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**Submission to the
Scrutiny of Acts and Regulations Committee
on the
Corrections Amendment Bill 2008 (Vic)**

11 August 2008



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About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre (**HRLRC**) is the first national specialist human rights law centre in Australia. It aims to promote human rights in Australia – particularly the human rights of people who are disadvantaged or living in poverty – through the practice of law.

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 HRLRC would like to thank Charandev Singh for his valuable assistance with the preparation of this submission.

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1. Executive Summary

1.1 Introduction

1. This submission is made by the Human Rights Law Resource Centre Ltd (**HRLRC**). The HRLRC is a specialist community legal service and aims to promote and protect human rights in Australia through case work, litigation, policy analysis and development, and legal education.
2. This submission examines and discusses the Corrections Amendment Bill 2008 (Vic) (**Bill**) and its impact on human rights.
3. Human rights belong to all people by virtue of their humanity. As the Victorian Attorney-General Rob Hulls states in his second reading speech of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**):

Whether you are a man or a woman, young or old, whether you live in Mildura, Moe, Melton or Mordialloc, whether you are living with a disability, whatever your income or your background or your religion -- this bill is about those rights and values that belong to all of us by virtue of our shared humanity.¹

4. The Centre urges the Scrutiny of Acts and Regulations Committee to be mindful that 'people do not forfeit their human rights when they are convicted of a criminal offence'.² Rather, the Victorian government has an obligation to protect the human rights of prisoners under their care and to ensure that prisoners are not mistreated while they are in detention. If the Bill were enacted it would seriously undermine the human rights of prisoners.
5. Section 1 of the Bill indicates that its purpose is:

To provide for the creation of prisoner compensation quarantine funds for the purpose of paying into those funds certain damages awarded to prisoners and to provide for the payments out of those funds of certain amounts recoverable by victims and others from prisoners.
6. The Centre has grave concerns about the impact that the Bill would have on the following human rights. The rights listed below are protected under the Charter at the sections indicated.

¹ *Charter of Human Rights and Responsibilities Bill Second Reading*, Legislative Assembly, 4 May 2006 (Rob Hulls) 1289.

² New Zealand Human Rights Commission, *Prisoners and Victims claims Bill doesn't do Prisoners or Victims Justice*, <http://www.hrc.co.nz/home/hrc/newsandissues/prisonersandvictimsclaimsbill.php>, accessed on 6 August 2008.

- (a) The right to recognition and equality before the law (section 8).
 - (b) The right to privacy and reputation (section 13).
 - (c) The right to protection of families and children (section 17).
 - (d) Property rights (section 20).
 - (e) The right to humane treatment when deprived of liberty (section 22).
 - (f) The right to fair hearing, including the right to equal access to courts (section 24).
 - (g) The right to an effective remedy (which is fundamental to the protection of all human rights).
7. The interaction of these rights with the Bill is considered in further detail below in section 3.
8. The Centre also questions the effectiveness of the Bill, as it seems more likely to deter prisoners from claiming compensation (regardless of the legitimacy of their claim), rather than to assist victims of crime to recover compensation.

1.2 Recommendations

9. The Centre considers the premise of the Bill to be incompatible with the human rights outlined above in paragraph 6, which are rights that the Victorian government commendably seeks to protect and promote in the Charter. As such, the Centre recommends that the Bill be withdrawn in its entirety.

2. The Corrections Amendment Bill 2008 (Vic)

2.1 Introduction

10. The second reading speech states that the substantive effect of the Bill would be to:
- quarantine damages and awards payments to prisoners received as a result of a successful claim against the state of Victoria or a private prison operator;
 - provide for the public notification of successful claims by prisoners to enable victims of crime and others to consider civil action to recover funds;
 - provide for the registration of victims to allow the disclosure of relevant information;
 - provide for the payment out of the fund to victims and creditors.³

2.2 Who the Bill applies to

11. The Bill applies to all prisoners, regardless of their crime or whether or not there are any pending claims for compensation against them and regardless of whether they bring their claim while in custody or after their release.⁴ The second reading speech confirms that:
- The scheme captures any payment of damages or an award following a successful claim made by a prisoner at common law or under statute. The types of claims that may be made by prisoners or former prisoners include allegations of negligence, breach of contract, breach of statutory duty and claims based on a statute such as antidiscrimination matters and breaches of privacy.⁵

2.3 Quarantine period

12. The quarantine period is for 12 months, so a prisoner would not be able to access any payment of compensation to them by the State or a private prison operator for a period of at least 12 months after the payment is made.

2.4 Payments that are affected by the Bill

13. The Minister for Corrections states that
- the Bill will not affect damages payable in relation to medical costs and the cost of future care. In addition, the scheme does not capture the payment of legal costs awarded against the state of Victoria or a private prison operator.⁶

³ *Corrections Amendment Bill Second Reading*, Legislative Assembly, 31 July 2008 (Bob Cameron), 2894.

⁴ *Ibid*. See also *Corrections Amendment Bill 2008 (Vic) (Bill)*, ss 104O and 104P.

⁵ *Corrections Amendment Bill Second Reading*, Legislative Assembly, 31 July 2008 (Bob Cameron), 2894.

⁶ *Ibid*, 2895.

14. However, the Bill only excludes an amount that is '*awarded or agreed* in respect of existing and future medical costs and legal costs'⁷ (emphasis added). As with all civil litigation, there are unlikely to be many circumstances where the portion of damages paid to a successful claimant in respect of their medical and legal costs reflects the true value of these costs. As a result, even if a claimant is successful, the amount of damages that they can immediately access under the scheme proposed by the Bill is likely to be insufficient to pay their legal and medical fees.
15. While prisoners are already disadvantaged by this aspect of the Bill, section 104U(2)(b) of the Bill goes a step further. This provision requires a court to specify the portions of the total amount payable to a prisoner which represent the amounts, if any, of the prisoner's medical and legal costs. In apportioning these amounts, the court must have regard to:
- (i) The claim; and
 - (ii) The loss or damage suffered by the prisoner; and
 - (iii) The need to ensure as far as possible that victims are not deprived of an opportunity to enforce a successful claim for damages against a prisoner.⁸
16. Section 104U(2)(b)(iii) invites the court to reduce the amount of compensation that is ultimately payable to a prisoner, who may themselves be a victim of abuse, by reference to a matter that has no connection to the prisoner's claim, and to a matter that should have absolutely no connection to the treatment of the prisoner while they are in prison or thereafter.

2.5 Disclosure permitted by the Bill

17. The Bill proposes to publicly disclose the following personal information about prisoners who have been paid an award of damages.
- (a) The fact that an award of damages has been made.⁹
 - (b) The fact that the individual has made a claim against the State.¹⁰
 - (c) The name of the prisoner and the fact that they are a prisoner.¹¹

⁷ Bill, s 104T(1).

