section 28(1) applications, presenting a skewed picture of detainees' time in custody. Applications we viewed commonly listed every minor and serious misbehaviour engaged in by a detainee throughout their often considerable period of time in custody. These lists were not contextualised or annotated in any way. As well, the applications did not always contain the views of a range of centre staff, and seemed to reflect those of certain people only. In summary, rather than objectively present a range of information to enable the Minister for Juvenile Justice to make an informed decision, it appeared that the section 28(1) applications we viewed mounted an argument as to why a young person should be transferred to adult custody, presenting a selection of evidence to support it.¹²⁶

It is concerning that a Minister may not be fully informed when making a decision to authorise the transfer of a young person to the adult correctional system. This is particularly significant given the effort expended by DJJ to provide a comprehensive and objective picture of an offender's background, circumstances and prognosis at the time of sentencing. The court decides to make a section 19 order to enable an individual to remain in juvenile detention based on this information. However, when it came to making a decision during the review period as to whether an individual should be transferred to the adult correctional system under section 28(1), the information that was provided to the Minister, and on which the decision was based, could not be said to be similarly comprehensive in the cases we reviewed.

Finally, the case of N raises a specific issue relating to approval of section 28(1) orders. N was described during court proceedings as having a mild-range intellectual disability, significant educational disruption and a very limited understanding of appropriate social behaviour. The sentencing judge considered that these factors meant N should serve his sentence in a juvenile justice centre. N's record of behaviour in custody was mixed. In the early period of his detention on remand, he committed a number of minor and more serious misbehaviours. Appearing to settle, for a time he resided in the highest privileged unit at Kariong and was reportedly participating well in education, A&OD counselling and a vocational TAFE course. However, N's behaviour seemed to deteriorate as his sentence date approached and was unstable during the six months that followed it. Staff considered that his behaviour placed other detainees and staff at risk. Behavioural management plans were reportedly implemented, but their effectiveness was said to be minimal and intermittent.

Following a serious incident in which N and two other detainees armed themselves, threatened staff and other detainees and destroyed property, N was moved to the adult correctional system. The Minister for Juvenile Justice approved N's transfer 'subject to [a] management plan being put in place with Corrective Services'. All new inmates are subject to a Case Plan, which is reviewed at six-monthly intervals throughout the inmate's period of custody. Given the mandatory nature of this requirement, it would seem the Minister had something else in mind when issuing her directive. However, the nature of the directive remains unclear, and we have been unable to identify the existence of any 'management plan' in relation to N over and above the standard Case Plan requirement.

8.2.2. Individuals ordered to complete part of their sentence in a correctional centre

The remaining nine individuals who moved to the adult correctional system in an unplanned manner were subject to a section 19 order directing that they complete part of their sentence in adult custody. Of these:

- one was moved under section 28(1)
- two requested to move earlier than their scheduled transfer date under section 28(1), and
- six were moved under section 28BA after committing a detention centre offence as an adult.

With two exceptions, the young people transferred to adult custody under section 28(1) or 28BA were convicted of aggravated sexual assault offences and are of Lebanese extraction. They were aged between 17 years and nine months and 20 years and nine months at the time of transfer. Three were under the age of 18. Immediately prior to being transferred, the young people were held at Kariong. At the time of their transfer, all had lengthy periods remaining to serve before becoming eligible for parole. They moved between two days and two years before their scheduled transfer date under section 19.

The young people were ordered by the court to complete part of their sentences in juvenile custody for various reasons, including emotionally immaturity, intellectual disability, mental illness, rehabilitative potential, availability of specific programs and access to education. Two were ordered to move to the adult correctional system at 19, one at 19 and six months, one at 20 and the remainder at 21 years.

The young people who moved under section 28BA were charged with affray and assault related offences. Most of these charges arose from incidents in which the individuals armed themselves, threatened or assaulted staff and/or other detainees and damaged property. They were adults at the time of committing these offences and although the sentences they received in relation to them were relatively short, under section 28BA the court was required to order them to serve the sentence, as well as the balance of their original sentence, in adult custody.

8.2.2.1. Outcomes in adult custody

From the MRRRC, one individual was classified to Lithgow Correctional Centre. The remainder were classified to Goulburn.¹²⁷ Most individuals spoke negatively about their time at the MRRRC, where they were placed in protection and had no access to education, programs or facilities. Describing Goulburn, one individual summed up the views of others, describing it as 'the worst place on earth'. Another said he would probably 'neck' [kill] himself as a result of being placed there.

The majority of individuals have not been provided with an opportunity to work while in adult custody. As well, their participation in education and programs has been minimal and sporadic. Some have accessed general education and vocational courses through TAFE, while a handful has undertaken some A&OD education and/or anger management. Two individuals with a high level of personal motivation have fared significantly better in this respect, undertaking a number of different educational courses and programs.

While all the individuals had regular counselling in juvenile custody, their contact with psychological services in the adult correctional system has been minimal. This is despite the majority being identified as in need of such contact, some due to serious emotional disturbance. One individual reported to Ombudsman staff, for example, that he was constantly suicidal. Another presented as depressed, anxious, and suffering unresolved grief over the death of a close relative. He stated that there was no point thinking about the future as 'you could die tomorrow anyway'. This individual stated that prison was 'too violent' and that he felt 'like an animal in a cage'. To date, none of the individuals has participated in specific offence-related counselling or programs. However, this is largely because most individuals in the correctional system are not eligible to do so until they have completed a significant proportion of their sentence and obtained a lower classification.

Two individuals with a known history of mental illness experienced a deterioration of symptoms at Goulburn. One was transferred to Long Bay after almost 18 months for a full psychiatric assessment when he began to display psychotic symptoms of increasing severity. The other individual, who also has an intellectual disability, on his own report began to suffer increasingly severe paranoia soon after he was placed at Goulburn. This led him to make and carry a knife

and, as a result, he was placed in segregation where he remained for 12 months with minimal access to a psychiatrist and psychologist, no access to programs and limited access to education. While there, his behaviour significantly worsened. He was eventually moved to a unit for intellectually disabled inmates at Long Bay, where he was formally diagnosed with a serious and chronic mental illness. Despite the significant progress that this individual has made at Long Bay, SORC has approved a management plan that will see him rotated between Long Bay, Goulburn and Lithgow on a rotational basis.¹²⁸

Apart from those with mental health issues and one who must be dealt with using extreme caution at all times, the individuals have not at the time of writing presented significant management problems in adult custody. One has been involved in chronic low-level misbehaviour, while another has been identified as sometimes being 'a disruptive influence' on other inmates. That individual has tested positive for drug use on one occasion and was recently refused re-classification after being found in possession of a knife.

