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Sentencing Advisory Council
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Dear Sentencing Advisory Council

High Risk Offenders: Post-Sentence Supervision and Detention

Thank you for the opportunity to respond to your Discussion and Options Paper, entitled *High-Risk Offenders: Post-Sentence Supervision and Detention* ('Paper').

A. About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre Ltd ('Centre'), a joint initiative of the Public Interest Law Clearing House (Vic) and Liberty Victoria, is an independent community legal centre.

The Centre aims to promote human rights in Victoria and Australia, particularly the human rights of people that are disadvantaged or living in poverty, through the practice of law. It also aims to promote the development of Australian law and policy consistently with international human rights standards, including through casework, litigation, policy analysis, education and advocacy.

Having regard to these aims, this submission considers the relevance of international human rights law and the *Charter of Human Rights and Responsibilities 2006* (Vic) to the issue of post-sentence supervision and detention, including in particular, the permissibility of limitations on human rights.

B. Rights Affected by Post-Sentence Supervision and Detention

As the Paper identifies, a scheme of post-sentence supervision and detention may be incompatible with or infringe a range of human rights under both international human rights law (particularly the *International Covenant on Civil and Political Rights*) and domestic human rights law (particularly the Victorian *Charter of Human Rights and Responsibilities*), including:

- The right to liberty and security and freedom from arbitrary detention;¹
- The right to freedom from cruel, inhuman or degrading treatment or punishment;²
- The right to humane treatment when deprived of liberty;³
- The right to a fair hearing;⁴
- The right to a presumption of innocence and procedural fairness;⁵
- The right not to be punished more than once;⁶ and
- The right to freedom from retrospective criminal laws or penalties.⁷

Part C of this submission considers the discussion in the Paper of the right to freedom from arbitrary detention enshrined by art 9 of the *ICCPR* and s 21 of the *Charter*.

Part D of this submission considers the discussion in the Paper of the right to humane treatment when deprived of liberty enshrined by art 10 of the *ICCPR* and s 22 of the *Charter*.

Part E of this submission considers the permissibility of limitations of each of the rights identified in the Paper and above.

C. Right to Freedom from Arbitrary Detention

The Paper, erroneously in our view, states that the term 'arbitrary' is 'open to debate' and that, on one view, it could merely mean 'not according to legislative procedure' while, on a broader view, it could mean 'unjust or unreasonable detention'. In our view, it is clear and well established that the prohibition against arbitrary detention is more than a mere prohibition on detention that is 'against the law', with the term 'arbitrary' subsuming considerations of reasonableness, necessity and proportionality. The UN Human Rights Committee, which is an independent body of experts with the authority to interpret and expound the meaning of the *ICCPR*, has stated that:

the notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case ... the element of proportionality becomes relevant in this context.⁸

¹ *ICCPR* art 9; *Charter* s 21.

² *ICCPR* art 7; *Charter* s 10.

³ *ICCPR* art 10, *Charter* s 22.

⁴ *ICCPR* art 14(1); *Charter* s 24.

⁵ *ICCPR* art 14(2)-(5); *Charter* s 25.

⁶ *ICCPR* art 14(7); *Charter* s 26.

⁷ *ICCPR* art 15(1); *Charter* s 27.

⁸ *A v Australia*, HRC, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) [9.2].

In *A v Australia*,⁹ the Committee also stated that the following considerations are relevant to whether detention is arbitrary:

- whether there has been individual consideration of whether detention is necessary rather than a blanket decision to detain a class of people;
- the length of time of non-punitive detention; and
- whether detention is a disproportionate measure in the circumstances.

The Committee found in that case that administrative detention of an asylum seeker was arbitrary and in breach of art 9 on the basis that he was detained for four years pursuant to a blanket policy of detaining all persons in his situation.

In the United Kingdom, the following situations, among others, have been argued and found to constitute a breach of the analogous right to personal freedom under art 5 of the *European Convention on Human Rights*:

- delays in the processing of asylum applications while the applicants were held in detention;¹⁰
- the imposition of mandatory life sentences for murder;¹¹ and
- delays in the process for reviewing the involuntary detention of persons for mental health treatment purposes.¹²

C. Right to Humane Treatment in Detention

The right to be treated humanely when deprived of liberty is recognised in art 10 of the *ICCPR* and s 22 of the *Charter*.

In addition to establishing the right of all persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person, s 22 also establishes that accused persons who are detained and persons who are detained without charge should:

- generally be segregated from convicted offenders;¹³ and
- be treated in a way appropriate to a person who has not been convicted.¹⁴

This section is modelled on art 10 of the *ICCPR*, but has a wider scope in that it specifically refers to the right of persons who are detained but have not been convicted to humane treatment.¹⁵

⁹ Ibid [9.1]–[9.7].

¹⁰ *R (Saadi, Maged, Osman and Mohammed) v Secretary of State for the Home Department* [2002] 1 WLR 3131. Note, however, that while the UK High Court found a breach of art 5, this was overturned by the Court of Appeal. The Court of Appeal judgment was upheld by the House of Lords and, subsequently, the European Court of Human Rights: *Saadi v United Kingdom*, European Court of Human Rights (4th Section), Application No 13229/03, 11 July 2006.