⁸ Bill, s 104U.

⁹ Bill, s 104Y(2)(a).

¹⁰ Bill, s 104Y(2)(a).

18. This information would be posted in both the Government Gazette, a daily newspaper circulating in Victoria, a daily newspaper circulating in Australia and, at the discretion of the Secretary, on the internet.¹²
19. Of great concern, the Bill also allows for the Secretary to disclose
any other information that the Secretary from time to time believes will assist the victim to make an informed decision as to whether to bring proceedings against the prisoner.¹³
20. The information outlined in paragraphs 17 and 19 will be disclosed even if the prisoner and the State reach an out of court settlement.¹⁴ As a result the Bill effectively denies prisoners the right to reach a confidential settlement of any civil claim against the State.

¹¹ *Bill*, s 104Y(2)(b).

¹² *Bill*, s 104Y(3).

¹³ *Bill*, s 104ZA(2)(d).

¹⁴ *Bill*, ss 104O, 104V and 104ZB.

3. Case Studies

3.1 Introduction

21. Below are two case studies which the Centre asks that the Committee bear in mind when considering the Bill and these submissions.

Case study 1

SH grew up with estranged parents, placement in institutionalised care, treatment by violence and she suffered ill health, including depression.

SH encountered trouble with other prisoners, and on 13 August 2005 she was violently attacked. SH was in her cell when a fellow prisoner grabbed her hair with one hand and her throat with another and pushed her backwards. SH's head hit a hard object and she was rendered unconscious. On regaining consciousness, SH discovered that she was suffering profuse anal bleeding and pain. She realised that a toilet brush had been inserted by her attacker into her anus and rectum. She was terrified, shocked and disgusted.

Prison officers heard the commotion and attended the cell, but the other prisoners left and SH told the officers that nothing had happened. Although suffering heavy anal bleeding, SH did not seek medical attention for fear of reprisals. SH was warned that she would be stabbed if she spoke about the incident. The day after the incident, SH was still bleeding and saw the psychiatric nurse. SH was so hysterical that she could not tell the nurse about the assault. SH was diagnosed with broken ribs and prescribed painkillers.

The sexual and physical assaults were reported by a fellow prisoner to prison staff who referred the matter to the Victoria Police. SH was too terrified to tell anyone about the assault or to pursue a complaint and the rape and related assaults were not further investigated. SH also did not tell her husband about the assault because she did not feel that he would cope with knowing about the assault.

Eventually, in November 2005, SH told the psychiatric nurse about the assault and she was hospitalised for about six weeks. Upon being discharged, SH was diagnosed as suffering post traumatic stress disorder with symptoms of distress, nightmares, panic attacks, uncontrollable shaking and incontinence.

In its judgment considering the sentencing of SH, the Supreme Court of Victoria was particularly critical of the lack of adequate medical facilities and psychological care made available to SH while she was in prison. The Court also noted that the assault on SH should be of considerable concern to the corrective authorities.

For further details of this case study, see [R v SH \[2006\] VSCA 83 \(20 April 2006\)](#).

Case study 2

A young and acutely mentally ill woman at acute risk of suicide and self-harm was held within a cell in the separation unit of a corrections facility. She was allegedly sexually abused by one male prison officer within her cell and then ordered by a second prison officer to go to the supervisor's office where she was allegedly raped twice.

She was subsequently transferred to the Thomas Embling Hospital for acute psychiatric care and disclosed an allegation that she had been raped and sexually abused by two prison officers.

The woman became pregnant in the course of the alleged rape and DNA testing confirmed the paternity of one of the alleged assailants.

The alleged assailant was committed to trial in the county Court but the DPP subsequently entered a nolle prosequi owing to the extreme vulnerability of the victim.

For further details of this case study, see [State of Victoria & Anor v Nine Network \[2007\] VSC 431 \(29 November 2007\)](#).

Prospective impacts of the Bill on case studies 1 & 2

- If the claimants were successful in a claim for breach of duty of care against the State or the private prison operator they would have no assurance of receiving any damages over \$10,000 for very significant physical and psychiatric injuries, even though the claimants are prima facie victims of rape and other serious offences.
- This fact is likely to be a significant disincentive to pursuing a claim, despite the profound and debilitating impact of the crimes committed against the prisoners and the potential negligence of Corrections Victoria.
- If the claimants were awarded compensation, this fact and their names would be publicised. As a result, their assailants, associates of their assailants and others who may have acted in common purpose would become aware that the claimants had pursued complaints and remedies. The claimants are consequently placed at risk of imminent severe harm whether they remain in custody or return to the community.
- Furthermore, the claimants' families may also be at risk due to the publication of their names and the award of compensation.
- The factors militating against pursuit of civil remedies reinforces the effective impunity and lack of public scrutiny of officers of Corrections Victoria as well the perpetrators of the rape and other assaults.

4. Human Rights Engaged by the Bill

4.1 Introduction

22. As indicated earlier in this submission, the Centre considers the Bill to be incompatible with the following human rights, which are discussed in greater detail below.

- (a) The right to recognition and equality before the law (section 8).
- (b) The right to privacy and reputation (section 13).
- (c) The right to protection of families and children (section 17).
- (d) Property rights (section 20).
- (e) The right to humane treatment when deprived of liberty (section 22).
- (f) The right to fair hearing, including the right to equal access to courts (section 24).
- (g) The right to an effective remedy (which is fundamental to the protection of all human rights).

4.2 Recognition and Equality Before the Law

(a) *The Content of the Right*

23. Under section 8(2) of the Charter, every person has the right to enjoy his or her human rights without discrimination. Section 8(3) of the Charter further provides that every person is equal before the law, is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.¹⁵

24. The right to equality and freedom from discrimination is an integral component of the international human rights normative framework and is entrenched in both the *International Covenant on Civil and Political Rights*¹⁶ (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights*¹⁷ (ICESCR).¹⁸ Having regard to comparative and

¹⁵ Section 8(3), modelled on art 26 of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). For HRC jurisprudence on the right to non-discrimination and equality before the law, see HRC, *General Comment 18: Non-Discrimination* (1989).

¹⁶ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹⁷ Opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976).

international law on the right to equality and non-discrimination, s 8(3) imposes an immediate obligation on the government and public authorities to ensure that legislation, policies and programs prohibit discrimination and are themselves non-discriminatory.