The individuals report mixed feelings about being in adult custody. Several regret the circumstances that led to their transfer. One individual, who was moved after allegedly throwing a tennis ball at a staff member on purpose, continues to deny that he intended to assault the person concerned. A number of individuals said the aspect of being in adult custody that they most appreciated was being treated like an adult, which had not been their experience in juvenile custody. One individual imprisoned at Goulburn said the key to 'staying out of trouble' at that centre was to 'lie low'. He expressed hope of eventually transferring to JM1 and participating in the violent offender program some time in the future. Another individual reported that prison was 'okay if you play the game'. He declined to elaborate on this statement.

To date, two individuals placed at Goulburn have achieved re-classification to other correctional centres. One has been classified to Junee Correctional Centre but is currently at JM1 waiting for his court appeal to be finalised. Since arriving at JM1, he has had regular contact with welfare and psychology and is participating in programs. The other individual has been classified to Lithgow pending availability of a bed. He is described as a positive, respectful and motivated individual. Due to association issues with other inmates, this individual is currently held in protection, restricting his access to programs and education.

8.2.2.2. Issues raised

Six of the seven Lebanese-Australian individuals claimed a small number of staff at Kariong had treated them unfairly by racially abusing them and inciting detainees to harass them. They claimed these staff members encouraged them to seek transfers to the adult correctional system. Other evidence received during the inquiry noted that the presence at Kariong of the individuals in question generated open hostility, abuse and intolerance on the part of other detainees as well as some staff. This was seen to undermine the efforts of others to work positively and productively with this group. It was suggested that some staff were unable to appropriately deal with such high profile serious young offenders, and particularly those who also had an intellectual disability and/or mental illness.

Several of the individuals deliberately engaged in acts they knew would lead to their transfer to the adult correctional system. One claimed a staff member had 'set up' other detainees to bash him. Two others reported feeling 'unsafe' at Kariong. Some cited boredom. One individual deliberately committed an offence to achieve a higher security classification to avoid being placed at the correctional centre to which he was classified.

The enormous media and political scrutiny generated around these individuals and their cases, as well as the fact that they formed a large group of co-offenders, would present challenges for management and staff of any centre. It appears the existing problems at Kariong may have reduced that centre's capacity to deal with these offenders.

An independent issue concerns the needs of detainees with serious mental health problems. The case of 'V' illustrates this issue. On admission to Kariong, V was diagnosed with symptoms of anxiety and depression. A short time later he began to report psychotic symptoms and was referred to a psychiatrist. The psychiatrist made two attempts to have V hospitalised, but on both occasions, the hospital deemed admission inappropriate on the grounds that V was suffering from a 'situational reaction'. Reporting this outcome to the Director of Psychological and Specialist Services at DJJ, the psychiatrist wrote, 'I am concerned that the level of psychiatric care that is necessary for [V] is higher than what is available at Kariong JJC'. Although V's symptoms subsequently stabilised as a result of medical treatment provided by the psychiatrist, DJJ was sufficiently concerned to recommend to the court in its background report that 'any transfer to DCS be coordinated so that [V's] risk of suicide be reduced'. However V was later moved to the adult correctional system under section 28BA, meaning his transfer was sudden, unplanned and uncoordinated. V was classified to Goulburn where he has fared poorly. Eventually, V was categorised as a threat to staff due to his increasingly erratic behaviour caused by psychotic symptoms.

The case of 'O' raises additional issues. During original proceedings against him, the court accepted evidence that O had a significant intellectual disability and possibly suffered from a serious mental illness. The sentencing judge in O's case made a section 19 order on the basis of this vulnerability. He found that there was at that time a shortage of beds in adult custody for intellectually disabled prisoners. The judge concluded:

[O's] intellectual and mental problems are of such severity that he should not be housed in the main part of an adult prison. I recommend to [DCS] that he be placed in a unit for intellectually disabled prisoners when he is admitted into the prison system.

He continued, 'there is a reasonable prospect of rehabilitation if he is given the benefit of programmes defined for the intellectually and mentally disabled'.

When O began to actively seek his transfer to the adult correctional system, a case conference was held to ascertain that he understood the implications of this. Despite DJJ's conclusion that O remained adamant about his wishes, questions exist over his capacity to provide full, informed consent given his intellectual disability and mental illness. Contrary to the recommendation made by the sentencing judge, O was placed at Goulburn CC, a mainstream, maximum-security correctional centre. When his behaviour deteriorated there, O was placed in segregation where he remained for 12 months.

Another issue concerns the coordination of detainee transfers from juvenile to adult custody. This is particularly pertinent for detainees who move under section 28BA. Such moves occur suddenly and in an unplanned manner. Among other things, there is sometimes no opportunity for the detainee's counsellor to responsibly terminate the therapeutic relationship. We are aware of counsellors who have sought permission to attend an adult correctional centre in order to do so, an arrangement that is clearly not optimal. In addition, we know of at least one case in which the parents and family of one individual were not informed for several days that their son had been transferred from the juvenile to the adult correctional system under section 28BA. Even in instances where there is an opportunity to effect a more planned, coordinated transfer, this does not necessarily occur.

One detainee, who was described as 'demonstrating a consistent pattern of appropriate behaviour', made an informed decision to actively pursue his transfer under section 28(1). However, he requested that his move not take place during Ramadan, a religious festival of particular significance to him. The individual was concerned that being moved during the festival would significantly disrupt his ability to properly observe it. He wrote to the appropriate DJJ officer setting out his concerns. The officer responded that his request would be considered. In an interview with Ombudsman staff, the officer said she had held discussions with relevant parties to try to facilitate the individual's request, to which she was sympathetic. However, while she was on unanticipated leave from her position, the individual was moved to the adult correctional system during Ramadan. The explanation that was provided to Ombudsman staff by Kariong, the centre where the individual was detained, was that they had no choice but to organise his removal once Ministers had approved the section 28(1) order. However, it is unclear whether this was actually necessary.

