Submission to Corrections Victoria

in response to the

Proposed Corrections Regulations 2009

20 February 2009

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About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre (***HRLRC***) is an independent community legal centre that is a joint initiative of the Public Interest Law Clearing House (Vic) Inc and the Victorian Council for Civil Liberties Inc.

The HRLRC provides and supports human rights litigation, education, training, research and advocacy services to:

(a) contribute to the harmonisation of law, policy and practice in Victoria and Australia with international human rights norms and standards;

(b) support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and

(c) empower people who are disadvantaged or living in poverty by operating within a human rights framework.

The four 'thematic priorities' for the work of the HRLRC are:

(a) the development, operation and entrenchment of Charters of Rights at a national, state and territory level;

(b) the treatment and conditions of detained persons, including prisoners, involuntary patients and persons deprived of liberty by operation of counter-terrorism laws and measures;

(c) the promotion, protection and entrenchment of economic, social and cultural rights, particularly the right to adequate health care; and

(d) the promotion of equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples.

Acknowledgement

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1. Background and Executive Summary

1.1 About this Submission

2. The Human Rights Law Resource Centre (***HRLRC***) welcomes the opportunity to provide this submission on the Regulatory Impact Statement and the Corrections Regulations Exposure Draft 2009 (Vic) (***Proposed Regulations***) issued by Corrections Victoria in January 2009.

3. The stated objectives of the Proposed Regulations are to:

   (a) bring greater clarity and transparency to aspects of correctional services currently regulated under the *Corrections Regulations 1998* (Vic) (***Current Regulations***);

   (b) ensure compliance with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (***Victorian Charter***); and

   (c) reflect changes in operational practice across the correctional system.

4. The purpose of this submission is to provide an assessment of the extent to which the Proposed Regulations are consistent with the rights, standards and obligations contained in the Victorian Charter. In particular, this submission addresses the following aspects of the Proposed Regulations:

   (a) Firearms (Part 3 Division 1);

   (b) Use of Restraint (Part 3 Division 3);

   (c) Classification, Placement and Separation (Part 3 Divisions 6, 7 and 8);

   (d) Prison Discipline (Part 4);

   (e) Access to Prisoners (Part 5); and

   (f) Search, Seizure and Testing (Part 6).

5. In relation to each of these aspects of the Proposed Regulations, this submission seeks to provide an analysis of comparative international corrections practices and to make recommendations as to the nature of amendments which we submit should be made to the Proposed Regulations in order to ensure the Victorian Government's compliance with the Victorian Charter.

1.2 Executive Summary

6. International human rights law clearly establishes that a person imprisoned for committing a criminal offence should not suffer any punishment or treatment over and above the deprivation of liberty which imprisonment itself entails. All other basic human rights must remain protected.

7. The HRLRC considers that certain aspects of the obligations, standards and practices contained in the Proposed Regulations do not comply with established international and comparative jurisprudence relating to the treatment of prisoners. In particular, the HRLRC has the following concerns in relation to the Proposed Regulations as currently drafted:

   (a) the regulations concerning the use of firearms permit an escort officer to shoot and kill an escaping officer, regardless of the threat that the prisoner poses;

(b) the provisions authorising the use of instruments of restraint provide prison staff with an overly broad discretion;

(c) the provisions relating to classification of prisoners inappropriately identify 'risk' to be the single overarching consideration in making such decisions;

(d) the placement of prisoners does not give sufficient consideration to the need for prisoners to maintain connections with family and friends;

(e) there is insufficient clarity and transparency around the process for separation of prisoners;

(f) the provisions relating to prison discipline must be consistent with the right to a fair hearing, particularly in relation to the prescription of offences and penalties and ensuring the right to an effective remedy;

(g) there may be an unjustified and arbitrary interference with access to prisoners, particularly in relation to visits by lawyers and family members and the register of letters and parcels; and

(h) provisions relating to searching, and in particular strip searching, remain unacceptably arbitrary and do not require any reasonable belief or suspicion that the security or safety of the prison will be compromised.

8. While the HRLRC acknowledges that there may be questions about the compatibility of various aspects of the *Corrections Act 1986* (Vic) (***Corrections Act***) with the Victorian Charter, and that the scope for reform of the Current Regulations is therefore limited, we consider that the Proposed Regulations must conform with the human rights contained in the Victorian Charter to the maximum extent possible.

1.3 Consequences of incompatibility with the Victorian Charter

9. The HRLRC notes that section 32(3)(b) of the Victorian Charter provides that the validity of a subordinate instrument, or a provision of a subordinate instrument, that is incompatible with a human right is not affected by such incompatibility provided that the incompatibility is 'empowered' by the Act under which the subordinate instrument is made. Thus, where subordinate legislation is not capable of being interpreted and applied compatibly with human rights, and that incompatibility is not authorised by the primary legislation (which should itself be interpreted, so far as possible, to be consistent with human rights), then the subordinate legislation may be arguably invalid.

10. It is an established principle of statutory interpretation that there is a presumption against abrogating fundamental rights and freedoms.[1] The HRLRC therefore considers that any incompatibility of the Proposed Regulations with the Victorian Charter must be clearly empowered or authorised — and explicitly so — by the Corrections Act in order to permit that inconsistency.

[1] See, for example, *S157/2002 v Cth* [2003] HCA 2 (4 February 2003).

2. The Victorian Charter

2.1 Overview of the Victorian Charter

11. The Victorian Charter enshrines a body of civil and political rights derived from the *International Covenant on Civil and Political Rights* (***ICCPR***). The substantive rights recognised in the Victorian Charter that have particular relevance for prisoners include:

    (a) recognition and equality before the law (section 8 of the Victorian Charter);

    (b) the right to life (section 9);

    (c) protection from ill-treatment (section 10);

    (d) the right to privacy (section 13);

    (e) the right to liberty and security of person (section 21);

    (f) humane treatment when deprived of liberty (section 22); and

    (g) the right to a fair hearing (section 24).

12. The Victorian Charter establishes a 'dialogue model' of human rights protection which seeks to ensure that human rights are taken into account when developing, interpreting and applying Victorian law and policy without displacing current constitutional arrangements. The dialogue between the various arms of government — namely, the legislature, the executive (which includes 'public authorities') and the courts — is facilitated through a number of mechanisms.

13. First, prior to introduction to parliament, bills must be assessed for the purpose of consistency with the human rights contained within the Victorian Charter, and a Statement of Compatibility tabled with the Bill when it is introduced to Parliament.

14. Second, all legislation, including subordinate legislation, must be considered by the parliamentary Scrutiny of Acts and Regulations Committee for the purpose of reporting as to whether the legislation is incompatible with human rights.

15. Third, public authorities must act compatibly with human rights and also give proper consideration to human rights in any decision-making process.

16. Fourth, so far as possible, courts and tribunals must interpret and apply legislation consistently with human rights and should consider relevant international, regional and comparative domestic jurisprudence in so doing.

17. Fifth, the Supreme Court has the power to declare that a law cannot be interpreted and applied consistently with human rights and to issue a Declaration of Inconsistent Interpretation. The Government must respond to such a Declaration within six months.

18. Finally, the Victorian Equal Opportunity and Human Rights Commission has responsibility for monitoring and reporting on the implementation and operation of the Victorian Charter and also for conducting community education regarding the Victorian Charter.

2.2 Application of the Victorian Charter to the Proposed Regulations

19. The following overarching principles should be considered in the interpretation and application of the Victorian Charter in the drafting of the Proposed Regulations:

(a) Division 1 of Part 3 of the Victorian Charter requires that all new legislation introduced in Victoria be considered for its compatibility with the human rights set out in the Victorian Charter. Accordingly, in drafting the Proposed Regulations, Corrections Victoria must take into account the human rights set out in the Victorian Charter.

(b) Section 32(1) of the Victorian Charter states,

> So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

The purpose and effect of this provision is to require that any person or entity that interprets and applies legislation does so in a way that gives effect to human rights. Section 32(1) requires, as a matter of law, that a human rights consistent interpretation be adopted whenever it is possible to do so, regardless of whether there is any ambiguity and regardless of how the provision in question may have been previously interpreted and applied.[2]

(c) The Victorian Charter is founded on the principle that human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom. Having regard to this, the rights should be interpreted broadly. In situations where a person alleges that their rights have been breached, the rights should be interpreted in favour of that person, particularly where they bear on issues of civil liberty, equality or human dignity.[3] The UN Human Rights Committee has, on a number of occasions, been critical of the tendency of states to interpret and apply rights too narrowly.[4]

(d) The rights should be interpreted and applied in a manner which renders them 'practical and effective, not theoretical and illusory'.[5] Consistently with the nature of human rights obligations articulated by the Human Rights Committee (namely, that states have obligations to respect, protect and fulfil human rights)[6] and the approach

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2 *Victorian Charter* s 49(1). See, eg, *R v Offen* [2001] 2 All ER 154 which held that, in light of the interpretative requirement under the *Human Rights Act 1998* (UK), a decision made a year earlier in relation to the interpretation and application of a provision of the *Criminal (Sentences) Act 1977* was no longer good law. See also *Re S (Care Order: Implementation of Care Plan)* [2002] AC 291, 313.