25. Further, pursuant to ss 8(2) and (4), read together, there is a further substantive obligation on the government and public authorities to take positive steps and adopt special measures to address the needs of people experiencing disadvantage so as to enable them to realise all of their rights and freedoms.¹⁹ Having regard to international jurisprudence, these steps should include legislative, educative, financial, social and administrative measures that are developed and implemented using the maximum of available governmental resources.²⁰

(b) *Impact of the Bill on the Right to Equality*

26. The Centre recognises that the definition of 'discrimination' in the Charter has the same meaning as provided in the *Equal Opportunity Act 1995* (Vic) (**EO Act**).²¹ The Centre also acknowledges that the status of being a prisoner is not a prohibited ground of discrimination under the EO Act. However, this does not mean that the Bill is compatible with the right to equality under the Charter.

27. The Bill fails to comply with the rights set out in ss 8(2) and 8(3) because it would:
- (a) significantly diminish the right of prisoners to enjoy their human rights free from discrimination;
 - (b) have the effect of providing prisoners with far less protection against discrimination than other individuals in the community enjoy; and
 - (c) reinforce structural inequalities, thereby having a detrimental effect on the substantive equality of all people in Victoria.

¹⁸ CESCR, *Substantive Issues Arising in the Implementation of the International Covenant in Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/C.12/2001/10 (2001) 3. See also *ICCPR*, above n 16, arts 2(1), 26; *ICESCR* art 2(2).

¹⁹ HRC, *General Comment 18*, above n 15. See also *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252, 278; *Lovelace v Ontario* [2000] 1 SCR 950.

²⁰ CESCR, *Substantive Issues Arising in the Implementation of the International Covenant in Economic, Social and Cultural Rights*, above n 18, [11]. See also *Eldridge v British Columbia (Attorney General)* [1997] 2 SCR 624.

²¹ The accompanying note to the definition of discrimination in s 3(1) of the *Charter* notes that s 6 of the *Equal Opportunity Act 1995* (Vic) lists a number of attributes in respect of which discrimination is prohibited. Some of these attributes are listed in the note, however this list is not exhaustive. Therefore, it is necessary to refer to the *Equal Opportunity Act 1995* (Vic) when interpreting the meaning of discrimination in the *Charter*.

28. As prisoners are totally dependent on the State to ensure their wellbeing, prisoners who suffer mistreatment in detention are among the most vulnerable members of society.²²
29. It is the opinion of the Centre that, if enacted, the Bill would deter prisoners who are victims of discrimination, vilification and sexual harassment from raising complaints against the State. This is because the Bill will result in the infringement of a complainant's right to privacy²³ and property,²⁴ and may result in the complainant being unable to recover an amount of money that adequately compensates their medical and legal costs, even if their claim is successful, due to both the apportionment of compensation requirements, discussed earlier in paragraphs 14 to 16, as well as the likely impact that the Bill would have on the cost of litigation, as discussed below in section 4.7(d). Further, under the Bill prisoners who have suffered a wrong at the hands of the State must then suffer the second indignity of having any compensation that may be payable to them by the State confiscated by the State, even if this is for a nominal period of 12 months.
30. Except for cases involving the most serious injuries for which costly medical treatment is required or cases involving victims who seek public recognition of the wrong that has been committed against them, there would be little incentive for many victims of discrimination and sexual harassment to lodge a formal complaint. As a result, the Bill significantly diminishes the protection of prisoners against discrimination and harassment.
31. At worst, the Bill may have the affect of sanctioning discrimination against prisoners who have potential claims pending against them. Prisoners in this category are unlikely to commence legal action against the perpetrators of their mistreatment because they will not receive any compensation awarded and are likely to be left out of pocket at the end of the litigation process. Further, the Bill creates a direct nexus between the mistreatment of the prisoner and the compensation of their victim, which may encourage prisoner mistreatment. As the Chief Commissioner of the New Zealand Human Rights Commission, Rosslyn Noonan has stated,

²² See, eg, A Grunseit, S Forell & E McCarron, *Taking justice into custody: the legal needs of prisoners*, Law and Justice Foundation of NSW, Sydney, 2008, [28]. This report noted that rates of major mental illnesses among Australian prisoners are three to five times higher than those in the general population [23], 'a significant minority [of inmates] do not speak, understand or write English' [20], 60% of women prisoners and 37% of men have reported that they were sexually abused before age 16 [25], and in 2001 60% of inmates 'were not functionally literate or numerate' [26].

²³ See section 4.3.

²⁴ See section 4.5.

[p]eople are sent to prison as punishment not for punishment. Their punishment is the deprivation of liberty and they should not be subjected to behaviour that would be criminal outside a prison.²⁵

32. In addition, it is the opinion of the Centre that the Bill would further entrench existing structural discrimination of particularly vulnerable minority groups. For example, prisoners with impairments and prisoners of particular cultural, religious, racial or linguistic backgrounds may already come across significant barriers preventing the lodgement of a complaint regarding discriminatory conduct. The Bill will impose an additional hurdle from such prisoners to overcome, so its worst impact is likely to be on the most vulnerable and disadvantaged prisoners. This impact cannot be underestimated, as a recent report by the Law and Justice Foundation of NSW has found that 'prisoners tend to come from, and return to, disadvantaged backgrounds'.

Aboriginal people, people with intellectual disability, alcohol and other drug dependence, mental health issues, histories of violence and abuse, histories of state care and/or parental imprisonment, interrupted or limited education and high unemployment are over-represented among prison inmates, when compared to the NSW general population. It could be expected that having any one of these characteristics may add to the complexity of accessing legal services and/or addressing legal need. However, the data reported...suggest[s] that many prisoners may in fact face multiple and interrelated forms of disadvantage, adding to the complexity of addressing their needs.²⁶

33. The Bill will again target those individuals and communities that are disproportionately imprisoned.²⁷

²⁵ New Zealand Human Rights Commission, above n 2.

²⁶ A Grunseit, S Forell & E McCarron, above n 22, [28]. See also generally above fn 22.

²⁷ Over the ten year period from 1995 to 2004, Indigenous people held in Victorian prisons rose from 128 to 186 (up 45 per cent) while non- Indigenous prisoners rose by 46 per cent. Indigenous prisoners made up 5.1 per cent of all prisoners in 2004, slightly less than the figure of 5.4 per cent ten years earlier. The over-representation of Indigenous people in Victorian prisons makes them twelve times more likely to be held in prisons than non-Indigenous people. Of the number of prisoners received into prison, Indigenous prisoners represent 6 per cent and are more likely to be on remand than non-Indigenous prisoners. The proportion of Indigenous prisoners on remand rose from 50 per cent in 1999-00 to 61 per cent in 2002-03. See Victorian Department of Justice, *Victorian Implementation Review of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody – Volume 2 Statistical Information* (October 2005), 100.