Finally, the concerns we expressed at 8.2.1.2 in relation to section 28(1) applications are also relevant here. 'I', who was moved to the adult correctional system under section 28(1), spent most of his time at Kariong residing in the highest privileged unit and was described one month before his transfer as 'generally a polite, friendly, outgoing young person who is usually well-behaved'. As a result, he achieved reclassification to Frank Baxter JJC. For reasons unknown, I involved himself in a serious incident, during which armed detainees threatened staff, before he could be moved to Frank Baxter.

It would seem that police did not charge the individual in relation to this incident. If he had been charged and convicted, the court could have ordered him, under section 28B of the Children (Detention Centres) Act, to complete the whole or part of any resulting sentencing in the adult correctional system.¹²⁹ Instead, a section 28(1) application was prepared. Among other things, the application stated that the individual:

has been involved in numerous incidents whilst in custody. There is frequent misbehaviour that centres on conflict with staff and other detainees [and] challenge to authority that involves threats, harassment and acts of aggression.

The application continued, '[he] has demonstrated an identifiable trend of violence aggression and non-compliance, which appears to be escalating'. Clearly, this assessment of the individual's behaviour does not tally with the report made just one month before his transfer, nor the fact that he achieved re-classification to another centre. This discrepancy is concerning.

Also of concern are the contents of the second section 28(1) application prepared in relation to O. It contained some questionable assertions. For instance, despite evidence provided by psychiatrists and psychologists and the court's acceptance that O suffered from an intellectual disability and probably a mental illness, the application stated:

[O]...is reported to have intellectual deficits. However, on one occasion in counselling, [O] demonstrated that he seems to have complete recall of his offending behaviour with victims and specific details of localities and the number of times offences occurred. This seems to contradict claims of intellectual impairment and deficient executive functioning.

The application further stated that:

although [O] presents as being scared, fearful, concerned for his wellbeing and innocent of involvement in disturbances at the centre with co-offenders, he is likely to have manipulated and discussed tactics that unfolded in the recent events.

The 'recent events' are not explained but presumably refer to the serious incident during which armed detainees threatened staff. No information is provided to support the assertion. Furthermore, no evidence is provided to support the statement that 'the adult system offers a greater range of appropriate programs'.

Several submissions to our review, including those made by the Bar Association, NCOSS, the Commission for Children and Young People, the Youth Justice Coalition, the Legal Aid Commission and the Shopfront Youth Legal Centre, expressed concerns about the section 28(1) and other transfer provisions contained in the Children (Detention Centres) Act. Some of the concerns cited in the submissions are:

- 'the apparent ease and arbitrariness with which detainees are charged with detention centre offences and sent to adult prisons'¹³⁰
- a lack of transparency, procedural fairness and external review procedures in relation to administrative orders made under section 28(1)
- a lack of guidance to assist the Minister¹³¹ in making a decision whether to approve a section 28(1) order to transfer a person to the adult correctional system, and
- the use of section 28 provisions to transfer individuals sentenced under section 19 to the adult correctional system.

We note also that in relation to section 28BA of the Children (Detention Centres) Act, which enables the transfer to adult custody of a young person over the age of 18 years who commits an offence in juvenile detention, the court has no discretion to consider whether such a transfer is appropriate. Particularly in relation to young people sentenced under section 19 who subsequently fall into this category, appropriateness may be a relevant consideration.

8.3.3. Other issues

8.2.3.1. Physical and/or sexual assault

One of the concerns raised during the Parliamentary debate about the amendment to section 19 was that transferring young people to adult correctional centres would put them at greater risk of physical and/or sexual assault. No young people with whom we spoke disclosed having been sexually or physically assaulted in adult custody. Some admitted they had been in fights, but did not identify themselves as victims in this regard. Two individuals reported they had been sexually harassed, and one individual made an indeterminate statement indicating possible sexual exploitation.

Although we received only limited information to suggest that young people who transfer to adult custody are at increased risk of sexual and physical assault/harassment, we are unable to draw a conclusion from this. Firstly, as we noted in Chapter 2, several factors may have inhibited the young people with whom we spoke from fully disclosing personal and sensitive information about a range of issues, including victimisation through sexual or physical assault/harassment. We are aware that at least one individual with whom we spoke, who did not disclose to us any fears or experiences of sexual assault, did disclose anxiety and concern to his legal representative, possibly relating to an actual experience of victimisation.

Another issue that needs to be taken into consideration when assessing our findings is that young people may be at reduced risk of sexual or physical assault if they have friends, relatives or associates in adult prison, or are transferred with a group of co-offenders. Several of the individuals we interviewed as part of our review fall into this category. Their experiences may not be representative.

8.2.3.2. Transition and induction arrangements

We have noted our finding that, during the review period, DJJ and DCS followed established transfer proceedings in relation to the transfer to the adult correctional system of young people with a section 19 order. Despite this, we found that most young people felt they did not receive sufficient information and support. This was especially the case for those individuals who were moved to the adult correctional system under section 28 of the Children (Detention Centres) Act. Such individuals do not benefit from the case conference that is held prior to the transfer of a young person pursuant to section 19.

Although many, if not most, young people are likely to experience a degree of unpreparedness and 'culture shock' when transferring to the adult correctional system, there may be transition and induction strategies that can assist in reducing the negative effects associated with such dislocation. It is appropriate that DJJ and DCS investigate and consider such strategies and how to implement them.¹³²

8.3. Impact of amended section 19 on the operation of juvenile justice and adult correctional centres

We are unable to conclude that the amended section 19 has had any significant effect on the operation of juvenile justice or adult correctional centres.

None of the DJJ operational staff with whom we spoke believed that the presence of older, serious young offenders in juvenile justice centres caused significant problems prior to the enactment of the legislation. In fact, they reported that chronic rather than serious offenders (those convicted of murder, manslaughter or aggravated sexual assault) were more likely to present management difficulties, and that serious offenders were often the more stable and well-behaved in custody. At Kariong, staff report that difficulties stemmed from the presence of two separate categories of detainees – serious offenders and those with behavioural difficulties. Staff also point to the challenges posed by the need to manage both young people who have been sentenced and those on remand.¹³³ Each group has significantly different needs that centres must attempt to meet. Young people on remand are often unsettled, and this can create tension and instability within a centre's population. These issues, rather than the presence of older, serious offenders *per se*, pose significant challenges for the juvenile justice system. Operational staff say that the amendment to section 19 has made no appreciable difference – positive or negative – to the juvenile justice centre environment.