3 See generally, Conor Gearty, *Principles of Human Rights Adjudication* (2004).

4 See, eg, UN Human Rights Committee, *General Comment No 6: The Right to Life* (1982) [5], available from http://www.ohchr.org/english/bodies/hrc/comments.htm.

5 *Goodwin v United Kingdom* (2002) 35 EHRR 447, [73]-[74]. See also *Airey v Ireland* (1979) 2 EHRR 305, 314.

6 See, eg, UN Human Rights Committee, *General Comment 3: Implementation at the National Level*, UN Doc HRI\GEN\1\Rev.1 (1981) available at http://www.ohchr.org/english/bodies/hrc/comments.htm:

> The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the *Covenant* is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights.

adopted by UK courts under the *Human Rights Act 1998* (UK) and the European Court of Human Rights under the *European Convention on Human Rights* (***European Convention***),[7] rights may impose both negative and positive obligations on public authorities. The right to life, for example, may require public authorities to not only refrain from taking life but to take positive measures to protect human life.

20. The HRLRC emphasises the importance of a human rights approach to the drafting of the Proposed Regulations. As Corrections Victoria will be aware, pursuant to consequential amendments to the *Subordinate Legislation Act 1994* (Vic), the responsible Minister will be required to prepare a 'human rights certificate' certifying whether, and if so how, the Proposed Regulations limit any human right set out in the Victorian Charter.

2.3 Limitations on Human Rights

21. 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.

22. In General Comment 31, the Human Rights 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.[8]

23. 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* (***Siracusa Principles***).

24. Among other things, the Siracusa Principles provide that:

(a) no limitations or grounds for applying them may be inconsistent with the essence of the particular right concerned;

(b) all limitation clauses should be interpreted strictly and in favour of the rights at issue;

(c) any limitation must be provided for by law and be compatible with the objects and purposes of the ICCPR;

(d) limitations must not be arbitrary or unreasonable;

(e) limitations must be subject to challenge and review;

(f) any limitation must be 'necessary', which requires that it:

(i) 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);

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7 See, eg, *Marckx v Belgium* (1979) 2 EHRR 330; *Gaskin v United Kingdom* (1989) 12 EHRR 36; *Airey v Ireland* (1979) 2 EHRR 305; *Plattform Artze fur das Leben v Austria* (1988) 13 EHRR 204.

8 UN Human Rights Committee, *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].

(ii) responds to a pressing need;

(iii) pursues a legitimate aim; and

(iv) is proportionate to that aim.[9]

25. Reflecting the Siracusa Principles, the Victorian Charter contains the limitation provision in section 7(2), which 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[10] based on human dignity, equality and freedom and taking into account all relevant factors.

26. Section 7(2) also sets out the following inclusive list of these relevant factors:

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relationship between the limitation and its purpose; and

(e) whether there is any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

27. It is desirable that, so far as possible, section 7(2) is interpreted and applied consistently with international law and the Siracusa Principles, including placing the burden of proof in relation to the permissibility of a limitation on the party arguing that the limitation is justified and proportionate.[11]

2.4 Relevance of International and Comparative Jurisprudence

28. Section 32(2) of the Victorian Charter states that:

> International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

29. The Explanatory Memorandum to the Victorian Charter suggests that section 32(2) of the Victorian Charter 'will operate as a guide' and goes on to state that

> a court or tribunal may examine international conventions, international customs as evidence of a general practice accepted as law, the general principles of law recognised by civilised nations, and (as subsidiary means) judicial decisions and teachings of the most highly qualified publicists of various nations.[12]

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9 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).

10 According to the Supreme Court of Canada, the values of a 'free and democratic society' include: respect for the inherent dignity of the human person, social justice, equality, accommodation of a plurality of beliefs, and respect for cultural and group identity: *R v Oakes* [1986] 1 SCR 103, 136.

11 See, eg, P Hogg, *Constitutional Law of Canada* (2004) 795-6.

12 Explanatory Memorandum, Victorian Charter of Human Rights and Responsibilities Bill 2006 (Vic) 23.

30. It also suggests that decisions of the International Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights and United Nations treaty monitoring bodies (including the Human Rights Committee) will be particularly relevant.[13] Judgments of domestic and foreign courts, particularly the Australian Capital Territory, Canada, New Zealand, South Africa and the United Kingdom, may also be relevant.[14]

31. There are a number of international instruments that apply in either a general or specific sense to the rights of prisoners, including:

    (a) the ICCPR:

        (i) the right to life (article 6);

        (ii) protection from torture and other cruel, inhuman or degrading treatment or punishment (article 7);

        (iii) when deprived of liberty, to be treated with humanity and with respect for the inherent dignity of the human person (article 10); and

        (iv) the right to a fair trial (article 14).

    (b) the United Nations *Convention against Torture* contains a broad definition of torture and other cruel treatment;

    (c) the United Nations Standard Minimum Rules for the Treatment of Prisoners 1955 (***Standard Minimum Rules***), which detail what is generally accepted as being good principle and practice in the treatment of prisoners and in the management of institutions; and

    (d) the European Convention.

32. The rights and standards contained in these instruments, and jurisprudence relating to their interpretation and application, are discussed throughout this submission.

[13] Ibid.

[14] Ibid.

3. Firearms (Part 3 Division 1)

3.1 Proposed Regulations

33. Both the Current Regulations and the Proposed Regulations provide that a Governor of a prison or the Secretary of the Department of Justice may only authorise the issue of a firearm to an escort officer in certain circumstances, such as in cases of emergency, where it is necessary for the security and good order of the prison, or where the escort officer is undertaking duties at posts where high security and maximum security prisoners are kept.[15]

34. Further, an escort officer acting in the course of his or her duties must not remove a firearm or ammunition from a prison unless authorised by the Governor to do so.[16] Breach of this regulation carries a penalty of 10 penalty units.

35. Under the Current Regulations, if a prisoner escapes or attempts to escape from custody, an escort officer may discharge a firearm at the prisoner if the escort officer believes on reasonable grounds that it is the only practicable way to prevent the escape of the prisoner from custody.[17]

36. An escort officer may also discharge a firearm at a person whom he or she reasonably believes is aiding a prisoner in escaping or attempting to escape from custody, if the escort officer believes on reasonable grounds that it is the only practicable way to prevent the escape of the prisoner.[18]

37. An escort officer may discharge a firearm at a person if the person is using force or threatening force against:

    (a) another person in the prison;

    (b) an officer within the meaning of Part 5 of the Act (including the escort officer carrying the firearm) acting in the execution of his or her duties outside a prison; or

    (c) a prisoner outside a prison,

    and the escort officer reasonably believes that shooting at the person using or threatening force is the only practicable way to prevent the person causing death or serious injury.

38. The Current Regulations also provide that, before discharging a firearm at a person, the escort officer must:

    (a) if it is practicable to do so, give an oral warning to the effect that the person will be shot at if he or she does not stop escaping, attempting to escape or using or threatening force (as the case may be); and

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15 Corrections Regulations 1998 (Vic), r 8.

16 Corrections Regulations 1998 (Vic), r 9.

17 Corrections Regulations 1998 (Vic), r 10.

18 Corrections Regulations 1998 (Vic), r 10.

(b) satisfy himself or herself that shooting at the person does not create an unnecessary risk to any other person.[19]

3.2 Relevance of the Victorian Charter

39. Section 9 of the Victorian Charter provides that that '[e]very person has the right to life and has the right not to be arbitrarily deprived of life'.[20]

40. Pursuant to section 7 of the Victorian Charter, any limitation on the right to life must be justifiable in light of the nature of the right, the importance of the purpose of the limitation, the extent of the limitation and whether any less-restrictive means are available to achieve the purpose the limitation seeks to achieve.[21] As the right must not be deprived arbitrarily, a limitation on the right to life must be assessed by reference to 'elements of inappropriateness, injustice and lack of predictability'.[22]

3.3 International and Comparative Jurisprudence

41. Section 9 of the Victorian is modelled on Article 6 of the ICCPR, which states that persons (including prisoners and detainees) should not to be arbitrarily deprived of life. The Human Rights Committee has described the right to life as 'the supreme right' and as a right which 'should not be interpreted narrowly'.[23] In various cases, the Human Rights Committee has expressed the view that the prohibition on 'arbitrary' deprivation of life requires that State conduct (for example in policing) not be unreasonable or disproportionate to the requirements of law enforcement in the circumstances.[24]

42. While the defence of self or others, the execution of an arrest, or the prevention of escape have been cited as exceptions to the right to life, international jurisprudence is clear that any use of such force must be 'absolutely necessary'.[25] 'Absolutely necessary' provides for a stricter test than that applied when determining whether a limitation is 'necessary in a democratic society'.