A recent study of the prevalence of mental disorders within the population of imprisoned women in Victoria have confirmed that up to 84% of women interviewed met the criteria for a mental disorder (including harmful/abusive substance dependence). The most prevalent disorders amongst imprisoned women included: 'drug use disorder (57%), major depression (44%), Post-traumatic stress disorder (36%), and personality disorders. Almost a quarter (24%) of respondents were identified as a 'case' on the psychosis screen.' The

34. The Centre considers the Bill to be a retrograde step in the government's endeavour to eliminate and protect people from discrimination and, as such, it fails to comply with the requirements of s 8 of the Charter. If the government passed this Bill, it would be failing its obligation to ensure that legislation, policies and programs prohibit discrimination and are themselves non-discriminatory.

4.3 Privacy and Reputation

(a) The Content of the Right

35. Section 13 of the *Charter* establishes that a person has the right not to have their privacy, family or correspondence unlawfully or arbitrarily interfered with, and the right not to have their reputation unlawfully attacked.²⁸
36. The HRC has stated in relation to the parallel right under the ICCPR that this right is a guarantee against interferences and attacks, whether they emanate from state authorities or from natural or legal persons. Further, the HRC has stated that the prohibition against 'arbitrariness' is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the *ICCPR*, and should be, in any event, reasonable and proportionate in the particular circumstances.²⁹
37. The right to privacy and respect for private life under art 8 of the *European Convention on Human Rights* has been considered extensively by the European Court of Human Rights. The right to 'private life' is a broad right which includes a right to physical and psychological

majority of imprisoned women suffer multiple disabilities. Women leaving prison have had a 27 times higher rate of death (post-release mortality) than women in the community.

The level and intensity of mental and physical illness, disability and co-morbidity amongst imprisoned men far outstrips that of men in the general community. Up to 21.4% of imprisoned men have been identified as a suicide risk. Equivalent and comparable assessments of the prevalence of mental disorders indicated that up to 50% of imprisoned men might suffer such disorders including a rate of psychosis 30 times the rate in the general community. Men leaving prison in Victoria have had a post release death rate ten times higher than men in the community. See C Tye and P Mullen, *Mental disorders in female prisoners*, (2006) 40 *Australian and New Zealand Journal of Psychiatry* 266; A Graham, *Post-prison Mortality Unnatural Death Among People Released from Victorian Prisons Between January 1990 and December 1999*, *Australian and New Zealand Journal of Criminology*, Vol 36, No.1 (2003), 100; P Kirby, *Report of the Independent Investigation into the Management and Operations of Victoria's Private Prisons*, Department of Justice, Melbourne, October 2000, 12 and E Wynhausen, 'Jailed in Body and Mind', *The Australian*, 28 August 2006.

²⁸ Section 13 is modelled on art 17 of the *ICCPR*, above n 16.

²⁹ HRC, *General Comment No 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (1988) [4].

integrity.³⁰ Accordingly, the right to respect for private and family life, home and correspondence under art 8 of the *European Convention* has been considered to include:

- the right to have personal and health information kept private and confidential;
- an obligation on the part of public authorities to ensure that any personal information they collect is necessary, secure and accurate;³¹
- the right to peaceful enjoyment of, and non-interference with, the home;
- the right to private and secure correspondence, including communication by letter, telephone, facsimile or email;³² and
- freedom from media intrusion.³³

(b) *Impact of the Bill on the right to privacy*

38. The Centre considers that the Bill would infringe the right to privacy of both prisoners and potentially others involved in civil claims. The publication of personal financial information about prisoners as well as the fact that the prisoner has made a claim, is an unreasonable interference with the enjoyment of their fundamental right to privacy and is incompatible with s 13 of the Charter.
39. The Centre notes the likely interaction of this right with the right to equality before the law and freedom from discrimination. Privacy is a major concern of many victims of discrimination, sexual harassment, vilification and mistreatment. Victims of these wrongs, who may have already suffered a breach to their bodily integrity as a result of the initial wrong, should not be subjected to a further breach of their privacy by publicising further information about their claim. It is particularly concerning that the second reading speech

³⁰ *Pretty v United Kingdom* (2002) 35 EHRR 1, [61].

³¹ *Norman Baker MP v Secretary of State for the Home Department* [2001] UKHRR 1275; *Gunn-Russo v Nugent Care Society and Secretary of State for Health* [2002] 1 FLR 1.

³² See, eg, *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 where the Court held that a blanket policy of searching prisoners' cells, including opening letters from legal representatives, was a violation of the right to privacy. See also *Potter, Re Judicial Review* [2007] ScotCS CSOH 56 (20 March 2007) at http://www.bailii.org/scot/cases/ScotCS/2007/CSOH_56.html in which the Scottish Court of Sessions held that attaching a pre-recorded message to all outgoing telephone calls made by a prisoner, informing the person receiving the call that the call is coming from a prison, breached right to respect for family life and correspondence.

³³ See, eg, *CC v AB* [2006] EWHC 3083 (QB); *Douglas v Hello! Ltd* [2001] QB 967.

specifically identifies claims of a breach of privacy and discrimination as the types of claims that are captured by the Bill.³⁴

40. As indicated in the case studies discussed in section 3, publication of this information may also expose the claimant and their families to physical harm if the perpetrator or an associate of the perpetrator seeks retribution due to the claimant making a complaint.
41. The Centre is particularly concerned about the unrestricted discretion that the Bill affords the Secretary to disclose 'any other information', as discussed above in paragraph 19. The Bill provides no limitation on what this 'other information' may comprise, but it presumably include any information about the prisoner in question. The Centre notes that even if this provision of the Bill is passed into law, it enables the arbitrary disclosure of private information about an individual, which is potentially in breach of both the Charter and Australia's obligations under art 17 of the ICCPR.
42. The Bill also prevents prisoners from being able to reach a private out of court settlement, as discussed above in paragraph 20. The ability to come to a confidential agreement is an important right enjoyed by all Victorians involved in civil litigation. In many instances, it is the capacity to maintain confidentiality and privacy which is the incentive of either one or both of the parties to a dispute to settle the claim privately. The removal of this option results in both an invasion of privacy and a disincentive to prisoners to make a claim in the first place.

4.4 Protection of Families and Children

(a) Content of the Right

43. Section 17 of the Charter states that families are the fundamental group unit of society, and as such are entitled to protection by society and the state.³⁵ The term 'families' is intended to be interpreted broadly, so as to recognise the diversity of families living in Victoria and to afford all such families protection.³⁶

³⁴ *Corrections Amendment Bill Second Reading*, Legislative Assembly, 31 July 2008 (Bob Cameron), 2894. See also above at paragraph 11.

³⁵ The right of families to protection is modelled on art 23 of the *ICCPR*, above n 16.

³⁶ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 14.

