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Department of Justice

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By email: parolecomments@justice.vic.gov.au

Dear Sir or Madam:

Response to the 'Review of the Parole System in Victoria'

Liberty Victoria welcomes the opportunity to make a submission to the Department of Justice in response to the 'Review of the Parole System in Victoria' (the 'Review') conducted by former High Court Justice, Mr Ian Callinan AC ('Mr Callinan').

Our submission proceeds as follows:

- Part I introduces Liberty Victoria;
- Part II provides a summary of our submissions; and
- Part III provides individual responses to each of the 23 measures proposed in the Review.

I About Liberty Victoria

Liberty Victoria has a long and proud history of campaigning for civil liberties and human rights for more than 70 years. Officially known as the Victorian Council for Civil Liberties Inc, its lineage extends back to the Australian Council for Civil Liberties ('ACCL'). The ACCL was formed in Melbourne in 1936 and was determined to offer 'a means of

expression to those people in all parties who believe that social progress may be achieved only in an atmosphere of liberty.' Brian Fitzpatrick was the ACCL's General Secretary for twenty-six years and helped to form the Victorian Council for Civil Liberties before his death in 1965.

Throughout its history, Liberty Victoria has defended the right of individuals and organisations to free speech, freedom of the press and of assembly, and freedom from discrimination on the grounds of race, religion or political belief. It has operated in accord with the ACCL's original platform, working not only to defend existing civil liberties and oppose their limitation, but to campaign for the 'enlargement of these liberties.' We are now one of Australia's leading civil liberties organisations.

II Summary of Submissions

A. Introduction

Liberty Victoria recognises that the parole system is an integral part of Victoria's criminal justice system. A well-functioning parole system has significant benefits for both the community and offenders.

There are some recommendations made in the Review with which we strongly agree, while there are others that we firmly oppose. It should be noted that we take issue with, what appears to be, the underlying premise of the Review, that community safety is often best achieved through refusing applications for parole which results in prisoners serving longer periods of imprisonment and consequently having a shorter period of supervision on parole. With respect, that approach is short-sighted, and fails to acknowledge both the deleterious effects of extended period of imprisonment and the need for proper supervision if offenders are to successfully return to the community. These matters are addressed in summary as follows, and are expanded upon in our responses to each of the Review's recommendations.

B. Broad Issues with the Review

Liberty Victoria acknowledges that the principal consideration of the Adult Parole Board should be the safety and protection of the community. The question remains, however, as to how this is best achieved. The Review proceeds largely on the basis that the interests of the prisoner in being released on parole, and the safety and protection of the community, are discordant and oppositional.

The Review is underpinned by, what we submit is, the erroneous assumption that in every parole determination the interests are diametrically opposed as follows:

- for the prisoner, the interest is the grant of limited freedom in the community; and
- for the community, the interest is in public safety achieved by the continued detention of the offender.

The Review suggests that the satisfaction of one set of interests necessarily compromises the other.

Liberty Victoria submits that such a binary conception of community safety is deeply flawed. The respective interests of the prisoner and the community, in fact, overlap and find common ground in notions of rehabilitation and reintegration. The supervised and supported release of prisoners back into community life, by way of parole, is essential to prisoners' rehabilitation and reintegration, as well as to community safety.

As held by French CJ in the High Court judgment of *Hogan v Hinch*:[1]

> 'Rehabilitation, if it can be achieved, is likely to be the most durable guarantor of community protection and is clearly in the public interest.'

All but a very small minority of Victorian prisoners will eventually be released from custody. Once this reality is acknowledged, we confront the fact that such prisoners will only ever be released in one of two ways. Either: (1) by way of supervised and supported release on parole; or (2) unsupervised and unsupported release at the expiration of their maximum sentence. The research overwhelmingly demonstrates that supervised and supported release of prisoners on parole is substantially safer for the community, and

[1] (2011) 243 CLR 506; [2011] HCA 4, [32].

substantially more effective in terms of rehabilitation and reintegration of prisoners, than is sudden and unsupervised release at the expiration of sentence.[2]

A comparative analysis of the two options for release shows quite clearly why supervised and supported release on parole is in the interests of the community:

Release on parole

- Prisoners are supervised as they reintegrate into community life. The state can put enforceable conditions on parolees, such as controlling which geographical areas they may visit and mandating that they receive treatment for any issues they may have that may contribute to recidivism. Parolees are on conditional release and are technically still serving their sentence. If parole conditions are breached, even where the act constituting breach would not of itself constitute any criminal offence, the state can remove the prisoner from the community and place them back in detention;
- Prisoners are supported in their rehabilitation according to their specific individual needs. Every parolee is assigned a case manager from Corrections Victoria. Many prisoners are dealing with issues and challenges involving substance misuse, mental illness and social dysfunction. Every parolee receives case-specific attention to their needs for rehabilitation; and
- There is less pressure placed on our prison system, which is a very large public expense and is under enormous strain from overcrowding.[3] The evidence suggests that in order to address crime, rather than spending public money on expanding prisons, it is wiser to divert those funds to social infrastructure and cost-effective initiatives that have been shown to effectively address the underlying causes of crime.[4]

[2] See generally Bronwyn Naylor and Johannes Schmidt, 'Do Prisoners Have a Right to Fairness Before the Parole Board?' (2010) 32 *Sydney Law Review* 436, 449-450; Ivan Zinger, 'Conditional Release and Human Rights in Canada: A Commentary' (January 2012) *Canadian Journal of Criminology and Criminal Justice* 117, 118-119;

[3] See, eg, Jane Lee, Nino Bucci and Adam Cooper, 'Justice System Crumbling', *The Age* (online), 30 October 2013 <http://www.theage.com.au/victoria/justice-system-crumbling-20131029-2wedi.html>.