43. Other authoritative international instruments consistently provide that the use of lethal force on prisoners is only justified as a last resort and that the amount of force to be used should be proportionate to the seriousness or threat of the offence. For example:

(a) Article 54 of the Standard Minimum Rules states that prison officers 'shall not … use force except in self-defence or in cases of attempted escape, or active or passive physical resistance … . Officers who have recourse to force must use *no more than is strictly necessary*' [emphasis added]; and

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19 Corrections Regulations 1998 (Vic), r 10.

20 *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 9.

21 *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 7(2).

22 *Van Alphen v The Netherlands*, Human Rights Committee, Communication No. 305/88.

23 Human Rights Committee, *General Comment 6: The Right to Life* (1982), paragraph 1.

24 See for example *Suarez de Guerrero v Colombia*, Human Rights Committee, Communication No. 45/79.

25 See, eg, McCann v United Kingdom (1995) 21 EHRR 97, [148]; Jordan v United Kingdom (2003) 37 EHRR 52.

(b) the United Nations Basic Principles of the Use of Force and Firearms by Law Enforcement Officials makes similar provision:

(i) Articles 4 and 5 require that law enforcement officials shall only use force and firearms where unavoidable and that where force is used, the officials must 'exercise restraint … and act in proportion to the seriousness of the offence and the legitimate objective to be achieved … [and] minimize damage and injury, and respect and preserve human life';

(ii) Articles 9 and 16 relevantly require that officials only use firearms in the context of preventing escape if the prisoner presents an 'imminent threat of death or serious injury' or is likely to perpetrate a 'particularly serious crime involving grave threat to life' and, in both cases, 'only when less extreme means are insufficient to achieve these objectives'; and

(iii) Article 9 further states that firearms should only be used 'when strictly unavoidable in order to protect life'.

44. Jurisprudence in relation to these instruments is consistently clear that the use of force must be a strictly proportionate response. For example, in the context of preventing the escape of a prisoner, proper warnings must be given before potentially lethal force is used.[26] Individuals must be given all opportunities to surrender and the use of force must be the option of last resort. There must also be a clear procedures concerning when lethal force can be used.

45. Based on the standards and obligations contained in these international instruments, the HRLRC considers that the Proposed Regulations should only limit the right to life in situations of last resort. Such actions cannot be arbitrary. Firearms must only be used where other less extreme measures are not appropriate, and where their use is proportionate to the consequences of the prisoner conduct which they are intended to prevent (namely, where the escapee presents an imminent threat to the lives of others), not merely because the prisoner is escaping. Furthermore, where the use of firearms is necessary, they must be used in a way which minimises the risk of death.

3.4 Other measures are available to prevent escape

46. The Current Regulations authorise the use of firearms by escort officers (when acting as such) where the escort officer believes on reasonable grounds that the use of the firearm is the only practicable way to prevent the escape of a prisoner [or] … to prevent death or serious injury being caused to [others].

47. The Regulations permit the use of firearms in circumstances broader than where there are no 'less extreme means' available to prevent the escape of a prisoner. If using the firearm is considered the 'only practicable way' to prevent the escape etc, then the officer is not required even to attempt any alternative methods of preventing escape. This is so regardless of the imminence and gravity of the threat to life that the escaping prisoner may pose.

48. The use of firearms should be limited to cases where such use is a last resort and all other means have been exhausted. This is reflected in the Queensland provisions discussed below.

[26] See, for example, *Ogur v Turkey*, Application no. 21594/93 (20 May 1999).

3.5 Queensland Corrective Services Act

49. The HRLRC submits that the *Corrective Services Act 2006* (Qld) (***Queensland Act***) is an example of an effective framework for, amongst other things, the use of firearms and force within prisons. The Queensland Act provides that prison officers may use reasonable force (other than lethal force):

    (a) only where it is reasonably necessary to do so, for a number of specified reasons;

    (b) where the relevant act cannot be stopped in another way;

    (c) where a clear warning of the intention to use force is given if the act is not stopped;

    (d) where sufficient time is given for the warning to be observed; and

    (e) where the force is used in a way which is unlikely to cause death or grievous bodily harm.[27]

50. The Queensland Act provides that giving a clear warning and time for the warning to be observed is not necessary if doing so would create a risk of injury to the officer or another (including the prisoner). The use of reasonable force may involve only the following devices:

    (a) a gas gun;

    (b) a chemical agent;

    (c) riot control equipment;

    (d) a restraining device; or

    (e) a corrective services dog under the control of a corrective services officer.[28]

51. The Queensland Act presents an approach which is far more conducive than the Proposed Regulations to upholding human rights by providing for the specific use of non-lethal force, and with limitations on this use, along with a list alternatives to traditional firearms.

52. The Queensland Act also regulates the use of lethal force.[29] The chief executive of prisons must ensure that all corrective services officers authorised to use lethal force have been trained.[30] Unlike the Proposed Regulations, there is an overarching requirement that prison and escort officers carry firearms only where it is reasonably necessary to do so to perform their functions under the legislation.[31] Further, the use of firearms in escape situations is limited to those escapes where the officer reasonably believes the prisoner is likely to cause serious injury or death to someone other than the prisoner in the escape or attempted escape.[32]

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27 Corrective Services Act 2006 (Qld), s 143.

28 Corrective Services Act 2006 (Qld), s 143(4).

29 Corrective Services Act 2006 (Qld), ss 144-148.

30 Corrective Services Act 2006 (Qld), s 144.

31 Corrective Services Act 2006 (Qld), s 145.

32 Corrective Services Act 2006 (Qld), s 147.

53. The Queensland provisions provide that a corrective services officer may use lethal force only if the officer:

(a) reasonably believes the act or omission permitting the use of lethal force cannot be stopped in another way;

(b) gives a clear warning of the intention to use lethal force if the act or omission does not stop;

(c) gives sufficient time for the warning to be observed; and

(d) attempts to use the force in a way that causes the least injury to anyone,

although (b) to (d) do not need to be complied with if doing so would create a risk of injury to others. Nonetheless, the Queensland Act is far more consistent with fundamental human rights and the Victorian Charter.

3.6 Conclusion and Recommendations

54. The HRLRC considers that the Proposed Regulations that relate to the use of firearms by prison officers and escort officers are not consistent with the Victorian Charter. The HRLRC is particularly concerned that the Proposed Regulations continue to fail to address the important recommendations of the Coronial Inquest Finding in 2005 into the death of Garry Whyte.[33]

55. While we note that the Current Regulations were amended in May 2008 after the Corrections Act was amended by the insertion of section 112A, the Proposed Regulations do not adopt a more favourable approach to the issue and use of firearms than the Current Regulations.

56. In particular, the Proposed Regulations allow an escort officer to kill an escaping prisoner, regardless of the threat the prisoner poses, if it is the only practicable way to prevent the escape. However, many prisoners (for example, minimum security and remand prisoners) do not present a sufficiently serious level of risk to justify the use of lethal force to prevent their escape.

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[33] 21 January, 2005 Case No: 1328/02. The Coroner's recommendations were as follows:

***Recommendation 1*:** Recommendations made in the Comrie Report be promulgated. Regulation 10 of the *Corrections Regulations 1998* be reviewed and amended so that the circumstances in which prison officers can use lethal / deadly force are in line with the broad thrust of the law in that regard.

***Recommendation 2*:** Recommend that the expression *'Prisons don't move'* be deleted from the corrections lexicon and be substituted by the blunt warning *'Stop or I'll shoot'*.

***Recommendation 3*:** Recommend the diagram referred to as a 'carousel' which forms part of the explanation of the Tactical Options Model be reviewed as it contains no real guidance with the 'firearms' option being located between the options of 'Baton' and 'Negotiation'.

***Recommendation 4*:** Recommend that at least those responsible for the delivery of training undergo psychological assessment to determine their suitability for the important task.

***Recommendation 5*:** Consideration be given by Corrections Victoria to the feasibility of a suggestion made by Counsel at the hearing that all prison officers who are (or are to be) firearm trained first undergo a psychological profiling/screening.

***Recommendation 6*:** Recommend that consideration be given to providing at least those officers who are firearm trained more sophisticated specific scenario training, such as, *'Shoot - Don't Shoot'* exercises.

57. The HRLRC therefore considers that the Proposed Regulations exposes:

    (a) prison officers to unacceptable legal risk around the unlawful use of firearms;

    (b) the public to unacceptable risk of death or injury; and

    (c) prisoners to preventable deaths in custody.

58. The HRLRC considers that the Proposed Regulations concerning the power to use firearms to prevent escape should be amended so that firearms may only be used in the following circumstances:

    (a) where escape presents an imminent and grave threat to life or likelihood of serious injury; *and*

    (b) as a last resort; *and*

    (c) where it is proportionate to the risk or threat posed by the escape of the prisoner.