44. The HRC has confirmed in General Comments 16 and 19 that it is not possible to give the concept of 'family' a standard definition, and has emphasised that protection should be given to any group of people regarded within a particular country or region as a 'family'.³⁷
45. The HRC has emphasised that protection of families should be carried out by society, and requires the development of necessary protections by social institutions.³⁸
46. Section 17 of the *Charter* also establishes the right of the child, without discrimination, to protection in his or her best interests. This provision is modelled on art 24(1) of the *ICCPR*. The HRC has also stated that all necessary measures should be taken 'ensure that children fully enjoy the other rights enunciated in the Covenant'.³⁹

(b) *Impact of the Bill on the Right to Protection of Families and Children*

47. As a result of the Bill, prisoners who make a successful claim against the State or a private prison would be unable to provide money from the compensation that they receive to their families and children. While the Centre has been unable to obtain recent statistics regarding the number of Victorian prisoners with children, the 2001 New South Wales Inmate Health Survey indicates that 49% of male inmates and 57% of female inmates reported that they had children under 16 years.⁴⁰
48. While compensation for prisoners may be eventually released from the quarantine fund, there are likely to be instances when the money is needed by the prisoner's family urgently in order to prevent the family from living in poverty. This is particularly significant when a prisoner's partner is a single parent caring for their children alone and on a single income. There may be other circumstances where the family of the prisoner has contributed to the costs of litigation and are left financially disadvantaged as a result of the Bill.
49. The Statement of Compatibility specifically refers to the Child Support Agency being able to access compensation paid to prisoners which is in the quarantine fund.⁴¹ Access to child support will not counter the disadvantageous impact of the Bill on families and children.

³⁷ HRC, *General Comment No 16*, above n 29, [5]; HRC, *General Comment No 19: Protection of the Family, the Right to Marriage and Equality of the Spouses* (1990) [2].

³⁸ HRC, *General Comment No 19*, above n 37, [3].

³⁹ *Ibid.*

⁴⁰ Butler, T. & Milner, L. 2003, *The 2001 New South Wales Inmate Health Survey*, NSW Corrections Health Service, 21.

⁴¹ *Corrections Amendment Bill Second Reading*, Legislative Assembly, 31 July 2008 (Bob Cameron), 2893.

Further, families should not be forced to go through the Family Court to secure voluntary financial assistance from relatives who are in prison.

4.5 Property Rights

(a) The Content of the Right

50. Section 20 of the Charter provides that a person must not to be deprived of property other than in accordance with law. This section has no direct equivalent in the ICCPR.⁴² However, the ICCPR does require States parties to the Covenant to respect and ensure to all individuals within their territories the rights recognised in the Covenant without any distinction, including as to property.⁴³

51. Although the term 'deprived' is not defined in the Charter, it is likely to include transfer, extinguishment, disposition, destruction or substantial lessening of value.

(b) Impact of the Bill on the right not to be deprived of property

52. The Centre considers the Bill to infringe the right of prisoners not to be deprived of property. The Centre considers the arbitrary deprivation of compensation payments from individuals for a period of at least 12 months to be more than a mere 'temporary seizure', as was suggested in the government's statement of compatibility.⁴⁴ Twelve months is an extended period of time, particularly if the prisoner has legal fees and medical costs to cover, which have not been adequately provided for in the apportionment process discussed above in paragraphs 14 to 16.
53. The Centre expresses its further concern about section 104W(2)(c) of the Bill, which enables money to be paid out of the prisoner compensation quarantine fund for the costs of administration of the fund. As the prisoner compensation quarantine fund scheme is a compulsory scheme, it is unreasonable to charge prisoners for the cost of the fund. Charging prisoners for the cost of the fund is of itself a deprivation of property that is in breach of section 20 of the Charter.

⁴² There are broadly equivalent provisions in the *European Convention on Human Rights* (first protocol, art 1) and the *South African Constitution* (s 25).

⁴³ *ICCPR*, above n 16, art 2(1).

⁴⁴ Compare with the *Corrections Amendment Bill Statement of Compatibility*, Legislative Assembly, 31 July 2008 (Bob Cameron), 66.

4.6 Humane Treatment When Deprived of Liberty

(a) *The content of the right*

54. The right to be treated humanely when deprived of liberty is recognised in s 22 of the Charter. Section 22 establishes the right of all persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person. This section is modelled on art 10 of the *ICCPR*, but has a wider scope in that it specifically refers to the right of persons who are detained but have not been convicted to humane treatment.⁴⁵
55. In relation to article 10 of the *ICCPR*, the following principles and legal instruments apply.
- The rights apply 'to any one deprived of liberty under the laws and authority of the State who is held in prisons, hospitals — particularly psychiatric hospitals — detention camps or correctional institutions or elsewhere'.⁴⁶ This is reflected in the wording of the *Charter*, noted above.⁴⁷
 - Prisoners must be accorded all of their civil and political rights, subject to the restrictions that are 'unavoidable in a closed environment'.⁴⁸ Similarly, Article 5 of the *UN Basic Principles for the Treatment of Prisoners*⁴⁹ provides that 'all prisoners shall retain their human rights and fundamental freedoms' except to the extent that a limitation is 'demonstrably justified by the fact of incarceration'.
 - Article 10 imposes a positive obligation on the State towards persons who are particularly vulnerable because of their status as persons deprived of liberty. In accordance with this article, persons deprived of their liberty may not be:
 - subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons.⁵⁰
 - The implementation of the right is not dependent on the material resources available to the state and the right must be enjoyed by all persons without any kind of distinction as to race, sex, etc.⁵¹

⁴⁵ There are broadly equivalent provisions in the *Human Rights Act 2004* (ACT) (s 19), *New Zealand Bill of Rights Act 1990* (s 22) and *South African Constitution* (s 35(2)(e)).

⁴⁶ HRC, *General Comment No 21 (Replaces General Comment 9) concerning Humane Treatment of Persons Deprived of Liberty* (1992) [2].

⁴⁷ The New Zealand Court of Appeal has held that detention includes not only confinement, but also extends to any 'substantial intrusion on personal liberty': *Police v Smith and Herewini* [1994] 2 NZLR 306.

⁴⁸ See also Human Rights Committee, *General Comment 21: Replaces General Comment 9 Concerning Humane Treatment of Persons Deprived of Liberty (Art 10)*, 153, UN Doc HRI/GEN/1/Rev.6 (2003).

⁴⁹ GA res 111, UN GAOR, 45th sess, 68th mtg, Supp No 49A, UN Doc A/Res/45/49 (1990).

⁵⁰ HRC, *General Comment No 21*, above n 46, [3].