Correctional centre staff with whom we spoke also reported that the amended section 19 has not had an impact. Significantly, however, they stated that they prefer to receive young people transferring from juvenile detention in the planned manner that section 19 enables, rather than suddenly under section 28 of the Children (Detention Centres) Act. Young people who arrive in the adult system having had time to prepare themselves are easier to manage and fare significantly better according to correctional centre staff.

It is recommended that an independent body review section 28 of the Children (Detention Centres) Act 1987 with particular attention to the operation and effect of section 28(1).

It is recommended that the Departments of Juvenile Justice and Corrective Services develop a formal transition and induction program specifically for young offenders who are transferring to the adult correctional system for any reason. It is further recommended that this program specifically identify and mandate the roles and responsibilities of staff.

Endnotes

¹²³ 'Restorative justice' is a process that encourages offenders to actively take responsibility for their actions and their impact on others.

¹²⁴ In prison parlance, to have someone 'looking after' you can mean that, in exchange for providing another inmate with sexual or other favours, the inmate offers you 'protection'.

¹²⁵ Section 28BA relates to detainees aged 18 years or over only.

¹²⁶ The passage of the Juvenile Offenders Legislation Act means that the Minister no longer authorises section 28(1) orders. They are now authorised by the Director-General of the Department of Juvenile Justice.

¹²⁷ One individual spent a month at Parklea CC before being transferred to Goulburn.

¹²⁸ At the request of the Ombudsman, DCS is reviewing the management of this individual.

¹²⁹ To do so, the Director General of DJJ must make a request to this effect and the court must find the person unsuitable to remain in a juvenile justice centre.

¹³⁰ The Shopfront Youth Legal Centre, submission to Ombudsman, 24 May 2004, p.3.

¹³¹ Note that submissions were made prior to the passage of the Juvenile Offenders Legislation Amendment Act, which amended section 28(1) by transferring responsibility for the approval of section 28(1) orders from the Minister for Juvenile Justice to the Director-General of DJJ.

¹³² In correspondence to the Ombudsman on 29 August 2005, DCS opined that 'section 28 transfers...occur in an atmosphere of detainee stress, anxiety and/or antipathy that is not conducive to a willingness on the part of the detainee to participate in an orderly, reasoned process. Nevertheless, detainees transferred under section 28 receive substantially the same information that is provided to section 19 detainee upon reception in a correctional centre or their first case management team meeting thereafter'.

¹³³ At 30 June 2003 less than 50 per cent of persons in juvenile detention in NSW were sentenced. (Kate Charlton and Marissa McCall, *Statistics on Juvenile Detention in Australia: 1981-2003* (Technical and Background Paper No.10), Australian Institute of Criminology, 2004).

Conclusion

Major findings

Application of amended section 19

Our task, as directed by Parliament, was to monitor both the *operation* and *effect* of the Children (Criminal Proceedings) Amendment (Adult Detainees) Act 2001. Our key finding is that the legislation has so far not achieved its intended objective, that is, to limit the number of offenders over the age of 18 years detained in juvenile justice centres. The rate of persons in juvenile detention falling into this group remained more or less stable between 2001 and 2003 but has since increased significantly.

Of 147 juveniles convicted for indictable or serious children's indictable offences during the review period, 138 were given a section 19 order to remain in juvenile detention beyond their 18th birthday.¹³⁴ This effectively means that the court found 'special circumstances' in the vast majority of cases it heard. It is possible that this reflects a general philosophical position held by the court that young offenders should be held in juvenile custody for as long as possible. However, as the 2003 Young People in Custody Health Survey found, young people in custody (usually serious or chronic offenders) are a considerably 'at-risk' group. For example:

- 28% had a history of living away from their usual family (in care)
- 66% reported a history of childhood abuse or neglect
- 10% (possibly more) had an intellectual disability
- 84% had mental health symptoms consistent with a clinical disorder, and
- 44% had experienced psychosocial substance use difficulties.¹³⁵

That the court found 'special circumstances' in so many cases may merely reflect the likelihood that a substantial number of young people coming before it present with considerable difficulties and high needs. Based on our review, the most common grounds for finding special circumstances were youth, availability of programs in juvenile custody, and vulnerability in adult custody.

Impact on juvenile justice and correctional centres

The legislation has achieved no significant effect in terms of its impact – positive or negative – on the operation of juvenile justice centres. As a result of our review, we are unable to conclude that the presence in juvenile justice centres of serious young offenders over the age of 18 years, as a group, had a considerable impact on the operation of juvenile justice centres either prior to or since the commencement of the legislation. There is no evidence that serious young offenders over the age of 18 and offenders who present management problems in juvenile custody are intrinsically one and the same group. Additionally, we are unable to conclude that this group pose a particular risk to their younger peers in custody.

Due to the small numbers involved, we are also unable to conclude that the amended section 19 has exerted any substantive effect, positive or negative, on the operation of adult correctional centres.

Extent to which section 19 orders are given practical effect

One of our major findings is that section 19 orders are not enforceable and can be effectively countermanded by the application of provisions contained in section 28 of the Children (Detention Centres) Act.¹³⁶ During the review period, only four individuals (3%) sentenced under section 19 subsequently transferred to the adult correctional system on the date specified by the court. A further 16 (over 10%) were moved to the adult correctional system under section 28. Of the 16, seven had been ordered by the court to complete the whole of their sentence in juvenile detention. Of the individuals whose section 19 orders scheduled them to be transferred to the adult system during the review period, 69% were transferred under another legislative provision before this scheduled date.