59. The current inadequacies in Victoria's framework should be rectified by amending the Act. However, the present review of the Regulations presents an alternative opportunity to improve conformity with the Victorian Charter and international law. The provisions of the Queensland Act, as outlined above, provide a good foundation for the Victorian framework.

4. Use of Restraint (Part 3 Division 3)

4.1 The Proposed Regulations

60. Division 3 of Part 3 of the Proposed Regulations deals with the use of instruments of restraint.

61. The Proposed Regulations seek to provide more guidance regarding the circumstances in which prison officers and escort officers can use instruments of restraint. Under the Proposed Regulations, restraints may be applied to a prisoner either:

    (a) by order of the General Manager of the prison if he or she believes on reasonable grounds that the instrument of restraint is necessary;[34] or

    (b) if the immediate safety of a prisoner or the security of the prison is threatened, and the officer believes on reasonable grounds that it is necessary.[35]

62. A prison officer or escort officer may also apply an instrument of restraint to a prisoner during a transfer of the prisoner under escort from one place to another if the prisoner's conduct during the transfer has been such that it is reasonable to believe that the application of the instrument of restraint is necessary to prevent the escape of the prisoner, or the assault of, or injury to any person.[36]

63. The instruments of restraint that are contemplated in the Proposed Regulations are:

    (a) handcuffs;

    (b) arm restraints;

    (c) leg restraints; and

    (d) belts that restrain part of the body.[37]

64. Under the Current Regulations, when restraints are used for lengthy periods, the General Manager must advise the Secretary, who will decide if it is appropriate to remove the instrument of restraint. The time periods have been shortened in the Proposed Regulations. It is now after a continuous period of restraint of more than 18 hours that the Secretary must be advised (previously 24 hours) or for a cumulative period of 36 hours in any 96 hour period (previously 48 hours in any 96 hour period).[38]

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[34] Corrections Regulations Exposure Draft 2009 (Vic), r 13(1).

[35] Corrections Regulations Exposure Draft 2009 (Vic), r 13(2).

[36] Corrections Regulations Exposure Draft 2009 (Vic), r 15(2).

[37] Corrections Regulations Exposure Draft 2009 (Vic), r 13(3).

[38] Corrections Regulations Exposure Draft 2009 (Vic), r 14.

4.2 Relevance of the Victorian Charter

65. The use of restraint against prisoners either directly engages, or has the potential to engage, the following rights that enshrined in the Victoria Charter:

(a) protection from ill-treatment (section 10);

(b) right to liberty and security of person (section 21); and

(c) humane treatment when deprived of liberty (section 22).

4.3 International and Comparative Jurisprudence

66. The amendments to Part 3 Division 3 are intended to increase the transparency and accountability of the use of restraints. However, the HRLRC is concerned that the Proposed Regulations do not provide sufficient clarity and guidance on the circumstances in which instruments of restraint can be used.

67. Under the Proposed Regulations, prison and escort officers retain a high degree of discretion to decide how instruments of restraint are to be used. The HRLRC considers that, based on the standards and obligations required under various international and comparative law instruments, the reference to 'reasonable grounds' as the basis for applying an instrument of restraint is too vague to protect prisoners against the potential of arbitrary interference with various rights contained in the Victorian Charter. In particular, measures relating to the restraint of prisoners must be expressed in detailed procedures and discretion for prison officers to use force and restraints should be strictly limited.

(a) Standard Minimum Rules

68. Rule 30 of the Standard Minimum Rules state that:[39]

(a) instruments of restraint ... shall never be applied as a punishment; and

(b) instruments of restraint shall not be used except ... as a precaution against escape during a transfer, for medical reasons, or as a last resort to exercise control of the prisoner'.

(b) United Kingdom

69. The UK prison regulations provide useful guidance. Those regulations provide that the governor may order prisoners to be put in physical restraints where necessary to prevent injury to themselves, injury to others, damaging property or creating a disturbance. Physical restraints should only be used in rare and extreme cases. If restraints are used, the medical officer and a member of the Independent Monitoring Board must be informed without delay. If the medical officer disagrees with the order to put the prisoner under restraint the governor must comply with his or her recommendation.

70. The UK House of Lords has stated that 'treatment is inhuman and degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being'.[40] Further, the UK Court of Appeal held that the Government could not be excused from what were otherwise

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[39] Standard Minimum Rules for the Treatment of Prisoners, Rule 30.

[40] R (Limbuela) v Secretary of State for the Home Department 2006 AC 396

breaches of the right to freedom from cruel treatment in the prison context 'simply by pointing to a lack of resources that are provided by other arms of government'.[41]

(c) Council of Europe Recommendations

71. In January 2006, the Committee of Ministers of the Council of Europe adopted some of the recommendations on the European Prison Rules. These recommendations are based on the European Convention, the case law of the European Court of Human Rights and also on the work carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (and in particular the standards it has developed in its general report).

72. Part 4 of the Council of Europe recommendations deals generally with maintaining the good order of prisons. More specifically, sections 64-1 to 70-7 of the recommendations relate to the use of force in prison, the use of instruments of restraints and the requests and complaints that can be brought by the prisoners. The recommendations include that:

(a) the use of force by a prison officer is prohibited except in restricted circumstances such as 'self-defence, attempt of escape, active or passive physical resistance to a lawful order'. However, it must always remain the last resort, and for the minimum amount necessary and for the shortest necessary time;

(b) there must be written detailed procedures concerning the type of force that can be used and the members of the staff entitled to use such force. A further detailed report must be completed by the officers once the force has been used;

(c) the use of weapons should be limited to operational emergencies. In other circumstances, the staff shall not carry lethal weapons within the prisoner perimeter;

(d) prisoners, individually or as a group, shall have ample opportunity to make requests or complaints to the director of prison or to any other competent authority; and

(e) prisoners shall be entitled to seek legal advice about complaints and appeals procedures and to legal assistance when the interest of justice requires.

4.4 Certain uses of restraint could never be reasonable

73. The HRLRC submits that certain uses of restraint could never be ‘reasonable’ nor constitute a justifiable limitation on any human right, namely:

(a) the use of handcuffs, shackles and belts for women undergoing labour and pre- and post-natal care;

(b) the use of restraints for prisoners receiving emergency life saving medical care;

(c) the use of restraints for prisoners receiving palliative care in an end of life context; and

(d) the use of restraints in secure hospital wards.

74. The HRLRC considers that the above situations should be specifically identified in the Proposed Regulations.

[41] R (Noorkoiv) v Secretary of State for the Home Department.

4.5 Conclusion and Recommendations

75. The Proposed Regulations must ensure an appropriate balance between the human rights of the prisoner and the security and good management of the prison. The HRLRC considers that the Proposed Regulations around prison officers' and escort officers' use of instruments of restraint fails to address this balance as required by the Victorian Charter. The regime gives to the prison staff an overly broad discretion in the decision to use such instruments.

76. The following principles can be drawn from the international instruments discussed above:

(a) Instruments of restraint, such as handcuffs or chains, shall never be used as a punishment. This prohibition should be expressly provided in prison regulations.

(b) The use of instruments of restraint has to remain a last resort. Handcuffs, restraints and belts restraining parts of the body should only be applied in exceptional circumstances and as an alternative to other measures of security that limit rights in a less restrictive way.

(c) In the case of transfer of prisoners, the use of such instruments should not be systematic, and shall be based in an individual assessment of the risk posed by the prisoner.

(d) Where restraints are used, they should be removed as soon as this cause for the restraint stops (for example, when a prisoner stops exhibiting violent behaviour).

(e) A satisfactory appeals mechanism against the decision to use an instrument of restraint must be provided.

77. The HRLRC considers that to ensure compliance with the Victorian Charter, and for the purposes of transparency and accountability, such principles should be detailed in the Proposed Regulations. The procedures must be specific as to the circumstances in which restraint may be used, who can authorise their use, how they are to be applied and who is to monitor that the prescribed procedures are being carried out correctly.

78. Furthermore, and importantly, prison staff must be trained in the use of such procedures.[42]

[42] Andrew Coyle, *A Human Rights Approach to Prison Management*, Section 5.

5. Classification, Placement and Separation (Part 3 Divisions 6, 7 and 8)

5.1 The Proposed Regulations

79. The key amendments made by the Proposed Regulations to the areas of classification, placement and separation include:

(a) expressly stating what 'classification' means under the Regulations;

(b) improved transparency in decision making in relation to classification;

(c) setting out the factors which may be considered when determining the placement of a prisoner; and

(d) improved process for, and greater objectivity in, issuing separation orders.

5.2 Relevance of the Victorian Charter

80. Human rights under the Victorian Charter which are relevant to classification, placement and separation include:

(a) the requirement that all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person (s.22);

(b) the right to protection from torture and cruel, inhuman or degrading treatment (s.10);

(c) the right not have privacy or family unlawfully or arbitrarily interfered with (s.13); and

(d) rights to the protection of families and children (s.17).