- Article 10(3) provides, inter alia, that '[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation'. The HRC has emphasised that every penitentiary system must seek to realise that aim and must not be 'only retributory'.⁵² There is no equivalent provision in s 22 of the *Charter* but the Centre considers that that the same essential aim informs s 22.
- Article 60(1) of the *UN Standard Minimum Rules for the Treatment of Prisoners*⁵³ states that correctional services should 'seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings'.

56. In *Roach v Electoral Commissioner*⁵⁴ the High Court affirmed that prisoners do not give up their civil and political rights upon entering prison:

Prisoners who are citizens and members of the Australian community remain so. Their interest in, and duty to, their society and its governance survives incarceration.⁵⁵

(b) *Impact of the Bill on the right to humane treatment when deprived of liberty*

57. The Centre considers that the Bill will have an inhumane impact on prisoners. The Bill does not promote treatment of prisoners that is respectful of the inherent dignity of all human beings. The Bill involves the unreasonable restriction of numerous human rights (as outlined in this submission), which restrictions are not 'unavoidable in a closed environment'.⁵⁶ As a result, the Bill imposes an additional punishment to that which is intended for prisoners, being the deprivation of liberty, and diminishes the protection of the human rights of prisoners when compared to free persons.

⁵¹ Ibid [4].

⁵² Ibid [10].

⁵³ ESC Res 663C, UN ESCOR, 1st Annex, Supp 1, 11, UN Doc E/3048 (1957), as amended by ESC Res 2076, UN ESCOR, Supp 1, 35, UN Doc E/5988 (1977).

⁵⁴ [2007] HCA 43 (26 September 2007).

⁵⁵ Ibid, [84].

⁵⁶ HRC, General Comment No 21, above n 46, [3].

4.7 Fair Hearing

(a) *The content of the right*

58. The right to a 'fair hearing' is recognised in s 24 of the Charter. Section 24 applies to both persons charged with criminal offences⁵⁷ and persons who are party to a civil proceeding.⁵⁸ The right to a 'fair hearing' under s 24 of Charter is broadly similar to provisions in other jurisdictions, including art 14(1) of the *ICCPR*.⁵⁹
59. The concept of a fair hearing contains many elements and the standards against which a hearing is to be assessed in terms of fairness are interconnected. At the very least, the minimum basic elements of the right to a fair hearing can be said to consist of:
- equal access to, and equality before, the courts;
 - the right to legal advice and representation;
 - the right to procedural fairness;
 - the right to a trial without undue delay;
 - the right to a competent, independent and impartial tribunal established by law;
 - the right to a public hearing;
 - the right to have the free assistance of an interpreter where necessary; and
 - certain rights in respect of self-represented litigants.
60. The Centre considers the Bill to have a particular impact on the right to equal access to courts and the related issue of the cost of litigation. These issues are discussed further below.

⁵⁷ According to UK jurisprudence, a person is 'charged with a criminal offence' when he or she is officially alerted to the likelihood of criminal proceedings against him or her, normally being the time when he or she is formally charged or served with a summons. Arrest would not ordinarily mark the beginning of the period: see, eg, *Attorney General's Reference (No 2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72, paras 26-28, 31, 43, 44, 45, 128, 129, 140 and 141.

⁵⁸ A civil dispute does not necessarily have to be in a court for the right to a fair hearing to apply. From the UK experience, if the procedure involves the decisive settlement of a genuine, serious dispute, for example concerning a right or obligation and not merely the exercise of a discretion, then s 24 may apply.

⁵⁹ There are broadly equivalent provisions in the *Human Rights Act 2004* (ACT) (s 21), *Canadian Charter* (art 6), *New Zealand Bill of Rights Act 1990* (s 25), *South African Constitution* (s 35(3)) and the *European Convention on Human Rights* (art 6).

61. It is notable that while many of these elements may also arise under the common law, s 24 of the Charter provides for 'a positive right to a fair trial, rather than the right not to be tried unfairly as the common law provides'.⁶⁰

(b) *Equal Access to Courts*

62. Article 14 of the ICCPR has been interpreted to signify that all persons must be granted, without discrimination, the right of equal access to the justice system. The administration of justice must 'effectively be guaranteed in all cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice'.⁶¹ This is inherently linked with notions of equality before the courts and may raise issues of court fees, complexity of procedure, a right to legal aid, awarding of costs and discrimination.

63. Courts have determined that equal access to the courts requires the legal system to be set up in such a way as to ensure that people are not excluded from the court process.⁶² Equal access to courts has also been linked to the notion of equality before the courts. In *Olo Bahamonde v Equatorial Guinea*, the HRC stated that 'a situation in which an individual's attempts to seize the competent jurisdictions of their grievances are systematically frustrated runs counter to the guarantees of Article 14(1)'.⁶³

64. The right to a fair hearing is a fundamental human right which must not be limited in the mere interests of 'practicality and convenience'.⁶⁴

(c) *Costs of Litigation*

65. An important aspect of ensuring equal access to justice is the applicant's ability to pay the associated costs and the discriminatory effect this has on disadvantaged members of the community.⁶⁵

⁶⁰ *R v Griffin* [2007] ACTCA 6 (5 April 2007), [4] – [6] (Higgins CJ, Gray and Madgwick JJ discussing the equivalent provision of the *Human Rights Act 2004* (ACT)).

⁶¹ HRC, *Draft General Comment No 32: Article 14 Concerning the Right to Equality before Courts and Tribunals and to a Fair Trial*, CCPR/C/GC/32/CRP.1Rev.2 (2006), [2]. See also *Raymond v Honey* [1983] 1 AC 1.

⁶² Department for Constitutional Affairs, *Human Rights: Human Lives* (2006), available at www.dca.gov.uk/peoples-rights/human-rights/pdf/hr-handbook-public-authorities.pdf.

⁶³ *Olo Bahamonde v Equatorial Guinea*, HRC, UN Doc CCPR/C/49/D/468/1991, [9.4].

⁶⁴ *R v McBride* [2007] ACTSC 8 (13 February 2007).

⁶⁵ See, eg, *R v Lord Chancellor, Ex parte Witham* [1998] QB 575 (Laws J).