[4] See, eg, Smart Justice, 'More Prisons Are Not the Answer to Reducing Crime', 15 November 2011 <http://www.smartjustice.org.au/cb_pages/more_prisons_are_not_the_answer_to_reducing_crime.php>.

Release without parole

- Prisoners will be in prison longer. They will therefore have longer exposure to potentially negative influences, and be at greater risk of institutionalisation;
- Prisoners will be released at the expiry of maximum sentence without supervision. This means that no restrictions can be put on the ex-prisoner's activities in the community,[5] nor the geographical areas in which the ex-prisoner resides or visits. There would be no corrections officer monitoring and supervising the ex-prisoner's reintegration and any ongoing or new risks that they may pose to the community. The ex-prisoner may only be imprisoned again in the same manner as any other citizen – that is, only if he or she has committed another criminal offence, or is reasonably suspected to have committed an offence and is refused bail; and
- There is no mandated treatment and support for prisoners' rehabilitation needs once they leave prison. For example, ex-prisoners cannot be compelled to engage in treatment for any substance misuse or mental health issues.

Thus, we believe that is clear that as a general proposition, the release of prisoners on supervised and supported parole greatly increases community safety.

As will be addressed later, if the Review's recommendations were implemented, especially those recommending raising the threshold for grants of parole,[6] this will have the effect of drastically reducing the number of grants of parole made to prisoners. For the reasons given above, although it may appease the immediate anxieties of the public about offenders on parole and therefore be seen as politically convenient, which is understandable in light of recent high profile cases and the arguable failings of an under-resourced Adult Parole Board, making fewer grants of parole would be detrimental to community safety in the long term.

The deleterious effects of imprisonment are well-recognised by the Courts. In *DPP v Tokava* [2006] VSCA 156, the Court of Appeal approved[7] the following passage of Fox J in *R v Dixon* (1975) ACTR 13:

[5] Apart from those prisoners made subject to detention or supervision orders pursuant to the *Serious Sex Offenders (Detention and Supervision) Act* 2009.
[6] See Measures 5-7.
[7] [23].

> ‘In general, but by no means always, persons convicted of serious crime are the maladjusted people of the community, and some will have developed serious behavioural problems. ... Unfortunately, gaol may well make their anti-social tendencies worse. This is not always the case; sometimes the experience of gaol effects a real improvement. Nevertheless, I think it is well accepted that it is so in most cases; at least where the sentences are at all long. The reasons are obvious enough: the prisoners are kept in unnatural, isolated conditions, their every activity is so strictly regulated and supervised that they have no opportunity to develop a sense of individual responsibility, they are deprived of any real opportunity to learn to live as members of society, their only companions are other criminals, some of whom are bound to be quite vicious, their sex life must be unnatural, scope for psychiatric treatment is very limited, if not non-existent, and employment is limited and stereotyped. To many this must seem one of the most absurd aspects of the whole matter. They may well ask why the system has to be so anti-social in operation, why it cannot be improved so that people for whom there is a prospect of reformation, and who are not so dangerous that they have to be kept in strict confinement, are given a real opportunity for self-improvement. The irony is that prison authorities are among the strongest advocates of reform.
>
> ...
>
> When, therefore, a court has to consider whether to send a young person to gaol for the first time, it has to take into account the likely adverse effects of a gaol sentence. A distinct possibility, particularly if the sentence is a long one, is that the person sent to gaol will come out more vicious, and distinctly more anti-social in thoughts and deed than when he went in. His own personality may well be permanently impaired in a serious degree. If he could be kept in gaol for the rest of his life, it might be possible to ignore the consequences to society, but he will re-enter society and often while still quite young. His new-found propensities then have to be reckoned with. A substantial minority of persons who serve medium or long gaol sentences soon offend again.’

As observed by Maxwell P:

> ‘These passages set out a view held in 1975 of the likely effect of gaol. As I remarked in the course of argument, my impression is that almost everything which his Honour said then is still true 30 years later, despite the best efforts of many people. The community would still ask today, as his Honour suggested then, why the prison system has to be "so anti-social in operation, why it cannot be improved so that people for whom there is a prospect of reformation are given a real opportunity for self-improvement".
>
> In my respectful opinion, the learned trial judge in the present case was right to have regard to the likelihood that imprisonment will have deleterious effects on the respondent. It would be unreal and artificial for sentencing courts to ignore the evidence about the anti-social effects of time spent in gaol.’[8]

In *Azzopardi v The Queen* (2011) 35 VR 43; [2011] VSCA 372 at [36], Redlich JA held:

[8] [23]-[24].

> '… courts sentencing young offenders are cognizant that the effect of incarceration in an adult prison on a young offender will more likely impair, rather than improve, the offender's prospects of successful rehabilitation. [9] While in prison a youthful offender is likely to be exposed to corrupting influences which may entrench in that young person criminal behaviour, thereby defeating the very purpose for which punishment is imposed.[10] Imprisonment for any substantial period carries with it the recognised risk that anti-social tendencies may be exacerbated. The likely detrimental effect of adult prison on a youthful offender has adverse flow-on consequences for the community.'[11]

It is clear that the community does not have an interest in prisoners being exposed to longer sentences of imprisonment unless they present a significant risk of re-offending.

