1. The Commission for Children and Young People

1.1 The NSW Commission for Children and Young People (‘the Commission’) promotes the safety, welfare and well-being of children and young people in NSW.

1.2 The Commission was established by the Commission for Children and Young People Act 1998 (NSW) (‘the Act’). Section 10 of the Act lays down three statutory principles which govern the work of the Commission:

(a) the safety, welfare and well-being of children are the paramount considerations;
(b) the views of children are to be given serious consideration and taken into account; and
(c) a co-operative relationship between children and their families and community is important to the safety, welfare and well-being of children.

1.3 Section 12 of the Act requires the Commission to give priority to the interests and needs of vulnerable children. Children are defined in the Act as all people under the age of 18 years.

1.4 Section 11(d) of the Act provides that one of the principal functions of the Commission is to make recommendations to government and non-government agencies on legislation, policies, practices and services affecting children.

2. General Comments

2.1 The Commission is pleased to make a submission to the NSW Ombudsman on the review of the Children (Criminal Proceedings) Amendment (Adult Detainees) Act 2001 (NSW).

2.2 Our submission focuses on issues impacting on young people under the age of 18 years, consistent with the Commission’s role under the Commission for Children and Young People Act 1998 (NSW).

2.3 The Commission is generally supportive of limiting the age that young people convicted of serious offences are able to remain in juvenile
detention. We appreciate that there may be 'special circumstances' to justify a young person staying in juvenile detention beyond 18 years under section 19(3) of the Children (Criminal Proceedings) Act 1987 (NSW). However, there are occasions where it is appropriate for young people to be transferred to an adult prison to keep other young people and staff in juvenile detention centres safe.

3. Specific Comments

3.1 Representations and recommendations by the Department of Juvenile Justice to the court on “special circumstances” under section 19

3.1.1 The background report prepared by the Department of Juvenile Justice should identify any special circumstances that exist to support a section 19 order. This should not be a matter only for the young person’s legal representative to raise. In most cases, the Department is in the most appropriate position to identify any special circumstances, having undertaken an assessment of the young person. A legal representative may only meet the young person at court on the day of their section 19 order. They only have a limited opportunity to develop a relationship with the young person and may not be able to properly assess if any special circumstances exist.

3.2 Safeguards to prevent young people being inappropriately transferred to prison under provisions other than section 19

3.2.2 The reasons for transfer under section 28(1) of the Children (Detention Centres) Act 1987 (NSW) provide only minimal guidance to assist the Minister in making a decision whether to transfer a young person to prison. It is the Commission’s view that the Act should contain more detailed issues for the Minister’s consideration, similar to the considerations in section 28E of the Act.

3.2.3 To provide further safeguards, transfers of young people to prison under section 28(1) of the Children (Detention Centres) Act 1987 (NSW) should be monitored so that the Department or particular centres are not misusing provisions to move unwanted detainees out of the juvenile justice system. Such transfers may be monitored in a similar way to transfers under section 28B, which are reviewed monthly by the Minister administering the Crimes (Administration of Sentences) Act 1999 (NSW).

3.2.4 The Children (Detention Centres) Act 1987 (NSW) does not contain provisions on the procedure for appealing the transfer of a young person to prison at the discretion of the Minister under section 28(1) of the Act. While a person may seek an administrative review of the Minister’s decision, it is the Commission’s view that the Act should contain clearer guidelines about the procedures to reverse the Minister’s decision to transfer a young person under section 28(1).
3.3 Safeguards to safely and appropriately manage young people in adult prisons

3.3.1 It is important to recognise the vulnerability of young people and the need to keep them safe in adult prisons.

3.3.2 None of the young people who have been transferred to adult prison under section 19 have participated in a young offenders program. This is of particular concern in matters where young people under 18 years are transferred in accordance with section 28 or 28B of the Children (Detention Centres) Act 1987 (NSW), or on remand in prison under section 28A of that Act. Young people have a particular vulnerability and should be separated from the general prison population. Studies have found that young people are at particular risk of sexual and physical assault in adult prisons.¹

3.3.3 There is a clear need to strengthen the young offenders program offered within prisons, so that more prisons offer it and so it is appropriate to the broad range of young people’s needs. Young people should be supported by specialist staff, with facilities that address their specific education, health and social needs.

3.3.4 Long term case plans should also be developed for young people likely to be transferred to prison. This case plan should be formally transferred between the Department of Juvenile Justice and the Department of Corrective Services at the time of the young person’s transfer, irrespective of the reasons for the young person’s transfer.