Children remain in adult prison

Wilson v Minister for Corrective Services [2013] WASC 157

By George Newhouse and Alan Watkins

The Western Australian Government's 'tough on crime' approach has resulted in a rapidly expanding prison population. At the same time, cuts to the public sector have left prisons dangerously understaffed. Children in detention are not immune from the effects of such policies. In *Wilson v Minister for Corrective Services*, the grandmother of a child in detention challenged the Minister's decision to transfer young offenders to an adult prison.

FACTS

The rate of Aboriginal children detained in Western Australia (WA) is second only to the Northern Territory. Three times more children are detained in WA than Victoria, a state with a significantly larger population.[1] The rate of child detention in WA increased 31 per cent in the years 2006–10 and Aboriginal children are detained at a rate 40–53 times higher than non-Aboriginal children.[2] At the same time, there is a lack of trained staff at Perth's only juvenile detention centre, Banksia Hill. One 'youth custodial officer' (YCO) is allocated for every eight detainees. That is half the ratio applied in every other jurisdiction in Australia.[3] Due to the stressful working conditions, 60 of the 199 YCOs are on workers' compensation, more than half of them on a long-term basis.[4] The staff shortages led to longer 'lockdowns', where the children were locked in cells without air-conditioning. On 24 October 2012, the union representing YCOs issued a press release saying that children were being locked down for long periods to deal with staff shortages, and detainees were being denied rehabilitation programs and recreation. Banksia Hill was described as a 'pressure cooker'.[5]

That pressure cooker finally exploded on the evening of 20 January 2013, during the height of summer. Three or four detainees escaped from their cells and liberated another 60. By the time order was restored, with the help of local police and an emergency response team, 108 cells were badly damaged and 73 children were handcuffed on the grassed oval of Banksia Hill. Those children were then transferred to the adjacent adult prison, Hakea.[6] Mrs Wilson sought to challenge the decision to send her grandchild to an adult prison and the subsequent decisions to declare Hakea Prison a 'detention centre' for the purposes of the *Young Offenders Act* 1994 (WA) (the Act).[7]

While in Hakea, the applicant's grandson was held in conditions which the Chief Justice euphemistically described, in his judgment, as 'less than optimal'. For several weeks after the incident at Banksia Hill, detainees were locked down for 23 hours a day; visits and telephone calls were curtailed; strip searches and the use of physical restraints were common. The prison's food, prepared at a central catering department, was described as insufficient and unappetising. Detainees were also denied education for two months and, when it was restored, it was less than half the service provided at Banksia Hill. No additional YCO had been recruited.

AHRC INTERVENTION

The Australian Human Rights Commission (AHRC) was granted leave to intervene in the proceedings and made submissions regarding Australia's international human rights obligations. The court drew attention to the fact that international treaties do not form part of Australian law, except for situations of legislative ambiguity, when the presumption that parliament will not legislate contrary to our international agreements is applied. As the court found that there was no legislative ambiguity in the Act, his Honour decided that the international agreements on the treatment of children were not relevant to the proceedings.

APPLICANT'S SUBMISSIONS

The Minister's decisions were challenged on the grounds that:

1. Hakea prison was unsuitable for the detention of young persons, therefore it was beyond the power of the Minister to declare it a detention centre;
2. The decisions did not accord with the objectives and principles of the Act; and
3. The Minister failed to take account of relevant considerations when making the decisions.

The first two grounds were dealt with concurrently by

the court. Section 13 of the Act gives the Minister the simple power to declare a place to be a 'detention centre'. Accordingly, the court formed the view that there are no jurisdictional requirements that need to be satisfied before the power can be exercised by the Minister. The applicant relied on the objectives and general principles of juvenile justice identified in the Act, as jurisdictional preconditions. Such principles included the general proposition that children be held in a 'facility that is suitable for a young person'. The Court held that matters of suitability were questions of 'evaluation and assessment', of which 'reasonable people might arrive at differing conclusions'. The *Malaysian Declaration Case* was distinguishable from the subject case because in the *Malaysian Declaration Case* there were objective matters of fact to be determined in order to enliven the decision-maker's power. The objectives and principles of the Act were merely matters to be considered when exercising all the powers and duties under the Act. Accordingly, the first two grounds were rejected.

The third ground asserted that the Minister had failed to take account of relevant considerations when making his decisions. The applicant contended that these considerations should include factors such as whether sufficient programmes were available, facilities were suitable and prison guards adequately trained. As the legislation did not list the factors to be considered, the court held that they must be drawn by implication from the subject matter, scope and purpose of the Act. Thus, the Minister was bound to consider whether the children would be exposed to contact with adults, as well as the suitability of the physical and operational characteristics of the facility in question. The Court again noted the 'elasticity of the notion of suitability'[8] and concluded that after all the options were considered, Hakea Prison was 'the least worst alternative'.[9] Ultimately, the court denied prerogative relief on the grounds that 'such relief would be futile, in that it would have no foreseeable consequences for the parties'.[10]

On 7 August, the Independent Parliamentary Inspector of Custodial Services, Neil Morgan, released his 153-page report on the 'incident' at Banksia Hill.[11] He concluded that the loss of control was entirely predictable, given the deteriorating conditions over the previous 18 months, citing the staff shortages, excessive lock-downs and lax security procedures as the principle causes. Ultimately, Mr Morgan recommended the creation of a specialist agency, separate from the Department of Correctional Services, which would focus solely on youth justice. In the short term, the Report recommends that the youths return to Banksia Hill but acknowledges this will take some months.

The authors contacted the Banksia Hill facility and, at the time of writing, there was no timeframe for the return of the detainees from Hakea Prison. Air-conditioning was apparently a risible suggestion. ■

Notes: **1** *Wilson v Minister for Corrective Services* [2013] WASC 157, [22]. **2** *Ibid*, [23]. **3** *Ibid*, [31]. **4** *Ibid*, [29] 35 of the 60 were on long-term workers' compensation. **5** *Ibid*, [77]. **6** *Ibid*, [36]-[41]. **7** *Young Offenders Act* 1994 (WA). **8** *Ibid*, [158]. **9** *Ibid*, [159]. **10** *Ibid*, [183]; citing *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581-2. **11** Office of the Inspector of Custodial Services, *Report 85 – Directed Review into an Incident at Banksia Hill Detention Centre on 20 January 2013* (July 2013).

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