It is plain that the community has an interest in a properly resourced Adult Parole Board making a proper risk assessment when considering whether parole should be granted or revoked. That is not achieved by having the Adult Parole Board operate off paper systems and with imperfect information. The solution to high profile cases, such as the offences committed by Mr Adrian Bayley, is not to lift the bar for the granting of parole to all prisoners given the problems described above. Rather, the solution is to properly resource the parole board so that it can make proper risk assessments. For example, had the Parole Board been properly resourced, with appropriate information systems and avenues of communication, then it is highly unlikely that Mr Adrian Bayley would have been in the community at the time he committed the offences against Ms Jill Meagher given he had already breached parole through further offending.

C. Parts of the Review We Support

We agree with Mr Callinan's comments that the workload of the Adult Parole Board has been 'intolerably heavy' and 'burdensome'. We strongly support the recommendations that the Adult Parole Board be better resourced so that it may function more effectively and efficiently.[12] We further support the recommendation that the Board receive resources and assistance in updating and developing its information technology systems. We acknowledge the Board itself has been calling for an increase in resources and support for many years.

[9] *R v McGaffin* [2010] SASCFC 22, [69].
[10] *R v Lam & Ors* [2005] VSC 495, [8].
[11] *R v Hatfield* [2004] VSCA 195, [10] (Chernov JA).
[12] See Measures 1, 4, 9, 15, 20.

We join Mr Callinan in submitting that the Corrections system is grossly underfunded and under resourced. We recognise and appreciate the vital role played by parole officers in enabling parolees' rehabilitation and reintegration, and in contributing to a safer community. Thus, we firmly endorse the recommendation that more parole officer positions and other supporting and management positions be created, and that parole officers receive ongoing high quality training and other supports.[13]

We submit that more resources and attention must be given to therapeutic and rehabilitative programs in prisons. If the underlying causes of offending are not addressed in prisons through such programs, then prisoners are more likely to reoffend once they are released. Therefore, we support the recommendations that there should be further rehabilitation programs in prisons designed by Corrections Victoria, in association with other experts, focused on helping prepare prisoners for their release into the community.[14]

D. Parts of the Review We Do Not Support

Liberty Victoria is very concerned about a number of measures proposed in the Review. We believe that, if implemented, many measures in the Review would, in fact, lead to a less safe community.

As Mr Callinan himself acknowledges, a number of recommendations in the Review, if implemented, will lead to far fewer grants of parole.[15] This means more and more prisoners being released at the expiration of their maximum sentence without any support or supervision, or alternatively with shorter period of supervision. We believe that, in most cases, parole will be a safer option for release than release without supervision.

We oppose the recommendation of a new category of prisoners, which Mr Callinan suggests should be named 'Potentially Dangerous Prisoners' ('PDPs'). Although some scheme of categorising prisoners may be beneficial to the running of the parole system, the category of PDPs recommended by Mr Callinan is too restrictive and casts the net too

[13] See Measure 19.
[14] See Measure 23.
[15] See eg, Measures 5-7.

wide. As is dealt with in our response to measure 6, the proposal of a new 'negligible risk' test for PDPs raises the threshold for a grant of parole to such an unreasonable level as to make it almost impossible to satisfy. If implemented, such a test would drastically reduce the number of prisoners being granted parole, which is dangerous for the reasons given above. It could also cause resentment among the prisoner population. A lengthy period of release on parole is a very useful carrot for ascertaining future cooperation with the authorities or for encouraging guilty pleas and commonwealth sentencing legislation recognises this fact. The realistic possibility of parole remains an important incentive for prisoners to behave well and avail themselves of opportunities to rehabilitate while serving their sentences. Once prisoners recognise that parole is only granted in exceptional cases, the incentive is removed which is to the detriment to the prisoners, to those managing the prisons, and to the broader community.

Moreover, we oppose Mr Callinan's recommendation that the Board and its processes remain exempt from the rules of natural justice and from the operation of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the '*Charter*').[16] Both of these exemptions, without good reason, see the continued denial of the basic civil rights of Victorian prisoners. We are also concerned that the exemptions may compromise the quality of the Board's decision-making and undermine public confidence in the criminal justice system. There is no good reason as to why the Board, like any other agent of the Executive, should not be regarded as a public authority under the *Charter* and have its decisions and processes subject to judicial review.

We further oppose the measure that proposes that the onus be placed onto prisoners to initiate applications for parole.[17] This will discriminate against the many vulnerable prisoners for whom such applications may be difficult to make without assistance.

III Individual Responses

Measure 1

A new and comprehensive electronic database and case management system which is accessible to all members of the Board and its staff needs to be established as quickly as

[16] See Measure 8.
[17] See Measure 2.

possible. The database and case management system should be designed to include appropriate Police intelligence and to allow secure remote access by Board members.

Liberty Victoria supports this measure, which is intended to improve the Board's decision-making process and, in particular, improve its capacity to assess the risk posed by prisoners to the community.

Measure 2

The Board should cease to initiate consideration of parole of its own motion for offenders sentenced to terms of imprisonment of three or more years. Such prisoners should be required to make an application for parole.