66. In *Kreuz v Poland*,⁶⁶ the requirement to pay court fees was held to be a violation of article 6 of the ECHR because it imposed a disproportionate burden on the individual. While the right to a fair hearing does not endow citizens with the right to free civil proceedings, the European Court said that the imposition of court fees must be balanced against the burden placed on the individual litigant.
67. In *Aarela v Finland*,⁶⁷ the HRC held that a rigid application of a policy to award costs to the winning party may breach the right of access to justice contained in the right to a fair hearing. The imposition of substantial costs against a disadvantaged claimant may prevent them from bringing a proceeding at all and therefore hinder their ability to remedy a breach of their rights. The HRC held that there should be judicial discretion to consider individual circumstances on a case-by-case basis and that, without such a discretion, the imposition of indiscriminate costs acts as a strong deterrent to the whole community, particularly its disadvantaged members, in exercising their right to have their complaint heard.
68. It is clear that the availability of funding for the costs of litigation, including court fees, disbursements and awards of costs is critical to ensuring access to justice for impecunious litigants. In many cases, a lack of available funding creates a significant barrier to progressing claims and may result in an individual being unable to access justice effectively.
- (d) *Impact of the Bill on Equal Access to Courts and the Cost of Litigation*
69. It is the opinion of the Centre that the Bill will have a detrimental effect on the right of prisoners to have equal access to the courts, in breach of s 24 of the Charter. The Bill greatly increases the power of States and private prisons in litigation against prisoners, resulting in inequality of the parties before the courts. This would compound existing systemic barriers preventing access to justice by prisoners⁶⁸ and disadvantage prisoners both during any litigation and by discouraging prisoners from litigating at all.
70. Specifically, the Bill is likely to discourage prisoners from bringing claims against the State or private prison operators in relation to their mistreatment in detention because of the various human rights breaches and barriers to litigation that result from the Bill. These include the following, which are discussed earlier in this submission.

⁶⁶ 28249/95 [2001] ECHR 398 (19 June 2001).

⁶⁷ *Anni Aarela and Jouni Nakkalajarvi v Finland*, UN Doc CCPR/C/73/D/779/1997.

⁶⁸ See, eg, A Grunseit, S Forell & E McCarron, above n 22.

- (a) the unreasonable invasion of the prisoner's privacy resulting from the disclosure of personal information about the prisoner;
 - (b) the confiscation of compensation that may be paid to the prisoner;
 - (c) the reduced cost/benefit of bringing a claim, resulting from the potential for a court to diminish the portion of any compensation that may go towards payment of the complainant's medical and legal costs;⁶⁹ and
 - (d) the indignity of suffering a wrong at the hands of the State and then having any compensation that may be payable by the State to the prisoner confiscated by the State, even if this is for a nominal period of 12 months.
71. Further, as damages payments of under \$10,000 are not required to be paid into the quarantine fund, the Bill encourages complainants to settle disputes for compensation payments of under \$10,000, even if their claim is worth substantially more. The significance of this is emphasised by the case studies outlined above in section 3.
72. Prisoners are also denied the bargaining tool of being able to agree to a confidential agreement.⁷⁰ The lack of confidentiality of agreements would in some cases be a disincentive to States and private prisons to reach an out of court settlement, and is likely to result in more claims being fought in the courts. This, in turn, would impact the cost of litigation for prisoners.
73. The Centre's concern regarding the impact that the Bill would have on the right of prisoners to equal access to courts is compounded by the following comments of the Minister for Corrections in the second Reading speech:
- The government is aware of the perceived inequity when offenders are seen to use the law for their own purposes through pursuing compensation arising from their circumstances in custody. This bill represents a step in addressing that inequity.
74. The Centre reiterates that human rights belong to everyone. There is nothing inequitable about prisoners having access to justice for mistreatment of them by the State or private prison operators. Denying prisoners the right to access justice, as the Bill would effectively do, is inequitable and incompatible with human rights set out in the Charter.

⁶⁹ See paragraphs 14 to 16.

⁷⁰ See paragraph 20.

4.8 The Right to an Effective Remedy

(a) *Content of the right*

75. It is a basic principle of international human rights law that the obligation to respect, protect and fulfil international human rights obligations includes a duty to provide effective remedies to victims.⁷¹ The requirement to provide an 'effective remedy' as part of a state's obligations in relation to particular human rights is found in many human rights conventions, including under the ICCPR, *International Convention on the Elimination of All Forms of Racial Discrimination*⁷² and the *Convention on the Rights of the Child*.⁷³
76. Under article 2(2) of the ICCPR, States undertake to 'adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant', and article 2(3)(a) further provides that States must ensure that people whose rights are violated have an 'effective remedy'. The right to an effective remedy is particularly important in situations where 'special measures' exist to ensure the development and protection of fundamental freedoms of particular vulnerable groups.
77. In its General Comment No. 31, the HRC addressed the implementation obligations that article 2 of the ICCPR imposes on States parties.⁷⁴ The Committee observed the 'unqualified' nature of the obligation expressed in article 2(2), stating that a failure to comply with the obligation 'cannot be justified by reference to political, social, cultural or economic considerations within the State'.
78. In relation to article 2(3), the HRC stated that States must provide individuals with accessible domestic remedies, which should be appropriately adapted so as to take account of the 'special vulnerabilities of certain categories of person, including in particular children'.⁷⁵ The Committee also considers that the right to an effective remedy imposes on

⁷¹ Office of the United Nations High Commissioner for Human Rights, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

⁷² *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

⁷³ Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁷⁴ 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).

⁷⁵ *Ibid* [15].

the state a duty to investigate allegations of human rights breaches, and the failure to discharge that duty may itself constitute a separate breach of the ICCPR.⁷⁶

(b) *The Impact of the Bill on the Right to an Effective Remedy*

79. The Centre refers to and repeats paragraphs 70 to 72 above. Due to the infringement of human rights involved in bringing a complaint (as outlined in these paragraphs), and the deprivation of any compensation payment resulting from a successful claim, the Centre considers the Bill to constitute a clear breach of the right to an effective remedy. This is of particular concern when the potential victims of human rights breaches for which there is no effective remedy are unable to get away from the perpetrator of those breaches.
80. Seeking remedies, accountability and compensation through Victorian Tribunals and Courts is the one enforceable domestic legal remedy available to Victorian prisoners and are intensely important within a prison context. Anti-discrimination and other civil law remedies also provide the only independent and publicly transparent examination of prison practices which raise issues of vital and intense public importance and interest that are heightened further by the fact that they occur within custodial institutions, which are shielded from everyday public forms of scrutiny and transparency.
81. The Bill will undoubtedly have a deterring or chilling impact on the resort to such remedies and thus lead to a diminution of judicial scrutiny of prison practices and conditions. This diminution will corrode any real deterrent that civil law remedies have in preventing or minimising unlawful discrimination, intentional torts, negligence and misfeasance within prisons, as illustrated by case studies 1 and 2.
82. The prison environment is one where the reality or threat of serious physical, sexual and psychological violence is often an omnipresent one. In *New South Wales v Bodjoso*,⁷⁷ the High Court held that:

It is true that a prison authority, as with any other authority, is under no greater duty than to take reasonable care. But the content of the duty in relation to a prison and its inmates is obviously different from what it is in the general law-abiding community. A prison may immediately be contrasted with, for example, a shopping centre to which people lawfully resort, and at which they generally lawfully conduct themselves. In a prison, the prison authority is charged with the custody and care of persons involuntarily held there. Violence is, to a lesser or a greater degree, often on the cards. No one except the authority can protect a target from the violence of other inmates. Many of the people in prisons are there precisely because they present a danger, often a physical danger, to the community. It is

⁷⁶ Ibid [18].