5.3 Classification (Division 6)

81. The HRLRC welcomes the greater clarity and transparency around the classification process provided in the Proposed Regulations.

82. However, Division 6 could be improved by amending Proposed Regulation 25. As currently drafted, the first paragraph of this Proposed Regulation requires all classification decisions to be considered through the overarching consideration of 'risk', while also taking into account the factors listed in (a) to (g).

83. Classification is defined to include decisions about 'a prisoner's security rating, placement and sentence plan'. These decisions can have an enormous impact on a prisoner's wellbeing, rehabilitation and sentence length (through access to parole). It is not appropriate for 'risk' to be the single overarching consideration in making these decisions. It would be preferable to remove 'risk' as the overarching consideration, and state that decision should take into account the range of factors identified in subparagraphs (a) to (g) of Proposed Regulation 25 and subparagraphs (a) to (k) of Proposed Regulation 26.

84. Further, it is not clear why both Proposed Regulation 25 and 26 are needed. It seems they could be consolidated into a general provision which listed the factors to be taken into account in classification decisions (encompassing security ratings, placement and sentence plan). This would clarify that the right under section 47(l) of the Corrections Act to have classification reviewed annually encompassed an annual review of placement.

85. The legislative regime governing classification could be further improved by:

(a) providing for an internal review mechanism where a prisoner disputes a classification decision;

(b) providing a more accessible independent external review mechanism where a prisoner disputes a classification decision. Supreme Court judicial review of prison decisions around classification is available. There is merit however in considering an alternative forum to the Supreme Court for these matters that is more accessible, timely and cost effective (eg: the Victorian Civil and Administrative Tribunal); and

(c) for clarity, renaming the security ratings so that there is no stricter regime than 'maximum security'. It is illogical and confusing that 'high security' is stricter than 'maximum security'.

5.4 Placement (Division 7)

86. Further to the above comments, Proposed Regulation 26 could be improved by changing subparagraph (h) from 'any relevant family issues' to 'the need to maintain connections with family and friends'. Whilst prisoners necessarily lose the right to free movement while detained, they retain, and indeed it is important for their rehabilitation to retain, the right to contact with their families. Equally, free citizens have the right to contact with imprisoned family members. Placement decisions should expressly take these issues into account. This is particularly important given than the majority of Victorian prisons are located in rural areas, which are potentially remote from a prisoner's family and friends.

87. The legislative regime governing placement could be further improved by inserting into the Act or the Proposed Regulations:

(a) a guarantee of a minimum appropriate standard of prisoner accommodation. The Standard Guidelines provide that 'each prisoner should be provided with suitable accommodation' and provide further details of minimum accommodation standards. There is no equivalent provision in the Act or Proposed Regulations; and

(b) express prohibitions against the unlawful use of 'solitary confinement'. S.47(1)(a) of the Act guarantees the right of prisoner to be in the open air for at least one hour each day. This guarantee however, might be complied with by allowing a prisoner to spend one hour *alone* each day in a small open air caged yard adjacent to their cell. Despite recognition of the adverse psychological impacts of solitary confinement, the Act and the Proposed Regulations do not provide adequate safeguards against its misuse.

5.5 Separation (Division 8)

88. Separation of a prisoner from other prisoners is a power which requires strict regulation as it is a severe restriction of the prisoner's liberties which can be detrimental to mental health and wellbeing. If misused, separation offends the fundamental human right of freedom from cruel and inhumane treatment. This is recognised by the European Committee for the Prevention of Torture.[43]

[43] Committee for the Prevention of Torture, 2nd General Report on the Committee for the Prevention of Torture's Activities, para 56.

89. The Proposed Regulations provide greater clarity and transparency around the separation process. This is commendable. However, the Proposed Regulations fall short of acceptable human rights compliant standards in relation to separation. This could be remedied by the following amendments:

(a) the Proposed Regulations should expressly prohibit the use of separation under Division 8 as a punishment. The ACT[44] and the European Prison Rules[45] explicitly prohibit the use of separation as a means of punishment;

(b) the Proposed Regulations should limit the period of a separation order. This limit should be 7 days, however further orders could be made if the relevant justification existed. The Proposed Regulations should expressly provide that a separation order expires at the end of the 7 day period;

(c) an oral separation order should be confirmed in writing within 12 hours in all cases. Written confirmation within 12 hours should in all cases be practicable;

(d) the Proposed Regulations should require the Secretary in making a separation decision, to take into account the impact of separation on the health and wellbeing of the relevant prisoner, and any relevant cultural considerations (see S.90(2) of the Corrections Management Act 2007 (ACT));

(e) the Proposed Regulations should provide that prisoners subject to a separation order should be managed under the least restrictive conditions consistent with the reasons for their placement. This is consistent with the paragraph 1.77 of the Standard Guidelines and with the fact that separation under Division 8 should not be used a punishment;

(f) the Proposed Regulations should mandate regular medical visits to prisoners subject to separation orders[46];

(g) there should be an internal review mechanism where a prisoner disputes a separation decision; and

(h) there should be a more accessible independent external review mechanism where a prisoner disputes a separation decision (see comments above in relation to classification).

[44] Corrections Management Act 2007 (ACT), s 89.

[45] Rule 37.

[46] See Standard Guidelines para 1.76 and European Prison Rules, r 38(3).

5.6 Conclusion and Recommendations

90. For the reasons outlined above, the HRLRC considers that the Proposed Regulations with respect to the classification, placement and separation of prisoners do not comply with the standards and obligations required under the Victorian Charter.

91. In particular, the Proposed Regulations:

(a) fail to guarantee minimum health and amenity conditions in relation to the placement of prisoners; and

(b) do not afford prisoners adequate protection against the use of separation as a means of cruel or inhumane punishment.

6. Prison Discipline (Part 4)

6.1 The Proposed Regulations

92. Part 4 of the Proposed Regulations concerns prison discipline. It enumerates the prison offences and defines the disciplinary process which must be followed by prison officers.

(a) Prison Offences

93. Procedural fairness and transparency implies that the prisoners should have a better understanding of the conduct that is unacceptable and subject to punishment. It is on this ground that the Proposed Regulations have increased the number of offences which are likely to fall under a disciplinary process and which meet changing social circumstances and expectations and technological changes.[47]

94. The six new prison offences in the Proposed Regulations are:

(a) smoking in area not approved by Governor;

(b) misusing telephones;

(c) using communication devices not approved by Governor;

(d) misusing computers to install hardware or software not approved by Commissioner;

(e) sending parcels; and

(f) receiving parcels.[48]

95. Under the Current Regulations, offences which are not expressly specified are dealt with under the general offence provision which prohibits any 'act or omission that is contrary to the good order, management or security of the prison or security of the prisoners'.[49]

(b) Governor's Hearing

96. The Proposed Regulations would modify the investigation procedure prior to the Governor's hearing of any alleged offence. Before charging a prisoner with an offence, the prison officer has a duty to comply with certain investigatory requirements – for example, to review all reports, interview witnesses and seek any additional evidence.[50] The aim of this new requirement is to reduce the formality and technicality of the proceedings, while also according procedural fairness to the prisoner.

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47 Section 4: Proposed Regulations and the delivery of correctional services, 4.2.8 'Prison Offences' http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Sentencing/Community+Corrections/JUSTICE+-+Regulatory+Impact+Statement+%28RIS%29+for+the+Corrections+Regulations+2009

48 Corrections Regulations Exposure Draft 2009 (Vic), r 50.

49 Correction Regulations 1998 (Vic), r 44(o).

50 Corrections Regulations Exposure Draft 2009 (Vic), r 51.

97. There are rights for prisoners under the Proposed Regulations regarding provision of information, such as:

(a) the prisoner must be given a notice of the time, date and place of the hearing and a written advice on the charge and the procedure of a Governor's hearing;[51]

(b) a series of detailed procedural requirements for pre-hearing matters and the conduct of hearing proceedings, which differ depending on the plea entered and whether the prisoner will attend the hearing or not;[52] and

(c) if the prisoner is found guilty, he is to be informed of the decision and a record must be made of the decision and any penalty imposed.[53]

6.2 Relevance of the Victorian Charter

98. Arguably, the most relevant right contained in the Victorian Charter that relates to prison discipline is the right to a fair hearing enshrined in sections 24 and 25. However, it is important to note that the regulations relating to prison discipline also have the potential to be particularly relevant to a number of other human rights, including:

(a) the right to liberty and security of a person (section 21);

(b) the right to humane treatment when deprived of liberty (section 22);

(c) the right not to be tried or punished more than once (section 26); and

(d) principles relating to retrospective criminal law (section 27).