¹¹ *R v Lichniak; R v Pyrah* [2003] 1 AC 903.

¹² *R (on the application of KB) v Mental Health Review Tribunal* [2004] QB 936. See also *R v Secretary for the Home Department & Anor, ex parte IH* [2002] EWCA Civ 646.

¹³ Section 22(2).

¹⁴ Section 22(3).

¹⁵ There are broadly equivalent provisions in the *Human Rights Act 2004 (ACT)* (s 19), *New Zealand Bill of Rights Act 1990* (s 22) and *South African Constitution* (s 35(2)(e)).

In relation to art 10 of the *ICCPR*, the Committee has stated that following principles apply:

- The rights apply 'to any one deprived of liberty under the laws and authority of the State who is held in prisons, hospitals — particularly psychiatric hospitals — detention camps or correctional institutions or elsewhere'.¹⁶ This is reflected in the wording of the *Charter*, noted above.
- The *Standard Minimum Rules for the Treatment of Prisoners*¹⁷ and the *Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment*¹⁸ should be taken into account in determining the content of the obligation to treat detainees with humanity and dignity. The travaux préparatoires of the *ICCPR* support that approach in relation to the *Minimum Rules*¹⁹ and the Committee has applied the *Minimum Rules* in giving content to art 10 and, in connection with art 10, have asked State parties in their reports to indicate to what extent they are applying the *Minimum Rules* and the *Body of Principles*.²⁰ Carr J (dissenting in the overall result) used the *Minimum Rules* and the *Body of Principles* to construe article 10 in respect of the right to humane treatment in detention in *Wu v Minister for Immigration for Ethnic Affairs*.²¹
- Article 10 imposes a positive obligation on the state towards persons who are particularly vulnerable because of their status as persons deprived of liberty. In accordance with this article, persons deprived of their liberty may not be:

subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the *Covenant*, subject to the restrictions that are unavoidable in a closed environment.²²
- Article 10(3) provides, inter alia, that '[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation'. The Committee has emphasised that every penitentiary system must seek to realise that aim and must not be 'only retributory'.²³ There is no equivalent provision in s 22 of the *Charter* but it is arguable that the same essential aim informs s 22.

¹⁶ HRC, *General Comment No 21 (Replaces General Comment 9) concerning Humane Treatment of Persons Deprived of Liberty* (1992) [2], available from <http://www.ohchr.org/english/bodies/hrc/comments.htm>. For further jurisprudence on the right to human treatment of persons in detention, see <http://www.bayefsky.com/bytheme.php/id/1006>.

¹⁷ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, Switzerland (1955), available at <http://www.ohchr.org/english/law/treatmentprisoners.htm> ('*Standard Minimum Rules*').

¹⁸ Adopted by the UN General Assembly in GA Res 43/173, GAOR, 43rd sess, 76th plen mtg, UN Doc A/RES/43/173 (9 December 1988), available at <http://www.ohchr.org/english/law/bodyprinciples.htm> ('*Body of Principles*').

¹⁹ Mark Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (1987) 233.

²⁰ *Kurbanov v Tajikistan*, HRC, Communication No 1096/2002, UN Doc CCPR/C/79/D/1096/2002 [7.8]; *Mukong v Cameroon*, HRC, Communication No 458/1991, UN Doc CCPR/C/51/D/458/1991 (1994) [9.3]; HRC, *General Comment No 21*, above n 16, [5].

²¹ (1996) 64 FCR 245, 265.

²² HRC, *General Comment No 21*, above n 16, [3].

²³ *Ibid* [10].

Breaches of art 10(1) have been found, inter alia, in cases where the prisoner is denied adequate bedding, food, exercise or medical attention; is exposed to unsanitary food/water and/or living conditions; physical abuse; extended periods of isolation; overcrowding; lack of educational opportunities, work or reading materials; and physical, psychological and verbal abuse.²⁴

Article 10(1) also complements the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in art 7 of the *ICCPR*. Thus, persons deprived of their liberty may not be subjected to treatment that is contrary to art 7, including medical and scientific experimentation, nor may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty.²⁵ Consistently with its jurisprudence in respect of art 7, the Committee has recognised that mental distress and deterioration caused by detention may constitute a breach of art 10(1).