Liberty Victoria does not support this measure. If implemented, it may introduce systematic unfairness that could disproportionately affect the most vulnerable prisoners. Prisoners are typically from highly disadvantaged backgrounds. For example:

- Approximately two thirds of Victorian prisoners may have an acquired brain injury;[18]
- 86% of the prison population have not completed secondary education;[19]
- 69% of male and 49% of female prisoners were unemployed when they were imprisoned;[20]
- 87% of female prisoners were victims of sexual, physical or emotional abuse, with the majority being victims of multiple forms of abuse;[21] and
- Indigenous Australians are 14 times more likely to be imprisoned than other Australians.[22]

[18] Corrections Victoria, *Acquired Brain Injury in the Victorian Prison System* (2012) 14, cited in Federation of Community Legal Centres (Victoria), Submission to Department of Justice, *Resourcing a Stronger Parole System for Increased Community Safety: Response to Ian Callinan AC Review of the Parole System in Victoria*, September 2013, 5.
[19] Yvette Bockisch, *Assessing Prisoner Basic Skills Gaps: Corrections Victoria's Language Literacy and Numeracy Assessment Toolkit* (2009) cited in Federation of Community Legal Centres (Victoria), Submission to Department of Justice, *Resourcing a Stronger Parole System for Increased Community Safety: Response to Ian Callinan AC Review of the Parole System in Victoria*, September 2013, 5.
[20] Department of Justice, *Statistical Profile of the Victorian Prison System 2005-06 to 2009-10* (2010) 38, cited in Smart Justice, above n 4, 2.
[21] Holly Johnson, 'Drugs and Crime: A Study of Incarcerated Female Offenders' *Australian Institute of Criminology*, (2004) xiv, cited in Smart Justice, above n 4, 2.
[22] Australian Bureau of Statistics, *Prisoners in Australia 2009*, (2009) 4517.0, cited in Smart Justice, above n 4, 2.

Prisoners are by definition isolated from the community, supports and resources. Many vulnerable and disadvantaged prisoners may lack the capacity or know-how to initiate applications for parole. Many prisoners would also lack the financial capacity to engage legal services to assist them in making applications for parole. Given the recent and well-documented issues facing Victoria Legal Aid, there appears to be no funding to assist prisoners with such applications.

Measure 3

On cancellation of parole and imprisonment, an offender should not be entitled to have cancellation of his or her parole reconsidered until half of the unexpired time of parole has elapsed or unless the offender has a prima facie case that he or she was unable to comply with a substantial condition of the parole by reason of matters beyond the control of the offender, or that the breach should be excused for other truly exceptional reasons.

We oppose this measure. We see no reason to fetter the discretion of the parole board in this way. The rationale behind this measure could be addressed through a guideline rather than a requirement. It is logical that when parole is cancelled, the Parole Board would have regard to the nature and circumstances of the breach, therefore it seems that to fetter the discretion of the Board with a mandatory requirement, even with exceptions, is superfluous. A breaching offence may be very minor (such as a shop-steal), and a prisoner may owe a large period of parole (such as 4 years). In such circumstances the proposed measure would operate in a draconian way. It should also be noted that in some cases the prisoner will be acquitted of the alleged breaching offence, or authorities may discontinue the prosecution. In those circumstances such a rule would be very unfair.

Measure 4

A sufficiently qualified person or a panel of persons experienced in public and/or commercial administration and organisational management should be appointed to oversee and assist in the administrative reform of the Board's structure, staffing and procedures, including the introduction of the case management system and supporting database, and the implementation of the other relevant Measures set out in this report.

Liberty Victoria supports this measure as it will assist the Board in undertaking a proper risk assessment of prisoners.

Measure 5

All offenders should be categorized on conviction and sentencing for non-parole term of imprisonment according to the nature and severity of the offence. It should then follow that consideration for parole can be given by the Board according to the gravity of the offence. One category should be of offenders who have committed intentional crimes of violence which would result in personal injury requiring treatment, or serious sexual crimes. I would also include in that category offenders who have broken and entered residential premises for the purposes of committing a crime. (Historically, the law has always regarded, and should continue to do so, crimes of breaking and entering in these circumstances as having a special tendency to lead to violence by reason of the alarmed response to an intruder by a householder). Their applications for parole should be considered in the first instance by a panel of which a judge or retired judge of the Supreme Court or County Court is the chair and a psychiatrist and a community member are the others. Parole should only be granted to these offenders by the unanimous decision of that panel of which the Chair is a member. The decision of the review panel will be final. No review will be necessary or should be undertaken if the first panel decides not to grant parole.

We are of the view that the proposed categorisation of PDPs including all intentional crimes of violence is too broad. It is not appropriate that all instances of crimes of breaking and entering should fall within the same category of more serious crimes of violence. Such crimes will often not involve violence, and are committed by vulnerable people.

We oppose the recommendation that all offenders should be categorised according to the nature and severity of the offence. We point out, with concern, that any such categorisation will be performed administratively, after sentencing, without any opportunity for the offender to argue or make submissions. The proposed measure lacks the flexibility required to respond appropriately to the different circumstances of every case. Furthermore, this could have 'upstream' consequences in the criminal justice system in terms of the decision to charge an accused, and influence plea negotiations.

Liberty Victoria does not support the recommendation that there be no recourse to review decisions. The right to review decisions of the Executive is a fundamental tenet of the rules of natural justice. This issue is addressed in more detail in our response to measure 8.