6.3 International and Comparative Jurisprudence

(a) European Convention

99. The European Court of Human Rights has held that article 6 of the European Convention (regarding the right to a fair trial) will, in certain circumstances, apply to prison disciplinary hearings.[54] The European Court has held article 6 'secures to everyone the right to have any claim related to his civil rights and obligations brought before a court or tribunal'.[55] As a result, it is important to ensure that prisoners, where required, are provided with the following guarantees of a fair trial:

(a) ***The right to a Tribunal that is independent and impartial*** – the European Court requires the disciplinary institution to be independent and impartial. The Court applies a common principle that 'justice must not only be done, it must also be seem to be done'.[56]

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51 Correction Regulations 1998 (Vic), r 46; Corrections Regulations Exposure Draft 2009 (Vic), r 53.

52 Correction Regulations 1998 (Vic), r 46-51; Corrections Regulations Exposure Draft 2009 (Vic), r 53-58.

53 Correction Regulations 1998 (Vic), r 52; Corrections Regulations Exposure Draft 2009 (Vic), r 59.

54 See CEDH Belilos c/ Switzerland's, 29 April 1988 and CEDH Campbell and Fell c/ United Kingdom 28 June 1984.

55 C.E.D.H., *Golder c. Royaume-Uni*, 21 février 1975.

56 *R. v Sussex Justices ex parte McCarthy*, Heward CJ 1924 and CEDH Delcourtc/ Belgium 17 January 1970.

(b) ***The right to legal representation*** – the European Court has taken the view that 'justice doesn't stop at prison's doors'[57] and Article 6 applies in its full meaning whenever a disciplinary matter can be likened to a criminal prosecution. Indeed, the HRLRC notes that, in France, a prisoner has been allowed to ask for the assistance of a lawyer or to be represented by him in the course of a disciplinary process since 2003.

(c) ***Right to an appeal mechanism*** – the European Convention provides that:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.[58]

The European Court requires a remedy in domestic law in respect of grievances which can be regarded as 'arguable' under the European Convention.[59] While it does not go so far as to guarantee a remedy, where an applicant has an arguable claim to a violation of a right granted by the European Convention the domestic regime must afford an effective remedy.[60]

(b) Council of Europe recommendations

100. As referred to in paragraph 71 above, in January 2006, the Committee of Ministers of the Council of Europe adopted some of the recommendations of the European Prison Rules. Relevantly, the recommendations:

(a) promote the use of mediation to disputes rather than disciplinary procedures which must remain the mechanism of last resort;[61]

(b) state that a prisoner must have certain rights (which must appear clearly in the prison regulation), such as the right to be promptly informed of the nature of the accusation and have adequate time and facilities for the preparation of his or her defence;

(c) allow a prisoner to represent himself or herself or obtain legal assistance, to request the attendance of a witness and the assistance of an interpreter, where required;

(d) require punishment to be imposed for disciplinary offences in accordance with national law – this means that the legal framework regulating prisons must give an express definition of the type of punishment incurred, the circumstances it might apply and the period of the punishment;

(e) punishments which involve a strong limitation on human rights (such as solitary confinement) should only be imposed in very exceptional circumstances, and in all cases the punishment must be proportionate to the offence; and

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57 Campbell and Fell c/ United Kingdom

58 European Convention on Human Rights, Article 13.

59 *CEDH Wainwright v. the United Kingdom* 26 September 2006; see also, for example, Boyle and Rice v. the United Kingdom 27 April 1988.

60 *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993.

61 See recommendations 56 to 62.

(f) provide that a prisoner who is found guilty of a disciplinary offence shall be able to appeal to a competent and independent higher authority.

6.4 Conclusion and Recommendations

101. While the HRLRC acknowledges that some aspects of the right to a fair hearing fall more squarely within the provisions of the Corrections Act, the HRLRC considers that the Proposed Regulations relating to prison discipline must, to the maximum extent possible, be consistent with the right to a fair hearing.

(a) Offences and Penalties

102. The HRLRC welcomes the identification and enumeration of specific prison offences.

103. However, the HRLRC remains concerned about the overly broad discretion given to disciplinary officers, General Managers and the Secretary under the Corrections Act and Regulations in determining penalties for prison offences. Decision makers can choose between a range of penalties, such as reprimand, fine, withdrawing of the prisoner's privilege or charging the prisoner with a prison offence. However, these penalties are not listed in the Act or Regulations.

104. To ensure that prisoners have a better understanding of what constitutes an offence, and what penalties arise from committing a certain offence, the offences should be categorised and each category should correspond to a penalty that is clearly expressed in the Proposed Regulations. For example, the disobeying of an order might not be treated in the same way as an injury to the persons or damage to property.

105. Some minor offences should be dealt with through an internal process. However, more significant offences, especially when an injury to a person has occurred, are analogous to offences punishable by criminal law.

106. In addition, the HRLRC considers that some of the prison offences that are expressly provided for in Proposed Regulation 50 do not provide sufficient certainty and clarity. For example:

(a) Proposed Regulation 50(o) creates an offence for a prisoner to 'work in a careless or negligent way'. What does it mean to work in a 'careless way'? and

(b) Proposed Regulation 50(s) creates an offence for a prisoner to 'give, sell or receive any of a prisoner's property to another prisoner'.

107. Amendment to the wording of some of these prison offences is therefore required.

(b) Appeals mechanism

108. The Proposed Regulations do not provide for an appeals mechanism against disciplinary decisions of a disciplinary officer or prison hearing. Under general administrative law, only review in the Supreme Court of Victoria of the legality of a decision in respect of disciplinary consequences of prison offences is available.

109. The Regulatory Impact Statement discusses the possibility that an appeal mechanism could be established, either to the Magistrates' Court, or to a tribunal established under the Corrections Act.[62] However, it was considered that the introduction of an additional appeal mechanism was of little public benefit due to the costs involved. It was concluded that an appeal mechanism was likely to 'hamper the efficient and effective management of prison offences and thereby compromise the operation of prisons'.[63]

110. It is submitted that the current system is not satisfactory. Since 2002, only seven judicial review proceedings from decisions made at a Governor's hearing in relation to prison offences have been brought.[64]

111. The HRLRC notes that the Regulatory Impact Statement refers to the statistic that 75% of prisoners would appeal disciplinary hearings if given a chance. While it is unclear how that figured is arrived at, if such a figure is so high then the HRLRC considers that this reflects the perception, on the part of prisoners, that the prison discipline process is manifestly unfair. Indeed, as identified by the approach taken by the European Court itself, the perception of fairness, independence and impartiality is paramount. In any event, the HRLRC notes the European Court's jurisprudence that an effective remedy must be afforded to any 'arguable' claim to a violation of a human right.

62 Regulatory Impact Statement for the Proposed Regulations, paragraph 5.10.

63 Regulatory Impact Statement for the Proposed Regulations, paragraph 5.10.5.

64 Corrections Victoria, Legal Service Branch.

7. Access to Prisoners (Part 5)

7.1 The Proposed Regulations

112. The Proposed Regulations are relatively similar to the current Regulations in relation to access to prisoners.

7.2 Relevance of the Victorian Charter

113. Human rights under the Victorian Charter which are relevant to access to prisoners include:

(a) the requirement that all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person (s.22);

(b) the right not have privacy or family unlawfully or arbitrarily interfered with (s.13);

(c) the right to freedom of expression (s.15); and

(d) rights to the protection of families and children (s.17).

7.3 Proposed Regulation 60 – Visits by lawyers

114. Proposed Regulation 60 should be amended to:

(a) provide that the Secretary can only prohibit the exchange of documents in a particular format if there is a legitimate reason for doing so. The Regulation currently allows the Secretary to ban the exchange of paper documents;

(b) provide expressly that a lawyer can directly and immediately exchange legal documents with a prisoner during a visit. At times, community legal centre lawyers have been prevented from directly exchanging documents with prisoners during visits, with prison staff telling the lawyer that they must deposit the documents for the prisoner through the normal property procedure so that they can be inspected;

(c) clarify the reference in subregulation (3). This subregulation provides that the provisions of the Regulations applying to *letters* apply to legal documents exchanged under subregulation (2). It seems that this should in fact refer either to the provisions of the Regulations applying to *parcels*, or to S47B of the Act;

(d) provide that the Proposed Regulations extend to a person authorised by a lawyer to act on their behalf and approved by the Governor (see s.40(3) of the Act); and

(e) provide that a visit by a lawyer must take place in a location where the conversation between the lawyer and the prisoner cannot be heard by prison officers.

7.4 Proposed Regulation 66 – Information to be given by a visitor

115. Proposed Regulation 66 should be amended to qualify the discretion of a prison officer around their satisfaction with a visitor's identify documentation. This could be achieved by inserting the word 'reasonable' before 'satisfaction of the prison officer'. This would prevent this discretion from being used in a capricious manner.

7.5 Proposed Regulation 68 – Refusal of entry

116. Community legal centres have represented family members of prisoners who have been banned for a period of time from visiting a prisoner. We understand that under Corrections Victoria's administrative procedures, when a Governor imposes a visit ban on a person for a period of time, the ban is not automatically lifted at the expiry of that time – rather, the same Governor must decide to lift the ban.