D. Limitations on Human Rights

At international law, it is well established that some human rights are absolute while, in certain circumstances and subject to certain conditions, other human rights may be limited. Reflecting this, the *Charter* contains a limitation provision, s 7, which is modelled on broadly equivalent provisions in s 5 *New Zealand Bill of Rights Act 1990* (NZ) and s 36 of the *South African Bill of Rights* contained in the *Constitution of the Republic of South Africa 1996*. In terms, s 7 of the *Charter* provides that '[a] human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom and taking into account all relevant factors'. According to the Explanatory Memorandum, the section 'reflects Parliament's intention that human rights are, in general, not absolute rights, but must be balanced against each other and against other competing public interests'.²⁶

1. Non-Derogable Rights

Although, unlike many other human rights instruments, the *Charter* does not provide that certain rights are non-derogable, the preferable view is that, consistently with art 4(2) of the *ICCPR*, certain human rights are absolute and must not be subject to limitation or derogation. Pursuant to art 4(2) of the *ICCPR*, these rights include:

- the right to life (art 6);
- *the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment (art 7);*
- the right to freedom from slavery or forced labour (art 8);
- the right not to be imprisoned for a contractual debt (art 11);
- *freedom from retrospective criminal punishment (art 15);*
- the right to recognition as a person before the law (art 16); and

²⁴ See, eg, *Robinson v Jamaica*, HRC, Communication No 731/1996, UN Doc CCPR/C/68/D/731/1996 (2000); *Sextus v Trinidad and Tobago*, HRC, Communication No 818/1998, UN Doc CCPR/C/72/D/818/1998 (2001); *Lantsova v Russian Federation*, HRC, Communication No 763/1997, UN Doc CCPR/C/74/D/763/1997 (2002); *Freemantle v Jamaica*, HRC, Communication No 625/1995, UN Doc CCPR/C/68/D/625/1995 (2000).

²⁵ HRC, *General Comment No 21*, above n 16, [3].

²⁶ Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill 2006* (Vic) 8.

- freedom of thought, conscience and religion (art 18).

In *General Comment 29*, the Committee posited that, in addition to those rights identified in art 4(2) the following further rights may not be lawfully derogated because to do so would be inherently inconsistent with the *ICCPR* or because they have attained the status of peremptory norms of customary international law:

- *the right of persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person (art 10);*
- the prohibition against taking of hostages, abductions or unacknowledged detention;
- the prohibition against incitement to discrimination, hostility or violence (art 20); and
- the obligation to provide 'effective remedies' for breaches of human rights (art 2(3)).²⁷

Similarly to the *ICCPR*, art 37(5) of the South African Bill of Rights provides that components of particular human rights are non-derogable, including in relation to:

- the right to equality;
- *the right to human dignity;*
- the right to life;
- *the right to freedom and security of the person;*
- certain children's rights; and
- certain rights of arrested, detained and accused persons.

2. Permissible Limitations on Human Rights under International Human Rights Law

International human rights law provides that, in respect of rights that are not absolute, limitations are only permissible in certain circumstances and subject to particular conditions.

In *General Comment 31*, the Committee stated that, where limitations or restrictions are made,

States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.²⁸

The general principles relating to the justification and extent of limitations have been further developed by the UN Economic and Social Council in the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*. Those principles include that:

- no limitations or grounds for applying them may be inconsistent with the essence of the *ICCPR* or the particular right concerned;
- all limitation clauses should be interpreted strictly and in favour of the rights at issue;

²⁷ HRC, *General Comment 29: States of Emergency (Article 4)*, UN Doc CCPR/C/21/Rev.1/Add.11 (2001) [14]–[16].

²⁸ HRC, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004) [6].

- any limitation must be provided for by law and be compatible with the objects and purposes of the *ICCPR*;
- limitations must not be arbitrary or unreasonable;
- limitations must be subject to challenge and review;
- limitations must not discriminate on a prohibited ground;
- any limitation must be 'necessary', which requires that it:
 - is based on one of the grounds which permit limitations (namely, public order, public health, public morals, national security, public safety or the rights and freedoms of others);
 - responds to a pressing need;
 - pursues a legitimate aim; and
 - is proportionate to that aim.²⁹

3. Permissible Limitations on Human Rights under the *Charter*

As discussed above, the *Charter* provides at s 7 that:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom and taking into account all relevant factors.

A non-exclusive list of relevant factors is set out in s 7, including:

- the nature of the right;
- the importance of the purpose of the limitation (ie, does the limitation fulfil a pressing need and pursue a legitimate aim?);
- the nature and extent of the limitation (ie, is the limitation proportionate?);
- the relationship between the limitation and its purpose (ie, is the limitation reasonably adapted to the objective?); and
- any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve (ie, can the objective of the limitation be achieved in a way that does not interfere with, or interferes less with, human rights?).

The preferable approach would be, so far as possible, to interpret and apply the s 7 limitation provision consistently with the *Siracusa Principles*.

Section 7 also provides that the *Charter* should not be interpreted as giving a person, entity or public authority a right to limit or to destroy the human rights of any person. This provision was included to safeguard against the possibility that the *Charter* might be misused to destroy or limit human rights.³⁰ For example, the right to freedom of expression should not be used to destroy the right to privacy. Rather, a balancing exercise is envisaged.

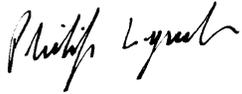
²⁹ UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (1985).

³⁰ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 8.

We hope that the discussion and submissions above will be of benefit to the Sentencing Council in the preparation of its final report.

We would welcome the opportunity to discuss any of the matters raised further.

Yours sincerely

A handwritten signature in black ink, appearing to read "Philip Lyne". The signature is written in a cursive, flowing style.

Director