Measure 6

Henceforth, PDP's should only be granted parole on application by them if they can satisfy the Parole Board, taking as paramount the safety and protection of the community, to a very high degree of probability that the risk of reoffending is negligible, and that they are highly likely to satisfy the conditions of parole to which they are likely to be made subject.

For the reasons given above in respect of measure 5, we reject the categorisation of prisoners as PDPs. We also reject the proposal that different tests for grants of parole should apply to different categories of prisoners.

We oppose the proposition of a new test of the kind described. The proposed test is convoluted and would be unworkable in practice. The proposed test substantially raises the threshold for a grant of parole. Liberty Victoria considers there to be a number of serious issues with this test.

First, the threshold, 'high degree of probability that the risk of reoffending is negligible', is so strenuous that it may be difficult for any reasonable person to consider any offender as ever having a negligible risk. The Oxford English dictionary defines negligible as meaning: 'so small or unimportant as to be not worth considering.'[23] Surely, all candidates for parole will present with a level of risk that is, at least, worth considering.

Second, the test fails to take into consideration the true predicament in parole determinations, once it is established that all but very few prisoners will ultimately be released from prisons. We contend that the enquiry in parole determinations should be one which balances the benefits and risks for community safety, and offender rehabilitation and reintegration, between the two options available: either (1) release the prisoner on parole with supervision and support or (2) refuse parole, have the prisoner

[23] *Oxford English Dictionary Online,* <http://www.oxforddictionaries.com/definition/english/negligible>.

remain in prison to be released on parole at a later stage or to be released at the expiration of their sentence without supervision.

The test used by the Canadian Parole Board is a good example of one that requires special attention to be given to the community interest inherent in parole release.[24] In Canada, parole is to be granted if the board is satisfied that:

> (a) the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and
> (b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.[25]

With respect, Mr Callinan's proposed approach gives too much weight to the perception of short-term community protection, which will result in fewer supervised and supported releases and will result in more unsupervised, and therefore less safe, releases in the long term.

The new 'negligible risk' test, if implemented, will mean that far fewer prisoners will be granted parole. Although Mr Callinan suggests that fewer grants of parole are in the public interest, we submit that this is not the case and that the review has failed to substantially grapple with the long-term consequences of such a policy. The corollary of less parole grants is that more and more prisoners, including potentially dangerous ones, will eventually be released from prison without any supervision or support. We reiterate that the research overwhelmingly indicates that gradual step-by-step 'decompression' release of prisoners is substantially safer for the public than sudden and unsupervised release at the expiration of sentence.**[26]**

[24] Naylor and Schmidt, above n 2, 443-444.
[25] *Corrections and Conditional Release Act* (Canada), SC 1992, c 20, s 102.
[26] See, eg, Naylor and Schmidt, above n 2; Zinger, above n 2;.

Measure 7

I favour legislation to give effect to Measures 5 and 6. The legislation should also specify the paramountcy of the safety and protection of the community in all considerations for parole or at least in consideration of parole for PDP's.

As we do not support measures 5 and 6, we do not favour legislation to give effect to them.

On the question of paramountcy in considerations for parole, we submit that it is flawed to suggest that community safety be a paramount consideration over the consideration of the rehabilitative needs of the prisoner. The two considerations are inextricably linked. The notion of community safety being paramount relies on the conception that community safety and prisoner rehabilitation are oppositional and incongruent. In fact, prisoner rehabilitation is necessary for a safe community. Therefore, the determinations of parole should consider both community safety and prisoner rehabilitation.

Measure 8

The rules of natural justice do not apply, and should not be required to be applied to the processes of the Board and its decisions. The Board should also remain exempt from the Charter of Human Rights and Responsibilities indefinitely.

(1) The Question of Natural Justice

Currently, section 69(2) of the *Corrections Act* 1986 (Vic) excludes the Board from the rules of natural justice. Although the exemption does not stop the Board from employing any of the rules of natural justice on their own accord, this cannot be properly assessed and reviewed. In 2008, the head of the Board told the then Attorney-General, the Hon Rob Hulls, 'that in all likelihood [the board denies] people natural justice.'[27] Importantly, if the exemption of the application of the rules of natural justice was lifted, it would not follow that the Board would have to apply every element of procedural fairness to parole hearings. As Mason J held in *Kioa v West*, procedural fairness 'conveys the notion of a

[27] Evidence to Public Accounts and Estimates Committee, Parliament of Victoria, Melbourne, 3 June 2008, 8 (Rob Hulls, Attorney-General) quoted in Naylor and Schmidt, above n 24, 438-439.

flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case.'[28]

The application of natural justice, in the context of the parole system, may include prisoners being provided with:

(a) Rights to access to any material that the Board will use to make its decision and the opportunity to test that material;
(b) Rights to legal representation at Board hearings;
(c) Rights to reasons for Board decisions; and
(d) Rights to appeal and/or judicially review Board decisions.

These are elaborated on as follows.