While section 19 gives the court discretion to order a person to remain in juvenile detention, the court plays no role in deciding whether a person sentenced under section 19 (or otherwise) should be transferred to the adult correctional system under section 28(1) or section 28BA of the Children (Detention Centres) Act. Juvenile justice centres have the power to instigate section 28(1) proceedings, which are administratively approved by DJJ. Among other things, we have concerns about the quality of the information on which section 28(1) orders are based, and the lack of

an independent review mechanism to oversight them. We note that the Select Committee on Juvenile Offenders, which reported to Parliament on 29 July 2005, has recommended a number of changes to section 28 of the Children (Detention Centres) Act, including:

- to ensure that detainees cannot be transferred to an adult correctional centre on the basis that they 'wish to be transferred' unless provided with counselling and advice, and to provide for those detainees transferred under this provision to be allowed to transfer back should they so wish
- to specify what 'behaviour' in particular would justify the making of a transfer order, and
- to allow juvenile offenders a right of appeal to a court against a decision to transfer that detainees from Kariong Juvenile Correctional Centre to an adult correctional centre.¹³⁷

Persons who transferred to the adult correctional system under section 19

Of the four individuals transferred to the adult correctional system under section 19, three were classified to John Morony Correctional Centre where they are participating in the SPYAMO. All four individuals reported that they were coping reasonably well in adult custody. They identified positive aspects of the adult system, such as clearer and more consistent rules, the opportunity to work, and greater personal responsibility. The three individuals held at John Morony are well-placed to progress through the SPYAMO. They identified this as a positive, motivational factor. In particular, they expressed excitement about eventually undertaking the Oberon component of the Program.

Whilst all four individuals have access to psychology, welfare and education services and facilities, our review of their progress in adult custody indicates that personal motivation and initiative largely determines the extent to which they utilise these services and facilities. Particularly in relation to psychological services (i.e. counselling), this is a cause for some concern.

Persons sentenced under section 19 who moved to the adult correctional system under another provision

Eighteen individuals sentenced under section 19 were moved to the adult correctional system during the review period. Nine had been directed by the court to complete the whole of their sentence in juvenile detention. Of these nine under other provisions:

- five were moved under section 28(1) of the Children (Detention Centres) Act
- one was moved after being charged and sentenced for a separate offence committed in the community as an adult; he returned to juvenile custody after serving his sentence for this offence
- one was moved as a result of being found, post-sentencing, to have been an adult when he committed the relevant offence, and
- two were moved under section 28BA of the Children (Detention Centres) Act after committing a detention centre offence as an adult.

Only two of the above individuals were classified to John Morony to participate in SPYAMO. Neither completed the program as they were released to parole during the program's initial stage. Four individuals were classified to the maximum-security correctional centres at Goulburn or Lithgow.

The other nine individuals were directed by the court to complete part of their sentence in juvenile detention. They moved to the adult correctional system prior to their scheduled transfer date. Of the nine:

- three were moved under section 28(1) – two at their own request, and
- six were moved under section 28BA after committing a detention centre offence as an adult.

With two exceptions (those individuals who requested their transfer under s28(1)), the above individuals are of Lebanese extraction and serving sentences for aggravated sexual assault offences. In the adult correctional system, one individual was classified to Lithgow. The remainder were classified to Goulburn.

Compared to those who moved under section 19 on their scheduled transfer date, the group of individuals who moved under section 28 have experienced less satisfactory outcomes in adult custody, particularly in terms of access to programs, work and facilities. This is particularly the case for those individuals placed in maximum-security centres like Goulburn and Lithgow. Many of the individuals are serving long sentences, and are not eligible to participate in offence-specific programs (e.g. sex offender program, violent offender program) until they have served a greater proportion of their sentence and achieved a lower classification. There is little in the way of long-term developmental opportunities for these offenders. While some have undertaken education in the adult system, our review indicates a haphazard rather than structured approach to participation.

Of particular concern are the outcomes for the individuals in this group with mental illness and/or intellectual disability. It is difficult to conclude that their management in the adult system has achieved any positive outcomes for these individuals.

Our findings relating to sexual and physical assault

When the legislation was debated in Parliament, a number of speakers voiced concern about subjecting young adults to greater risk of sexual and physical assault as a result of transferring them to the adult correctional system. Many submissions to our review expressed similar concerns. One of our objectives, therefore, was to attempt to find out whether young people transferred to the adult system had been victims of sexual or physical assault. We did not find evidence to support this. However, as we commented in Chapter 8, it is not possible to extrapolate from this a general finding about the extent to which young people who transfer to the adult correctional system are at risk of sexual or physical assault.

There is limited empirical research on the incidence of sexual assault in correctional centres, both in New South Wales and elsewhere. In 1998, David Heilpern published research that suggested 25% of young offenders (18-25 years) had been subjected to some sort of sexual harassment or assault whilst in custody.¹³⁸

DCS does not support Heilpern's findings, however, and regards its conclusions as 'significantly flawed'.¹³⁹ DCS points to the 2001 New South Wales Inmate Health Survey, in which three out of 550 male inmates said they had been sexually assaulted.¹⁴⁰ The same survey found that 15% of men 'were aware' of an incident of sexual assault occurring. It is important to note that sexual assault in general is an under-reported crime.¹⁴¹ Whilst there is no conclusive data about the incidence of sexual assault in correctional centres, there is certainly a vast amount of anecdotal evidence to suggest it is not rare.¹⁴²

Final words

The Children (Criminal Proceedings) Amendment Act 2001 has not reduced the number of serious young offenders over the age of 18 years detained in juvenile justice centres. Since its commencement, the court has overwhelmingly found that there are special circumstances to justify the majority of serious young offenders remaining in juvenile custody for a period beyond their 18th birthday. When introducing the legislation, the Government stated that it was concerned that serious, older offenders posed a significant risk to younger detainees. At this time, there were already legislative provisions in place (contained in the Children (Detention Centres) Act) that enabled the transfer to the adult correctional system of detainees deemed unsuitable to remain in juvenile custody. These provisions continue to exist and, as this report indicates, are utilised on a number of occasions in any given year.

The juvenile detention centre population has altered considerably over recent years, both within New South Wales and across Australia. Because of the increased utilisation of diversionary methods, most young people who now end up in juvenile custody are chronic or serious offenders. The vast majority are also aged 15 years or over. The challenge that exists is how to appropriately manage this population. Employing strategies based on a single characteristic, such as the age of an offender or the nature of their offence, does not appear to be the most efficacious means of attempting to meet this challenge.

The passage of the Juvenile Offenders Legislation Amendment Act and the proclamation of Kariong as a juvenile correctional centre serve to re-focus attention on the most appropriate and effective ways of managing young offenders in a custodial setting. In light of the changes to the juvenile justice environment in New South Wales, further consideration of this issue is both necessary and likely to occur.

Endnotes

¹³⁴ Of these, 23 were given an order despite their earliest release date falling before their 18th birthday or being indictable offenders whose sentence would expire before the age of 21 years and six months.

¹³⁵ Mark Allerton, 'Young People in NSW Juvenile Justice Custody', *Judicial Officers Bulletin*, Vol. 16. No. 7., Judicial Commission of NSW, August 2004.