117. This has caused considerable difficulty for some family members of prisoners, particularly where the prisoner and/or the Governor has moved to another prison. In some cases, lawyers assisting banned family members have been referred between multiple prisons and Corrections Victoria's head office with no person willing to make the decision to remove the ban because the original Governor who made the decision had moved from the prison where the ban was originally imposed (but the ban still operated to prevent the family member from visiting the prisoner).

118. The Proposed Regulations should be amended to provide that if a Governor prohibits a person from entering a prison for a period of time, that prohibition automatically expires at the end of the period, without the need for any further action to be taken.

7.6 Proposed Regulation 18 (Part 3 Division 4) – Register of letters and parcels

119. To minimise the risk of unjustified and arbitrary interference with prisoner communication, in addition to the requirement that a Governor must maintain a letter and parcel register, it should be mandatory for a Governor to notify a prisoner if any letter or parcel is censored. The Act and Proposed Regulations currently contain no such requirement.

7.7 Conclusion and Recommendations

120. The HRLRC considers that the amendments identified above should be made to the Proposed Regulations to ensure their compliance with the Victorian Charter.

8. Search, Seizure and Testing (Part 6)

8.1 The Proposed Regulations

(a) Searches of Prisoners

121. The Proposed Regulations provide for three types of searches:

(a) scanning search: a search of a person or the property of a person, using an electronic or other device, where the person is not touched;

(b) pat down search: a search of a person where the person's clothed body is touched; and

(c) strip search: a search of a person requiring the person to remove any or all of the person's clothing and examination of the person's body and that clothing, without the person conducting the search touching the person's body.

122. These three forms of search have been used in prisons under the Current Regulations. While the Current Regulations do not define the types of searches, definitions have been included in the Proposed Regulations to clarify the provisions governing searches.

123. The Proposed Regulations provide for the strip searching of a prisoner's body by prison officers in limited circumstances where the Governor (or an authorised officer) reasonably believes that a strip search is required for the security or good order of the prison in certain circumstances. These circumstances are:

(a) when a prisoner enters or leaves prison;

(b) before and/or after completing a contact visiting program or residential visiting program;

(c) prior to the testing of substances which have been seized from the possession of a prisoner by prison staff and which are believed to be drugs or alcohol;

(d) prior to a bodily fluids test; or

(e) at any other time where the General Manager, or authorised officer reasonably believes necessary for the security and good order of the prison or prisoners or where it is reasonably suspected that a prisoner is concealing an unauthorised article or substance that might be used to threaten another person, commit an offence or that otherwise poses a risk to safety or prison security.[65]

124. The Proposed Regulations remove the practice of random strip searching of prisoners and visitors that exists under the Current Regulations. However, the Proposed Regulations do explicitly authorise random scanning and pat down searches.[66] The changed approach to random searching has been adopted to ensure compliance with the Victorian Charter.

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[65] Corrections Regulations Exposure Draft 2009 (Vic), r 69(3).

[66] Corrections Regulations Exposure Draft 2009 (Vic), r 70.

125. There is provision in the Proposed Regulations for a scanning search, garment search or pat down search authorised under the Corrections Act to be escalated to a strip search. The Proposed Regulations attempt to balance the need to ensure that contraband does not enter (or is not in) the prison with the human rights of the prisoner. The Proposed Regulations also balance the safety and security of the prisoner with the prisoner's right to privacy. The following requirements of the Proposed Regulations aim at achieving these balances:

(a) at least two prison officers must be present during a strip search, but, subject to this requirement, the number of prison officers present should be kept to the minimum required to ensure the safety of the prison officers and prisoner;

(b) strip searches can only be conducted in the limited circumstances provided for in the Regulations;

(c) the search must be conducted as expeditiously as possible to minimise the impact on the prisoner's dignity and self-respect, avoiding any unnecessary force;

(d) a search must be undertaken in a private place or an area which provides reasonable privacy for the prisoner and is only in the presence or sight of any person necessary to ensure the safety of prison officers and the prisoner;

(e) the search must not involve the touching of the prisoner's body, except where reasonable force is necessary to compel the prisoner to comply with an order of a prison officer;

(f) the prisoner must be allowed to dress in private once the search is completed, and if clothing is seized the prisoner must be provided with appropriate clothing to wear; and

(g) a prisoner is not to be searched by a person of the opposite sex unless the search is urgently required and a person of the same sex is unavailable to conduct the search.[67]

126. All strip searches must be recorded in a register maintained by the Governor containing the information prescribed in the regulations.[68] This is not a requirement of the Current Regulations and has been included to improve transparency and accountability in respect of strip searches.

(b) Searches of persons other than prisoners

127. The Proposed Regulations are substantially similar to the Current Regulation in respect of searches of persons other than prisoners. However, there are some amendments which attempt to bring the practice of strip searching visitors in line with the Victorian Charter.

128. The Proposed Regulations provide explicit examples of the consequences of refusing a search when required to do so.[69] The procedural requirements for carrying out a strip search are also defined more clearly in addition to the inclusion of measures to ensure dignity and privacy during a strip search.[70]

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67 Corrections Regulations Exposure Draft 2009 (Vic), r 69.

68 Corrections Regulations Exposure Draft 2009 (Vic), r 69(7).

69 Corrections Regulations Exposure Draft 2009 (Vic), r 71(1)(d).

70 Corrections Regulations Exposure Draft 2009 (Vic), r 71(7).

(c) Seizure

129. Specific provision is made in the Proposed Regulations for dealing with articles or substances that have been seized. The General Manager must keep a register of all articles or substances seized in prison, and must include certain details including the name of the person from whom it was seized, contact details of the owner (if known), the time and date of the seizure and the name of the prison officer involved. Owing to the particular safety issues relating to seized firearms, explosive substances or prohibited drugs, these articles must be given to a member of the police force as soon as possible. Aside from this requirement, the General Manager must determine which of the prescribed methods of dealing with the seized article is appropriate. These prescribed methods include retention, disposal or return of the article or storage of the article as part of the property of the prisoner.

8.2 Relevance of the Victorian Charter

130. The practice of searching will almost always engage the right to privacy and, in some circumstances (particularly in relation to strip searching), engage other rights such the prohibition on inhuman or degrading treatment, the right to humane treatment in detention and the right to liberty and security of person. In the matter of *R v Benbrika*,[71] Bongiorno J was of the view that the practice of searching may also, in some circumstances, engage the right to a fair trial.

8.3 International and Comparative Jurisprudence

131. Article 3 of the European Convention, as with section 10 of the Victorian Charter, is designed to protect the physical integrity of person. European courts have interpreted Article 3 of the European Convention to protect against the infliction of pain or other acts that cause severe mental suffering. The HRLRC notes that, under international law, the right to protection against inhuman or degrading treatment is an absolute right and is not subject to exceptions. In the context of prisoners and body searches, regardless of the past or future activities of the individual, however undesirable, a prisoner is entitled to be treated in a manner which upholds the right to protection against inhuman or degrading treatment or punishment.

132. In some circumstances, body searches of prisoners have been considered to be degrading treatment under the European Convention. For *any* body search not to be contrary to the European Convention, it must be justified for reasons of security and be conducted in a manner which preserves the dignity of the person.

133. Strip searches are only permissible where 'absolutely necessary' and where there are 'serious reasons' to suspect that a prisoner is concealing contraband.[72]

134. International law is also clear on the requirement for each prison to have a clear and detailed set of procedures which described the circumstances in which a search should be carried out, the methods to be used and the frequency of searches. The procedures should be designed equally to prevent escape and the entry of contraband and to also protect the dignity of prisoners and their visitors.

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71 *(Ruling No 20)* [2008] VSC 80 (Unreported, Supreme Court of Victoria, Bongiorno J, 20 March 2008).

72 See *Frerot v France* [2007] ECHR 70204/01 (12 June 2007).

135. The HRLRC acknowledges that both the Current and Proposed Regulations mirror this language by requiring that 'the search [be] conducted...with regard to the decency and self-respect of the prisoner searched'[73] and that the strip search '...minimise the impact on the prisoner's dignity and self-respect'.[74] However, the HRLRC is concerned that the current legislative provisions and practices often fail in practice. While there are clear instructions under the regulations and internal policy and procedure manuals for conducting search and seizure, a recent report by the Victorian Ombudsman has expressed concerns that staff do not always comply with these.[75]

8.4 The effects of strip searching

(a) Female prisoners

136. Strip searching has a particular impact on female prisoners. Between 40 and 89 per cent of any female prison population are victims and survivors of sexual or physical violence and abuse.[76] The practice of strip searching can replicate previous experiences of abuse and consequent trauma.[77] Strip searching is also reported by many women to be an experience akin to rape.[78] In many instances, women prisoners may forego visits from family or external medical treatment in order to reduce the number of searches.[79] The Anti-Discrimination Commission in Queensland has explained the impact on women, particularly women who have been sexually abused in the past, of strip searching in the following terms:

> However, for a woman who has been sexually abused, strip-searching can be more than a humiliating and undignified experience. In some instances, it can re-traumatise women who have already been greatly traumatised by childhood or adult sexual abuse. The vast majority of female prisoners who spoke to the ADCQ said strip-searching diminished their self-esteem as human beings and greatly emphasised feelings of vulnerability and worthlessness. Strip searching can greatly undermine the best attempts being made by prison authorities to

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73 Corrections Regulations 1998 (Vic), r 62(2).