(a) Right to Access and Challenge Information

Prisoners being considered for parole currently have no formal right to access or contribute to the information the Board will use in making their decisions, nor do they have any formal right to test any material.[29] The situation in Victoria is in stark contrast to those in Canada, New Zealand, and the United Kingdom, where all material is provided to prisoners before parole hearings, subject to some reasonable exceptions, such as where it may jeopardise the safety of another person.[30]

The Board advised the Sentencing Advisory Council in 2011 that it '[r]arely… provide[s] any material to the prisoner.'[31] Without access to material, prisoners have no meaningful opportunity to challenge the probative value of the information on which the Board relies in making a determination. This poses a major threat to procedural fairness. The decisions of the Board have a major impact on the liberty of the prisoner. In *Kotzmann v Adult Parole Board of Victoria*,[32] Judd J held that circumstances such as these may be regarded as 'harsh and unjust'. His Honour held that the current law may lead to situations where:

[28] (1985) 159 CLR 550, 585.
[29] Sentencing Advisory Council, *Review of the Victorian Adult Parole System* (March 2012) 60-61.
[30] Ibid; See also *Parole Act 2002* (NZ) s 13; *Corrections and Conditional Release Act* (Canada), SC 1992, c 20, s 141.
[31] Sentencing Advisory Council, above n 29, 61.
[32] [2008] VSC 356; (2008) 29 VAR 391, 405 [61].

> 'a decision to revoke a parole order might be validly made on the basis of incorrect information provided to the Board privately, without notice to the person affected and without any opportunity given to the prisoner to be heard in relation to it…'[33]

His Honour further commented that the opportunity for the Board to satisfy itself of the correctness of information 'is significantly diminished if natural justice is denied a prisoner whose order is revoked.'[34] The prospects of accurate and fair decisions are made worse given the Board's intolerably heavy work load and severe under-resourcing, something which is repeatedly acknowledged by Mr Callinan in the Review.

(b) Right to Legal Representation

There is no right to legal representation for prisoners under the current Victorian parole system.[35] Legal representation is allowed in New South Wales, the Australian Capital Territory, and South Australia.[36]

(c) Right to Access Reasons

The Board is not required to provide reasons, except in circumstances where a parolee's parole is revoked or cancelled.[37] Mr Callinan describes the Board's existing requirement to provide reasons for revocations as a 'burden',[38] and expresses the view that the Board should not publish any reasons in any cases.[39] Again, this compares unfavourably to the circumstances in Queensland, Tasmania, and South Australia where reasons must be provided when parole is refused.[40]

[33] Ibid 402 [45].
[34] Ibid 403 [45].
[35] Sentencing Advisory Council, above n 29, 66.
[36] Ibid citing *Crimes (Administration of Sentences) Act 1999* (NSW) s 190(1); *Crimes (Sentence Administration) Act 2005* (ACT) s 209(a); *Correctional Services Act 1982* (SA) s 77(3).
[37] Sentencing Advisory Council, above n 29, 70.
[38] The Review, 35.
[39] Ibid 74.
[40] Sentencing Advisory Council, above n 29, 70, citing *Corrective Services Act 2006* (Qld) s 193(5)(a); *Corrections Act 1997* (Tas) s 72(8); *Correctional Services Act 1982* (SA) ss 67(9)(a)–(b).

(d) Right to Appeal

Prisoners refused parole may apply for judicial review pursuant to Order 56 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).[41] Judicial review differs from an appeal because the former is limited to examining the legality of a decision, namely whether or not the decision was made within the scope of the decision-maker's powers and functions.[42] While there is no formal avenue for appeal against a decision of the Board, a prisoner may make a request in writing that the Board review its decision on the basis of new information or where a prisoner thinks the decision was wrong.[43] The decision will be reviewed in the same manner as any other parole consideration. It is a matter of great concern that there is no requirement that the Board be differently constituted for the review.[44] The notion of a review is undermined if, as may apparently sometimes happen, the same composition of Board members conducts a review of a decision that they themselves made. Such circumstances clearly compromise the impartiality and integrity of the review decision.

In the Review, Mr Callinan argues that the Board exercises unreviewable Executive prerogative.[45] Liberty Victoria believes that the fact that the Board exercises Executive power is no bar to the application of natural justice. Other public authorities are subject to the rules of natural justice; there is yet no good reason why the Board should be treated differently.

Mr Callinan also suggests that allowing appeals would increase the workload for what is an already over-strained parole system.[46] However, these concerns may be appeased by looking to the effect rights of appeal have in other like jurisdictions. For example, in New Zealand, where certain decisions can be appealed to the New Zealand High Court, only 4.2% of decisions were appealed in the 2008-2009 period.[47] In any event, as Naylor and Schmidt argue, 'it must be emphasised that the fact people may access a right is not a good reason for denying that right.'[48]

[41] Sentencing Advisory Council, above n 29, 55.
[42] Ibid.
[43] Adult Parole Board of Victoria, 'Members' Manual 2013' (2013, 3rd ed) 41.
[44] Sentencing Advisory Council, above n 29, 74.
[45] The Review, 35.
[46] See generally ibid 35, 70, 74, 91.
[47] Naylor and Schmidt, above n 2, 468 citing *Parole Act 2002* (NZ) ss 67-70; New Zealand Parole Board, *Annual Report 2008/09* (2009) 18, 23.
[48] Naylor and Schmidt, above n 2, 468.

We submit that the denial of the rules of natural justice in the context of parole hearings has numerous negative consequences, including:

- Compromising the quality of decision making;
- Compromising the decision maker's diligence and objectivity;
- Reducing public confidence in the decision making process and the correctness of decisions; and
- Undermining prisoner's fundamental rights to procedural fairness.