¹³⁶ NSW Parliament, Select Committee on Juvenile Offenders, Legislative Council, *Report on the Inquiry into Juvenile Offenders*, 2005, p.44.

¹³⁷ Recommendation 23, *ibid*.

¹³⁸ David Heilpern, *Fear or Favour: Sexual Assault of Young Prisoners*, Southern Cross University Press, 1998.

¹³⁹ The Hon John Hatzistergos, Minister for Justice, NSWPD, Legislative Council, 28 October 2003, p.4147.

¹⁴⁰ Tony Butler and Lucas Milner, *The 2001 New South Wales Inmate Health Survey*, Corrections Health Service, 2003.

¹⁴¹ See Denise Lievore, 'Non-reporting and Hidden Recording of Sexual Assault in Australia' (Paper presented at the Third Australasian Women and Policing Conference: Women and Policing Globally, Canberra, October 2002). Available at www.aic.gov.au/conferences/policewomen3/lievore.html. Accessed 25 May 2005.

¹⁴² The Dulwich Centre in Adelaide, South Australia has recently established a Preventing Prisoner Rape Project based on anecdotal evidence about the incidence of sexual assault in Australian prisons. See www.dulwichcentre.com.au/. Accessed 11 July 2005.

Appendices

Appendix 1 Serious children's indictable offences

Crimes Act 1900

Sect 12	Devising, intending etc to deprive the Queen, etc – putting any force or constraint upon, or intimidating or overawing Parliament
Sect 19A	Murder
Sect 22A	Infanticide
Sect 24	Manslaughter
Sect 26	Conspiring to commit murder
Sect 27	Acts done to persons with intent to murder
Sect 28	Acts done to property with intent to murder
Sect 29	Certain other attempts to murder (eg. poison, drown, strangle, shoot)
Sect 30	Attempt to murder by other means
Sect 32	Impeding endeavours to escape shipwreck
Sect 33	Wounding etc., with intent to do bodily harm or resist arrest
Sect 36	Causing or attempting to cause a grievous bodily disease
Sect 37	Attempt to choke, strangle etc., in order to commit an indictable offence
Sect 38	Using chloroform etc., to commit an offence
Sect 46	Causing bodily injury by gunpowder, etc.
Sect 47	Using explosive substance or corrosive fluid etc., with intent to cause grievous bodily harm
Sect 61J	Aggravated sexual assault (including attempt) except when the aggravation only arises because the victim is under 16 years of age
Sect 61JA	Aggravated sexual assault in company
Sect 61K	Assault with intent to have sexual intercourse
Sect 61P	Attempted aggravated sexual assault and attempted assault with intent to have sexual intercourse
Sect 66A	Sexual intercourse with child under 10 years
Sect 66B	Attempt or assault with intent to have sexual intercourse with child under 10 years
Sect 66C	Sexual intercourse with children between 10 and 16 years
Sect 66EA(1)	Persistent sexual abuse of a child
Sect 78H	Homosexual intercourse with male under 10 years (repealed)
Sect 78I	Attempt to assault with intent to have sexual intercourse with child under 10 years (repealed)
Sect 80A	Sexual assault by forced self-manipulation, victim under 10 years
Sect 86A(3)	Kidnapping (specially aggravated)
Sect 93IF	Contaminating or threatening to contaminate goods with intent to cause public alarm or economic loss, with contamination causing death or grievous bodily harm or with intent to cause death or harm
Sect 96	Robbery with wounding

Sect 97(2)	Aggravated robbery
Sect 98	Robbery with arms and or in company with wounding or grievous bodily harm
Sect 106(3)	Break and enter place of Divine worship (specially aggravated)
Sect 109(3)	Break out of dwelling house after committing or entering with intent to commit indictable offence (specially aggravated)
Sect 110	Breaking, entering and assault with intent to murder or inflict grievous bodily harm
Sect 112(3)	Breaking etc into any house etc and committing serious indictable offence (specially aggravated)
Sect 198	Maliciously damage property with intention of endangering life
Sect 203(B)	Sabotage
Sect 204	Destruction of, or damage to, aircraft or vessel with intent or reckless indifference
Sect 208(3)	Threatening to destroy etc to an aircraft, vessel or vehicle
Sect 211(1)	Acts to railways with intent to cause death, bodily injury or endanger safety
Sect 345	A principal in the second degree is liable to the same punishment as the principal in the first degree
Sect 346	An accessory before the fact to a serious indictable offence is liable to the same punishment as the principal felon
Sect 349(1)	Accessory after fact to murder

Drug Misuse and Trafficking Act 1985

The following offences qualify as serious indictable offences only if the provisions of section 33(3) of the Act are activated, i.e. when the offence involved not less than the 'large commercial quantity' (defined at s33(4)) for the particular prohibited plant or drug

Sect 23(2)	Cultivate not less than the commercial quantity applicable to prohibited plants
Sect 24(2)	Manufacture or produce not less than the commercial quantity applicable to a prohibited drug
Sect 25(2) or (2A)	Supply not less than the commercial quantity applicable to a prohibited drug
Sect 26	Conspiring to commit an offence under any of the above three sections
Sect 27	Aiding, abetting, counselling, procuring, soliciting or inciting an offence under any of the above three sections
Sect 28	Conspiring, aiding, abetting, counselling, procuring, soliciting or inciting an offence outside NSW, being an offence punishable under the provisions of a law in force in that place which corresponds to any of the above three sections
Sect 33AA(2)(b)	Person found guilty of an offence under section 25(2A), supply to persons under 16 years

Firearms Act 1996

Sect 50A	Unauthorised manufacture of firearms
Sect 51(1A)	Selling firearms without inspection of purchaser's licence or permit
Sect 51(2A)	Selling firearms other than through licensed firearms dealer
Sect 51B	Selling firearms on an ongoing basis

Appendix 2 Legislation in other states and territories

For criminal justice purposes, a 'juvenile' is defined as a person under 18 years in all states and territories except Queensland and Victoria, where a 'juvenile' as defined as a person under 17 years. In all states and territories the minimum age for criminal responsibility is 10 years, and the maximum 14 years.

With the exception of the Northern Territory and the Australian Capital Territory, the detention of juveniles is legislated as a last resort.