⁷⁷ [2005] HCA 76.

also notorious that without close supervision some of the prisoners would do grave physical injury to other prisoners.⁷⁸

83. Absent any real capacity for prisoners to seek real and effective compensation and redress the possibility that the Bill will operate in a way that will facilitate breaches of the Charter, especially ss 10 and 22, and of anti-discrimination law is a real and foreseeable one.

⁷⁸ *New South Wales v Budjoso* [2005] HCA 76, per Gleeson CJ, Gummow J, Kirby J, Hayne J, Callinan J and Heydon J, 14-15.

5. A Limitations Analysis of the Bill

5.1 Permissible Limitations under International Law

84. 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.
85. In *General Comment 31*, the HRC stated that, where limitations or restrictions are made:⁷⁹
- 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.
86. 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)*.
87. 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) limitations must not discriminate on a prohibited ground;
 - (g) where a limitation is required to be 'necessary', it must:
 - (i) be 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);
 - (ii) respond to a pressing need;

⁷⁹ UN Human Rights Committee, *General Comment 31*, above n 74 [6].

- (iii) pursue a legitimate aim; and
- (iv) be proportionate to that aim.⁸⁰

5.2 Victorian Charter

88. Reflecting the Siracusa Principles, the Victorian Charter contains a limitation provision, 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 society⁸¹ based on human dignity, equality and freedom and taking into account all relevant factors.

89. 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.

5.3 A Limitations Analysis of the Bill

90. Applying s 7(2) of the Charter, the Centre considers the limitations imposed by the Bill on the human rights of prisoners to be unreasonable and unjustifiable in a free and democratic society based on human dignity, equality and freedom. In particular, the Centre considers the restriction on the human rights of prisoners to be:

- (a) unnecessary;
- (b) arbitrary;
- (c) disproportionate to the aim of the limitation, being to compensate victims of crime;
- (d) not sufficiently connected to that aim; and

⁸⁰ 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).

⁸¹ 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.

(e) not the least restrictive means of achieving the aim.

91. Section 7 of the Charter should be interpreted so as to place the burden of proof in relation to the permissibility of a limitation on the party arguing that the limitation is justified and proportionate, and the 'demonstrable justification' should require a 'very high degree of probability' and evidence.⁸²

92. Below is an analysis of the Bill according to the principles outlined in s 7(2) of the Charter, which elaborates the above concerns.

(a) *The nature of the right*

93. The Centre refers to and repeats its discussion of the various human rights engaged by the Bill in section 4. The Centre notes that the Bill engages core human rights.

(b) *The importance and purpose of the limitation*

94. The Centre affirms the importance of adequately compensating victims of crime and considers this to be a legitimate aim of parliament. However, there is an inadequate nexus between this aim and the restriction on the various human rights of prisoners who have been mistreated in prison. It is not appropriate to legislate to the effect that compensation for a victim is 'dependant on the behaviour and treatment of the perpetrator in prison.'⁸³

95. Further, rather than increasing access to compensation for victims of crime, the Centre considers that the Bill will have the opposite effect. By discouraging meritorious litigation by prisoners it may actually reduce the pool of money available to any victim. As a result, the likely outcome of the Bill is that it would further punish both prisoners and victims of crime.

(c) *The nature and extent of the limitation*

96. The blanket application of the Bill to all prisoners, regardless of their crime or the absence of claims pending against them is indicative of the arbitrary nature of the Bill. The restrictions on human rights imposed by the Bill are so broad and arbitrary that they are disproportionate to the aim of the Bill. Again, such restrictions are not necessary to ensure that victims of crime are compensated, as is discussed below at paragraph 100.

⁸² See, eg, *R v Oakes* [1986] 1 SCR 103, 105, 136-7; *Minister of Transport v Noort* [1992] 3 NZLR 260, 283; *Moise v Transitional Land Council of Greater Germiston* 2001 (4) SA 491 (CC), [19]. See also P Hogg, *Constitutional Law of Canada* (2004) 795-6.

⁸³ New Zealand Human Rights Commission, above n 2.

(d) *The relationship between the limitation and its purpose*

97. The Bill's limitation on the human rights of prisoners and its intended purpose of compensating victims of crime share a tenuous relationship at best. The statement of compatibility and the second reading speech refer to no evidence indicating that the Bill would substantially assist victims of crime. In fact, as discussed above in paragraph 95, the Bill may actually be detrimental to victims of crime if it discourages meritorious litigation by prisoners.
98. Similarly, the Centre notes that it is not aware of any quantitative or qualitative evidence advanced by the Government to indicate that prisoners are litigating vexatiously or for the purposes of enrichment.
99. Taking into account the self-defeating and ineffective nature of the Bill, the Centre considers the restrictions that it would impose on human rights to be disproportionate to the aim of assisting victims of crime, being an aim that it is unlikely to achieve. As a result, and as the Government has not put forward any evidence in support of the Bill (despite its obligation to do so as discussed above in paragraph 91), the Centre considers that the human rights limitations imposed by the Bill are unjustifiable.

(e) *Less restrictive means available to achieve the aim*

100. There are less restrictive means available to achieve the object of compensating victims of crime, such as through a statutory victims of crime compensation scheme. The *Victims of Crime Assistance Act 1996* (Vic) and the Restitution and Compensation order provisions pursuant to Part IV of the *Sentencing Act 1991* (Vic) provide an extensive legislative scheme for compensation to victims of crime. These schemes provide for compensation to victims of crime without any link to the mistreatment of prisoners.

6. Conclusion

101. The Centre applauds the Victorian government for being a human rights leader in Australia and for having enacted the Charter, which 'benefit[s] all Victorians by recording in one place the basic civil and political rights we all hold and expect government to observe'.⁸⁴ The Centre also thanks the Committee for considering its submission on the Bill.
102. In this instance, the Centre considers the Bill to be entirely incompatible with the Charter and the human rights that it seeks to protect. The Centre cannot see how the Bill could be amended so that it is human rights compatible. In order for the Victorian government to observe the basic human rights set out in the Charter, the Centre recommends that the Bill be withdrawn in its entirety.
103. The Centre welcomes any queries of the Committee in relation to the Bill and this submission.

⁸⁴ *Charter of Human Rights and Responsibilities Bill Second Reading*, Legislative Assembly, 4 May 2006 (Rob Hulls) 1290.