(2) The Question of Exemption from the Charter

The Board has been exempt from the *Charter* since its enactment.[49] An important section of the *Charter* that would relevantly apply to the Board, but for the exemption, is section 38(1)**,** which stipulates that: '…it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.' In the parole context, relevant rights would include:[50]

- The right to liberty and freedom of movement;[51]
- The right to privacy and reputation;[52]
- The right to a fair hearing;[53] and (possibly)
- The rights of families and children.[54]

We submit that the Board should be subject to the *Charter*. It would improve the integrity of the Board in the eyes of the public and prisoners. It would also infuse the Board with a human rights culture, which would improve decision-making. This has been the effect of the application of the human rights legislation to the Parole Board in the United Kingdom.[55] The changes made to the UK system in the light of human rights instruments have only improved the quality of decision-making, and ensured prisoners' cases are more fully and transparently considered.[56]

[49] See generally Naylor and Schmidt, above n 2, 456-457.
[50] Ibid 455-460.
[51] The *Charter* ss 12, 21.
[52] Ibid s 13.
[53] Ibid s 24.
[54] Ibid s 17.
[55] See Naylor and Schmidt, above n 2, 457-458, 469.
[56] Ibid.

Mr Callinan stresses in numerous parts of the Review that because the Board exercises Executive power it should not be subject to the *Charter.*[57] In relation to this issue, Liberty Victoria would echo the concerns expressed by the Victorian Equal Opportunity and Human Rights Commission in its 2008 report on the *Charter*:

> 'Insufficient information has been provided publicly to explain why the challenge for these Boards is so different to that experienced by many other public authorities as to justify their continuing exemption from the *Charter.* '[58]

If the *Charter* were to be applicable to the parole system, it does not follow, for example, that the parole system would break down on account of the right to liberty and freedom of movement. Rather, the *Charter* specifies that human rights may be limited where appropriate: [59]

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

Therefore, the application of the *Charter* would not undermine the essential function of parole, but rather ensure a more transparent and fair system.

Measure 9

Consideration should be given to the appointment of a recently retired judge of the Supreme Court to chair the Parole Board, and for other retired judges to sit on it on a suitably remunerated basis. There has been almost overwhelming support for the appointment of a full-time Chair: the necessary process of change and the need for a leadership role by a full-time Chair have persuaded me that such an appointment should be made.

Liberty Victoria supports the appointment of a suitably qualified full-time chair.

[57] The Review, 69-70, 91.
[58] Victorian Equal Opportunity and Human Rights Commission, *Emerging Change: The 2008 Report on the Operation of the Charter of Human Rights and Responsibilities* (2009) 6, quoted in Naylor and Schmidt, above n 2, 457.
[59] The *Charter* s 7(2).

Measure 10

It would be better I think if no member of the Board were to serve for more than six, or nine years at most. I would not suggest that any present member of the Board have his or her appointment revoked or cancelled on this account, but if this measure were to be adopted, on the effluxion of a current member's term, such a long-term member should not be reappointed.

Liberty Victoria does not oppose this measure.

Measure 11

There should be installed at the Board a section of the relevant Police unit processing intelligence about PDP's who should be consulted about any PDP before he or she is released on parole. The Police should also have access to, and be permitted to copy parole files (except to the extent that victims or other informants do not wish that to occur).

Liberty Victoria does not support the categorisation of PDPs. However, we note that, broadly speaking, we support the sharing of information between police and the Board, and any other means by which the Board may better inform itself in relation to parole determinations. However, we would not support the appointment of any police unit at the Board.

Measure 12

For reasons I have earlier explained victims' voices need to be heard and their views considered before any PDP's are released. Persons on the Victims' Register should be given timely notice of an offender's sentence, the possibility of an offender's parole and any likely conditions of it in order to enable victims to make submissions and such arrangement as they wish to make if parole were to be granted. Victims should also be informed no fewer than 14 days before the release of an offender on parole.

The role of the victim when dealing with the offender is a vexed issue. Whilst we support the notion that there should be opportunity for the victim's voice to be heard, it is difficult to see how this could be relevant to the decision making at this stage. The victim's voice should have been heard at the time of sentencing, when the non-parole period was

determined. The offender then serves the minimum term and becomes eligible for consideration for parole. It is difficult to see how the views of victims are relevant to the parole decision. We support the idea that victims be informed about the process.

If victims are to make submissions, the prisoner should have access to this information before the hearing, and the opportunity to challenge any information and to make submissions.

Measure 13

No person, whether a PDP or otherwise, should be granted parole who has not undertaken programmes which either the Court, or Corrective Services has ordered or directed or believes should be taken even if the prisoner has to await their availability. Similarly, no person, whether a PDP or not, should be granted parole who has not behaved satisfactorily for at least the second half of that person's time in prison. Failure to meet these requirements should be clear disqualifications for parole.

We do not oppose the first part of this measure, concerning the undertaking of programs being a condition necessary for grants of parole. However, we submit that a range of programs needs to be readily available in prisons. They need to be accessible, adequately funded and resourced. They need to be flexible and rehabilitative rather than punitive or restrictive. We do not support the proposition that a prisoner should be rejected parole on the basis that they are awaiting, beyond their control, the availability of programs, or have been denied a place in programs that they have applied for. Prisoners should not be denied parole for reasons beyond their power.

We oppose the second part of this measure, concerning the requirement that prisoners behave satisfactorily for the second half of their time in prison. We see no reason to fetter the Board's discretion in such a way. To do so seems unnecessary and inflexible, and would undermine the Board's capacity to treat every case according to its particular circumstances.