Table 1. Ages of criminal responsibility by Australian jurisdiction

Jurisdiction	No criminal responsibility	Presumption against criminal responsibility	Treatment as child/juvenile
Commonwealth	Under 10 years Crimes Act, s4M Criminal Code Act, s7.1	10 to less than 14 years Crimes Act, s4N Criminal Code Act, s7.2	Not specified
Australian Capital Territory	Under 10 years [since 10 May 2000] Children and Young People Act, s71(1)	10 to less than 14 years Children and Young People Act, s71(2)	Under 18 years Children and Young People Act, s8 ("young person")
Northern Territory	Under 10 years Criminal Code, s38(1)	10 to less than 14 years Criminal Code, s38(2)	Under 18 years [since 1 June 2000] Juvenile Justice Act, s3 ("juvenile")
New South Wales	Under 10 years Children (Criminal Proceedings) Act, s5	10 to less than 14 years Common law <i>doli incapax</i>	Under 18 years Children (Criminal Proceedings) Act, s3 ("adult")
Victoria	Under 10 years Children and Young Persons Act, s127	10 to less than 14 years Common law <i>doli incapax</i>	Under 18 years [since 1 July 2005] Children and Young Persons Act, s3 ("child")
South Australia	Under 10 years Young Offenders Act, s5	10 to less than 14 years Common law <i>doli incapax</i>	Under 18 years Young Offenders Act, s4 ("youth")
Western Australia	Under 10 years Criminal Code Act Compilation Act, s29	10 to less than 14 years Criminal Code Act Compilation Act, s29	Under 18 years Young Offenders Act, s3 ("young person")
Queensland	Under 10 years Criminal Code Act, s29(1)	10 to less than 14 years [since 1 August 1997] Criminal Code Act, s29(2)	Under 17 years Juvenile Justice Act, ss5, 6 ("child")
Tasmania	Under 10 years [since 1 February 2000] Criminal Code, s18(1)	10 to less than 14 years Criminal Code, s18(2)	Under 18 years [since 1.2.2000] Youth Justice Act, s3 ("youth"), but can be dealt with as an adult for indictable crimes.

Table 2. Maximum period and age up to which a juvenile can be ordered to serve a sentence in a juvenile detention centre

Jurisdiction	Period	Age	Governing Act(s)
Australian Capital Territory	Children's Court = 2 years Supreme Court = no longer than if committed by an adult	Not specified	Children and Young People Act, s96 and s123
New South Wales	Children's Court = 2 years Supreme Court = no longer than if committed by an adult	21 years	Children (Criminal Proceedings) Act, s33 and s19
Northern Territory	Period not exceeding the maximum period that may be imposed for the offence or 12 months, whichever is the lesser	18, must be transferred to adult prison within 28 days of turning 18	Juvenile Justice Act, s53 (1)(g) and s53 (6)
Queensland	1 year for most offences Up to 10 years for serious offences Life if particularly heinous offence	18 (minimum age of 15)	Juvenile Justice Act, s175 and s176 Juvenile Justice Act, s53
South Australia	3 years	No age limit prescribed	Young Offenders Act, s23(2)
Tasmania	2 years Not more than would be imposed on a adult committed of the same offence If convicted of an indictable offence, imprisonment may be served in a youth detention centre	No age limit prescribed	Youth Justice Act, s81 and s48
Victoria	1 year in a Youth Residential Centre (2 years for multiple offences) 2 years in a Youth Training Centre (3 years for multiple offences)	10 - 15 years (on day of sentencing) in a Youth Residential Centre Thereafter in a Youth Training Centre (must be 20 years of age or under at the time of sentencing). No age limit prescribed	Children and Young Persons Act, s187 Children and Young Persons Act, s189
Western Australia	Indefinite, but for a period no longer than the maximum period that may be imposed on a adult committed of the same offence	18	Young Offenders Act, s118 Young Offenders Act, s178

Table 3. Can a juvenile be ordered to serve a custodial sentence in an adult prison and how?

Jurisdiction	Adult prison?	Circumstance	Governing Act
Australian Capital Territory	Yes	Supreme Court may if the crime is of a very serious nature	Children (Detention Centres) Act, s28A
New South Wales	Yes	Only if aged above 16 years, found guilty of an indictable offence and considered to be unsuitable to be held in a detention centre	Juvenile Justice Act
Northern Territory	Yes	Only if aged above 15 years old	Juvenile Justice Act, s53(10)
Queensland	Yes	Only if aged above 17 years old Only under prescribed circumstances	Juvenile Justice Act, s270
South Australia	Yes	If sentenced as an adult, will still serve sentence in a training centre, unless otherwise directed However, the offender may be transferred to a prison once they turn 18, or under prescribed circumstances	Young Offenders Act, s36(1) and s36(2)
Tasmania	Yes	If sentenced by the Supreme Court	Sentencing Act Youth Justice Act
Victoria	Yes	May be transferred from youth detention, but only if aged above 16 years and where recommended by Youth Parole Board or requested by young offender and approved by Youth Parole Board	Young Offenders Act, s118
Western Australia	Yes	Only if aged above 16 years and with regard to certain matters	Young Offenders Act, s178(2)

Source: Australian Institute of Criminology <http://www.aic.gov.au/research/jjustice/> (Accessed 17 June 2005) and state and territory agencies. The Juvenile Justice Act (NT) has been the subject of review and the Youth Justice Bill (No.2) 2005 was introduced in June 2005 to provide that custody is a last resort and that a youth who is over the age of 15 years can be detained or imprisoned for a maximum of two years. An amendment is also being considered to give the Director of Correctional Services a discretion to allow a detainee to complete a sentence at a detention centre where that sentence does not exceed 6 months.