74 Corrections Regulations Exposure Draft 2009 (Vic), r 69(4).

75 Report of the Victorian Ombudsman, *Investigation into contraband entering a prison and related issues* (June 2008).

76 See, eg, B A Hockings et al, Department of Corrective Services, *Queensland Women Prisoners' Health Survey* (2002) 52-3; Barbara Denton, *Dealing: Women in the Drug Economy* (2001); Department of Justice, Western Australia, *Profile of Women in Prison* (2002); D Kilroy, 'When Will You See the Real Us?' Women in Prison', (2001) *Women in Prison Journal* 39. 'Sexual assault' figures here do not include strip searches.

77 Federation of Community Legal Centres and Victorian Council of Social Service, *Request for a Systemic Review of Discrimination against Women in Victorian Prisons* (2005), available at http://www.vals.org.au/news/submissions/33%20ExecutiveSummaryFinal%20Discrimination%20against%20women%20in%20prison.pdf.

78 A Bogdanic, *Strip-searching of women in Queensland prisons*, Submitted in partial fulfilment of the requirements for the degree of Bachelor of Arts with Honours in Criminology and Criminal Justice, School of Political and Social Inquiry, Monash University, October 2007, page 3.

79 Anti-Discrimination Commission Queensland, *Women in Prison: A Report by the Anti-Discrimination Commission Queensland* (2006) 52-3; Amnesty International, *'Not Part of My Sentence': Violations of Human Rights of Women in Custody* (1999) 24-5.

> rehabilitate women prisoners, through programs and counselling to rebuild self-esteem, cognitive and assertiveness skills.[80]

137. Strip searching, while intended to ensure prison safety and protect prisoners from access to drugs, may have the unintended effect of intensifying drug problems. It is reported that just as 'victims of rape may turn to alcohol and drug use following the incident ...so [too] may women in prisons turn to illicit drugs as a way of blocking out the memory of being strip-searched and thus regain a degree of control over their thoughts and feelings.'[81]

138. Further, the effectiveness of strip searching in confiscating contraband, not only in relation to women but also men, is also questionable. At the Dame Phyllis Frost Centre, 18,889 strip searches were conducted on a prison population of 203 within a 12-month period between 2001 and 2002. This represents an average of 93 strip searches per prisoner. Only one item of 'contraband' was found during that time.[82] The prison has since conducted a pilot program aimed at reducing strip searches on women prisoners with results finding no negative trends in terms of positive urine drug tests or contraband seizures.

(b) Strip searching deters family contact

139. Families and friends of prisoners are often deterred from visiting prisons once they realise the consequences for the prisoner they visit, in addition to the possibility of being strip searched themselves. The practice of strip searching deters family visits, and consequently undermines any support network and ties a prisoner may have to the outside world, further undermining their rehabilitation. This potentially enlivens the right to protection of families and children enshrined in section 17 of the Victorian Charter.

140. The Queensland Anti-Discrimination Commission reported that:

> 'A number of women, including those serving long sentences, told the [Anti-Discrimination Commission Queensland] they elected not to have contact visits at all because of their strong objections to being strip-searched. This is almost an impossible choice for women with children, who, in their attempts to maintain their relationships with their families, must have contact visits.'[83]

141. While the need to search visitors in some circumstances is recognised, the procedures for conducting such search must acknowledge that visitors are not themselves prisoners and that the obligation to protect the security of the prison has to be balanced against the right of visitors to their personal privacy, dignity and access to family and friends. Although in some

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80 Anti-Discrimination Commission Queensland (ADCQ), *Women in Prison: a report by the Anti-Discrimination Commission Queensland* (Brisbane, March 2006) at http://www.adcq.qld.gov.au/pubs/WIP_report.pdf pp. 72-73).

81 A Bogdanic, *Strip-searching of women in Queensland prisons*, Submitted in partial fulfilment of the requirements for the degree of Bachelor of Arts with Honours in Criminology and Criminal Justice, School of Political and Social Inquiry, Monash University, October 2007, page 67.

82 Study carried out by the Federation of Community Legal Centres as part of the Victorian Human Rights Charter Consultation in 2005.

83 Anti-Discrimination Commission Queensland (ADCQ), *Women in Prison: a report by the Anti-Discrimination Commission Queensland* (Brisbane, March 2006) at http://www.adcq.qld.gov.au/pubs/WIP_report.pdf p.73.

circumstances it may be necessary to search prisoners and visitors before and after visits, there will often exist means that impose a far less restrictive limitation on rights.[84]

(c) Fair Trial

142. As referred to above, in *Benbrika*, Bongiorno J held that for the relevant prisoners to have a fair trial, they should no longer be strip searched in any situation where they had previously been under constant supervision or in secure areas (no contraband was found on any of the prisoners over this period).[85] In that case, prisoners on remand had been subjected to twice daily strip searching for a period of over two years. A psychiatrist gave evidence that the search made the prisoners feel degraded and humiliated and that in combination with other factors, an ordinary person would experience significant psychological and emotional difficulties, including impairment on the ability to concentrate on the legal proceedings.[86]

8.5 Conclusion and Recommendations

143. The HRLRC acknowledges that search, seizure and testing regulation is intended to ensure the operation of safe and secure prisons and exists to prevent the entry and availability of contraband in prison facilities. It is understood that the availability of contraband contributes to a weakening of good governance within a prison and undermines the aims of making a prison environment safe and secure.[87]

144. While the HRLRC acknowledges that many of the provisions of the Proposed Regulations relating to searching have been improved, we remain concerned that the regulations remain unacceptably arbitrary. In particular, the provisions of the Proposed Regulations are not linked to any suspicion of carrying contraband, and strip searching may be carried out on all prisoners. Such a practice is clearly arbitrary and raises serious concerns in relation to compliance with the Victorian Charter because there is no requirement that searches be conducted in a manner that represents a permissible limitation on human rights.

145. The HRLRC strongly considers that it is not justifiable to conduct strip searches under the guise of a blanket need for 'security', as there are other measures to achieve the same outcome. However, the Proposed Regulations do not require prison officers to seek alternatives, nor do they balance security concerns with the potential harm caused by the search.

146. In this respect, and as referred to above, the HRLRC also notes that the practice of strip searching is considered to be an ineffective tool to discover contraband. This demonstrates that alternative measures are clearly required to achieve the legitimate aim of ensuring the good operation and security of the prison.

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84 A Coyle (2002) *A Human Rights Approach to Prison Management - Handbook for Prison Staff* , International Centre for Prison Studies, United Kingdom, page 99.

85: *R v Benbrika (Ruling No 20)* [2008] VSC 80 (Unreported, Supreme Court of Victoria, Bongiorno J, 20 March 2008) [36], [100].

86 *R v Benbrika (Ruling No 20)* [2008] VSC 80 (Unreported, Supreme Court of Victoria, Bongiorno J, 20 March 2008) [58].

87 The Report of the Victorian Ombudsman, *Investigation into contraband entering a prison and related issues,* June 2008.

147. The HRLRC is also extremely concerned about the practice of prison visitors being strip searched.

148. The HRLRC considers that for the Proposed Regulations governing search and seizure practices to be consistent with the Victorian Charter, the power to search should be subject to the following:

(a) strip searches should only be conducted under a reasonable belief that the prisoner is carrying contraband or a reasonable suspicion that prison security or safety will be compromised;

(b) a strip search must be reasonable, necessary and proportionate to the perceived security or safety threat held under a reasonable belief;

(c) searches should not be conducted as a routine practice, but should be conducted only when necessary; and

(d) prison officers should be required to consider alternative means to strip searching where appropriate.

9. Definitions

Corrections Act means the *Corrections Act 1986* (Vic).

Current Regulations means the *Corrections Regulations 1998* (Vic).

European Convention means the *European Convention on Human Rights*.

European Court means the European Court of Human Rights.

Human Rights Committee means the United Nations Human Rights Committee.

ICCPR means the *International Covenant on Civil and Political Rights*.

Prison Act means the *Prison Act 1952*.

Prison Rules means the *Prison Rules 1999*.

Proposed Regulations means the Corrections Regulations Exposure Draft 2009 (Vic).

Queensland Act means the *Corrective Services Act 2006* (Qld).

Standard Guidelines means the *Standard Guidelines for Corrections in Australia* (2004).

Standard Minimum Rules means the United Nations *Standard Minimum Rules for the Treatment of Prisoners 1955*.

Victorian Charter means the *Charter of Human Rights and Responsibilities Act 2006* (Vic).