Measure 14

The Members' Manual should provide guidance on the interpretation and use of formal risk assessments. A test or tests different from VISAT should be employed, the final form

of which should be discussed with, and approved by, Professor Ogloff, (or, in time, another suitably qualified expert) and kept under review by him to ensure that the tests used are the best internationally available.

Liberty Victoria has no position on this measure, other than to reiterate our broad support of processes that will result in a more accurate risk assessment of prisoners.

Measure 15

A chief administrative officer of sufficient seniority should be appointed with full authority over the day-to-day management of the Board's work and to carry out any necessary administrative reorganization so that the Adult Parole Board may be better assisted and so that the Chair of the Board may fulfill his or her substantive functions with fewer distractions.

Liberty Victoria supports any measure intended to improve the efficiency and effectiveness of the function of the Board, particularly as they relate to undertaking proper risk assessments.

Measure 16

Consideration be given to moving responsibility for making applications for detention orders from the DPP to, for example, Corrections Victoria or the Department of Justice.

Liberty Victoria does not support this measure. This responsibility should remain with the Director of Public Prosecutions.

Measure 17

Only very experienced forensic psychiatrists or psychologists should be engaged to prepare assessment reports, especially in cases in which detention might be sought.

Liberty Victoria supports any measure intended to improve the efficiency and effectiveness of the function of the Board, particularly as they relate to undertaking proper risk assessments.

Measure 18

I would endorse the recommendation of the Sentencing Advisory Council that there be a suitably resourced separate body to perform the supervisory functions to which I have referred, or better that a DSO division of the Board be provided with staff, resources and funding to enable it to do so adequately.

We do not oppose this measure.

Measure 19

Corrections are heavily pressed in relation to the number of parole officers. There needs to be incentives to attract and retain efficient and mature staff to do the important and difficult work of supervision in the field, that is, case management. The ratio of offenders to parole officer or supervisors needs to be reduced. Managers need to be enabled, if necessary by the appointment of office assistants and Principal Practitioners, to oversee, train and mentor staff working in the field. Changes should be made to ensure that there are career paths for Corrections Victoria staff supervising offenders outside prison. Graduated streams of supervisory staff according to categories of offenders to be supervised should be established within Corrections Victoria.

We strongly support any measure to see that Corrections is appropriately resourced and in a position to perform its function properly.

Measure 20

The Parole Board should be enabled to, and should, conduct regular seminars for continuing education, to raise the standards and knowledge of its members, and to promote consistency in the making of decisions. The Board should avail itself of the expertise external to it in the fields of criminology, psychiatry and related disciplines.

Liberty Victoria supports any measure intended to improve the quality of the function of the Board.

Measure 21 A

The best way I think of ensuring transparency is to make sure that parole is only granted when the conditions, to which I have elsewhere referred, are satisfied, and those

conditions of, for example, paramountcy of community safety, and negligibility of reoffending, are clearly stated legislatively and in the Members' Manual. It might also help to improve transparency if the media to be present, or to participate in the seminars which I recommend be conducted. Victims too will feel more confident about transparency if their views are more carefully considered and relevant timely notices about offences and parole are given to them.

We oppose the premises in the first part of this measure. Therefore we reject the recommendation that such conditions for release be stated legislatively and in the Members' Manual.

In relation to the second part of this measure, concerning the media being present at the seminars referred to in measure 20, we see no reason to oppose this.

As for the third part of this measure, concerning victims, not enough information as to what is proposed is given for us to take a position on this issue.

Measure 21B

In order to enhance transparency and accountability, the Board should make its Members Manual, Secretarial Operations Manual and all relevant Corrections Victoria Director's Instructions relevant to parolee management publicly available.

We support this measure.

Measure 21C

The Board should report publicly on all homicide and other serious offences committed by parolees.

We support transparency where it is not inconsistent with the interests of the good function of the Board and the rights of prisoners of the kinds to which we have referred above.

Measure 21D

If the Measures recommended in this Report to the extent that they are accepted and adopted by government, do not result in a major improvement in the performance of the

Board in relations to serious violent and serious sexual offenders, consideration should be given to the establishment of a Corrections and Criminal Justice Inspectorate of the kind that operates in Western Australia to monitor compliance and effectiveness of the performance of the Board.

The consideration of this measure should be deferred until the impact of reforms to the parole system can be properly assessed.

Measure 22

The Parole Board should treat the date of the expiration of a non-parole period as a target date only for the release of an offender on parole. Nobody should be released on parole unless the Parole Board is satisfied that it has before it and has considered all relevant information, including Police information relating to the prisoner's likely conduct on parole whether there have been delays in the provision of that information or not.

We do not oppose this measure. We note that this was already the practice of the Board. However, it must be emphasised that given the decision involves the liberty of the subject, the community would reasonably expect that the Parole Board to have all relevant informant well before the decision is due to be made.

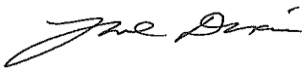
Measure 23

In addition to offenders' education and other Corrections programmes, there should be programmes designed by Corrections Victoria in consultation with appropriate experts (for example, Professor Ogloff and criminological educators) to prepare offenders in prison from release from it.

We strongly support this recommendation.

We thank you for this opportunity to make this submission. Please contact the President of Liberty Victoria, Jane Dixon SC or Stewart Bayles if we can provide any further information or assistance. This is a public submission and is not confidential.

Yours sincerely



Jane Dixon SC
President, Liberty Victoria