Appendix 3 Submissions on discussion paper

The Hon Diane Beamer, (former) Minister for Juvenile Justice/Department of Juvenile Justice (joint submission)

Juvenile Justice Advisory Council of New South Wales

Department of Community Services

Legal Aid Commission of New South Wales

Police Association of New South Wales

Attorney-General's Department

Mr J R Dive – (former) Senior Children's Magistrate on behalf of The Children's Court

Mr John Crawford – Children's Magistrate

Department of Corrective Services

New South Wales Bar Association

The Council of Social Service of New South Wales

Mr Tony Foley, Faculty of Law, Australian National University

Corrections Health Service (now Justice Health)

New South Wales Commission for Children and Young People

The Youth Justice Coalition

Anti-Discrimination Board of New South Wales

Department of Education and Training

Illawarra Legal Centre

Youth Justice Advisory Committee

The Shopfront Youth Legal Centre

Australian Institute of Criminology

Hon Justice R O Blanch – Chief Justice, District Court

Appendix 4 Correctional centre placement guide

8 CORRECTIONAL CENTRES

General Placement Guide - as at 31 October 2000							
Centre	Security/ Classifications	Sentenced/ Unsentenced	Receptions	Methodone	Protections	Diabetics	Other Criteria/ Restrictions
Bathurst	B, C1, C2, C3, E2	Both	Yes	Yes	Transit Only	Yes	Acute Crisis Unit - live RIT referral only. Women for Court/new receptions.
Berrima	B, C1, C2, C3	Both	No	No	No*	Yes	All prospective placements must be discussed with Governor
Brewarrina	C2, C3	Sentenced	No	No	No	No	Aboriginal non-violent (sentence greater than 6 months), non-sex offenders under 30 years of age.
Broken Hill	B, E2, C1, C2, C3 + Cat 1 & 2	Both	Yes	No	No	Yes	All prospective placements are discussed direct with Governor Unsentenced women held for Court Women's Unit for sentenced Cat 4, 3, 2 & 1 (not E)
Cessnock	C1, C2, C3	Sentenced	Yes	Yes	Short term remands and transits	Yes	Not centre of classification for protection inmates; placement by negotiation only. Acute Crisis Unit - live RIT referral only.
Cessnock Max 11 Wing Remand & Protections	A2, E2, A2U, BU, E2U, E1U	Both	Yes	Yes	Short term remands & transits	Yes	Not goal of classification. Only take Es, As & Bs if are unsentenced & awaiting court appearance. Sentenced in transit only.
Emu Plains	Cat 2, Cat 1	Sentenced	No	Yes	No	Yes	Mother & Children program available. Diabetics - conditional Refer also section Female Placement Guide
Glen Innes	C2 & C3's	Sentenced	No	No	No	No	
Goulburn	A1, A2, B, C1, C2, C3, E1, E2 A2U, BU, E1U	Both	Yes	Yes	Yes	Yes	The MPU/ Unit 6 is partly a Segregation Unit housing 17. Special Unit for ID inmates - approval should be sought from Disability Services Unit.
Grafton	E2, B, C1, C2, C3 & Cat 4, 3, 2 & 1	Both	Yes	Yes	No	Yes	Has protection facilities, for small number of inmates, awaiting court or transfer. Not a goal of classification for protection. Contains a women's unit for sentenced and unsentenced.
Ivanhoe	C2, C3	Sentenced	No	No	No	No	Aboriginals and local non-Aboriginals. Inmates with sex offences excluded.
John Morony 1	B, C1, C2	Sentenced	No	No	No	Yes	Young Adult Offender Criteria and Adult Nucleus criteria
John Morony 2	C1, C2, C3	Sentenced	No	Yes	No	Yes	No segregation, clinic only operates during day.
Juzee	E2, B, C1, C2, C3 (*A2U, *A2)	Sentenced, Prot/Strict Prot	Yes	Yes	Yes	Yes	No acute asthmatics due to high pollen count in air. Has 24 hour medical. Normal discipline beds for courts and remands only. 'A' sentenced and unsentenced for Court only.

General Placement Guide - as at 31 October 2000

Centre	Security/Classifications	Sentenced/Unsentenced	Receptions	Methodone	Protections	Diabetics	Other Criteria/ Restrictions
Katmonell	C1 (20 beds only), C2, C3	Sentenced	No	No	ex only	not insulin dependent	All inmates are confined to compound for two weeks pending a security assessment. Programs include ID and sex offender programs. ID inmates - approval should be sought from Disability Services Unit.
Lithgow	A2, E1, E2	Sentenced	No	Yes	Yes	Yes	Does not take active self-harmers, or strict protections.
Marrns	C2, C3	Sentenced	Only Police	No	No	Not insulin dependent	Only Police receptions with a minimum term of 12 months or less to be accepted.
MMTC	A1, A2 B, C1, C2, C3, E1, E2	Both	No	Yes	Yes	Yes	Medical transit centre only. Not centre of classification.
MRRC	A2U, BU, E1U, E2U	Unsentenced and sentenced Court Transits	Yes	Yes	Yes	Yes	Sentenced key workers only. Holds remands & receptions, and inmates pending court in metro area. Court transits A, B, C.
MSPC (incorporate former ITC)	A2, E2, B, C1, C2, C3	Both	No	Yes	yes	Yes, not insulin dependent	Includes inmates on therapeutic programs.
Mulawa	Cat 4, Cat 3, Cat 2, Cat 1, E1, E2	Both	Yes	Yes	Yes	Yes	Range of therapeutic programs available. Refer also section Female Placement Guide
Oberon YAOP & AN	C2, C3	Sentenced 4 months or more, with 18 months or less left to serve	No	No	No	No	No major medical problems, nearest hospital is 48 kms away. As per YAOP criteria. If violent/drug crime must have clearance from psych, AOD.
Parklea Areas 1, 2, 3	A2U, BU, C1U	Unsentenced	Yes	Yes	Yes	Yes	Primarily young adult offender remands. Sentenced key workers only.
Parklea Area 4	C2, C3	Sentenced	No	No	No	Yes	Has external leave programs.
Parramatta	C1, C2, C3, C1U	Both	No	Yes	No	Yes	C1 unsentenced from MRRC as per criteria, and all C classification transits.
Silverwater	C1 (50 beds only) C2, C3	Sentenced	No	Yes	No	Yes	Primarily a Pre-Release Program centre.
SPC ID Unit	A, B, C1, C2, C3, E1, E2	All	No	Yes	Yes	Yes	Placement - approval should be sought from Disability Services Unit.
St Heliers	C2, C3	Sentenced	Receptions see →	Yes	No	Yes	Only receive reception from Local Courts serving term of 12 months or less.
Tamworth	B, C1, C2, C3, E2, BU	Both	Yes	Yes	No	Yes	Not a goal of classification. Local Courts only.
Transitional Centre	Cat 1	Sentenced	No	Yes	No	Yes	Not a goal of classification, but a program option at end of sentence. Women only.

NOTE: * U after a classification level signifies an unsentenced inmate.
* E signifies an escapee

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